# D.C. RULES OF PROFESSIONAL CONDUCT

Effective February 1, 2007
(As amended through September 15, 2025)

The District of Columbia Bar
901 4th Street NW
Washington, DC 20001

# CONTENTS

**COURT ORDER** ..... **v**

**SCOPE** ..... **vii**

**CLIENT-LAWYER RELATIONSHIP** ..... **I-1**
1.0 TERMINOLOGY ..... I-1
1.1 COMPETENCE ..... I-3
1.2 SCOPE OF REPRESENTATION ..... I-3
1.3 DILIGENCE AND ZEAL ..... I-5
1.4 COMMUNICATION ..... I-6
1.5 FEES ..... I-7
1.6 CONFIDENTIALITY OF INFORMATION ..... I-9
1.7 CONFLICT OF INTEREST: GENERAL ..... I-16
1.8 CONFLICT OF INTEREST: SPECIFIC RULES ..... I-22
1.9 CONFLICT OF INTEREST: FORMER CLIENT ..... I-26
1.10 IMPUTED DISQUALIFICATION: GENERAL RULE ..... I-27
1.11 SUCCESSIVE GOVERNMENT AND PRIVATE OR OTHER EMPLOYMENT ..... I-32
1.12 THIRD-PARTY NEUTRALS ..... I-35
1.13 ORGANIZATION AS CLIENT ..... I-36
1.14 CLIENT WITH DIMINISHED CAPACITY ..... I-37
1.15 SAFEKEEPING PROPERTY ..... I-39
1.16 DECLINING OR TERMINATING REPRESENTATION ..... I-41
1.17 SALE OF LAW PRACTICE ..... I-43
1.18 DUTIES TO PROSPECTIVE CLIENT ..... I-45
AMENDMENTS ..... I-48

**COUNSELOR** ..... **II-1**
2.1 ADVISOR ..... II-1
2.3 EVALUATION FOR USE BY THIRD PERSONS ..... II-1
2.4 LAWYER SERVING AS THIRD PARTY NEUTRAL ..... II-2

**ADVOCATE** ..... **III-1**
3.1 MERITORIOUS CLAIMS AND CONTENTIONS ..... III-1
3.2 EXPEDITING LITIGATION ..... III-1
3.3 CANDOR TO TRIBUNAL ..... III-1
3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL ..... III-4
3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL ..... III-5
3.6 TRIAL PUBLICITY ..... III-6
3.7 LAWYER AS WITNESS ..... III-6
3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR ..... III-7
3.9 ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS ..... III-9

**TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS** ..... **IV-1**
4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS ..... IV-1
4.2 COMMUNICATION BETWEEN LAWYER AND PERSON REPRESENTED BY COUNSEL ..... IV-1
4.3 DEALING WITH UNREPRESENTED PERSON ..... IV-3
4.4 RESPECT FOR RIGHTS OF THIRD PERSONS ..... IV-3

**LAW FIRMS AND ASSOCIATIONS** ..... **V-1**
5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS ..... V-1
5.2 SUBORDINATE LAWYERS ..... V-2
5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS ..... V-2
5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER ..... V-3
5.5 UNAUTHORIZED PRACTICE ..... V-5
5.6 RESTRICTIONS ON RIGHT TO PRACTICE ..... V-5
5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES ..... V-6

**PUBLIC SERVICE** ..... **VI-1**
6.1 PRO BONO PUBLICO SERVICE ..... VI-1
6.2 ACCEPTING APPOINTMENTS ..... VI-1
6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION ..... VI-2
6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS ..... VI-2
6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS ..... VI-3

**INFORMATION ABOUT LEGAL SERVICES** ..... **VII-1**
7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES ..... VII-1
7.5 FIRM NAMES AND LETTERHEADS ..... VII-2

**MAINTAINING THE INTEGRITY OF THE PROFESSION** ..... **VIII-1**
8.1 BAR ADMISSION AND DISCIPLINARY MATTERS ..... VIII-1
8.3 REPORTING PROFESSIONAL MISCONDUCT ..... VIII-1
8.4 MISCONDUCT ..... VIII-2
8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW ..... VIII-3

**NONDISCRIMINATION BY MEMBERS OF THE BAR** ..... **IX-1**
9.1 NONDISCRIMINATION ..... IX-1

# DISTRICT OF COLUMBIA COURT OF APPEALS

No. M-223-05

BEFORE: Washington, Chief Judge; and Farrell, Ruiz, Reid, Glickman, Kramer, and Fisher, Associate Judges.

## ORDER
## (FILED AUGUST 1, 2006)

On consideration of the proposed amendments to the District of Columbia Rules of Professional Conduct submitted by the Board of Governors of the District of Columbia Bar on June 23, 2005, and the comments thereto, it is

ORDERED that the rules are amended in accordance with the version transmitted by the District of Columbia Court of Appeals to the District of Columbia Bar electronically and by written copy on August 1, 2006. It is

FURTHER ORDERED that the effective date of the Rules as amended is February 1, 2007.

ENTERED BY DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

# SCOPE

[1] The Rules of Professional Conduct (Rules) 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 interpreting the Rules and practicing in compliance with them.

[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 upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon 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] 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 upon 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, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[4] Nothing in these Rules, the Comments associated with them, or this Scope section is intended to enlarge or restrict existing law regarding the liability of lawyers to others or the requirements that the testimony of expert witnesses or other modes of proof must be employed in determining the scope of a lawyer's duty to others. Moreover, nothing in the Rules or associated Comments or this Scope section is intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding. Some judicial decisions have considered the standard of conduct established in these Rules in determining the standard of care applicable in a proceeding other than a disciplinary proceeding. A tribunal presented with claims that the conduct of a lawyer appearing before that tribunal requires, for example, disqualification of the lawyer and/or the lawyer's firm may take such action as seems appropriate in the circumstances, which may or may not involve disqualification.

[5] In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of Rule 1.3 are not intended to govern conflicts of interest, which are particularly discussed in Rules 1.7, 1.8, and 1.9. Thus, conduct that is proper under the specific conflicts rules is not improper under the more general rule of Rule 1.3. Except where the principle of priority stated here is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a lawyer has analyzed the ethical considerations under a given rule, the lawyer must generally extend the analysis to ensure compliance with all other applicable rules.

[6] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. This note on Scope provides general orientation and general rules of interpretation. The Comments are intended as guides to interpretation, but the text of each Rule is controlling.

# CLIENT-LAWYER RELATIONSHIP

## RULE 1.0 – TERMINOLOGY

**(a) "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.**

**(b) "CONSULT" OR "CONSULTATION" DENOTES COMMUNICATION OF INFORMATION REASONABLY SUFFICIENT TO PERMIT THE CLIENT TO APPRECIATE THE SIGNIFICANCE OF THE MATTER IN QUESTION.**

**(c) "FIRM" OR "LAW FIRM" DENOTES A LAWYER OR LAWYERS IN A LAW PARTNERSHIP, PROFESSIONAL CORPORATION, SOLE PROPRIETORSHIP OR OTHER ASSOCIATION AUTHORIZED TO PRACTICE LAW; OR LAWYERS EMPLOYED IN A LEGAL SERVICES ORGANIZATION OR THE LEGAL DEPARTMENT OF A CORPORATION OR OTHER ORGANIZATION, BUT DOES NOT INCLUDE A GOVERNMENT AGENCY OR OTHER GOVERNMENT ENTITY. SEE COMMENT, RULE 1.10.**

**(d) "FRAUD" OR "FRAUDULENT" DENOTES CONDUCT THAT IS FRAUDULENT UNDER THE SUBSTANTIVE OR PROCEDURAL LAW OF THE APPLICABLE JURISDICTION AND HAS A PURPOSE TO DECEIVE.**

**(e) "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.**

**(f) "KNOWINGLY," "KNOWN," OR "KNOWS" DENOTES ACTUAL KNOWLEDGE OF THE FACT IN QUESTION. A PERSON'S KNOWLEDGE MAY BE INFERRED FROM CIRCUMSTANCES.**

**(g) "LAW CLERK" DENOTES A PERSON, TYPICALLY A RECENT LAW SCHOOL GRADUATE, WHO ACTS, TYPICALLY FOR A LIMITED PERIOD, AS CONFIDENTIAL ASSISTANT TO A JUDGE OR JUDGES OF A COURT; TO AN ADMINISTRATIVE LAW JUDGE OR A SIMILAR ADMINISTRATIVE HEARING OFFICER; OR TO THE HEAD OF A GOVERNMENTAL AGENCY OR TO A MEMBER OF A GOVERNMENTAL COMMISSION, EITHER OF WHICH HAS AUTHORITY TO ADJUDICATE OR TO PROMULGATE RULES OR REGULATIONS OF GENERAL APPLICATION.**

**(h) "MATTER" MEANS ANY LITIGATION, ADMINISTRATIVE PROCEEDING, LOBBYING ACTIVITY, APPLICATION, CLAIM, INVESTIGATION, ARREST, CHARGE OR ACCUSATION, THE DRAFTING OF A CONTRACT, A NEGOTIATION, ESTATE OR FAMILY RELATIONS PRACTICE ISSUE, OR ANY OTHER REPRESENTATION, EXCEPT AS EXPRESSLY LIMITED IN A PARTICULAR RULE.**

**(i) "PARTNER" DENOTES A MEMBER OF A PARTNERSHIP, A SHAREHOLDER IN A LAW FIRM ORGANIZED AS A PROFESSIONAL CORPORATION OR PROFESSIONAL LIMITED LIABILITY COMPANY, OR A MEMBER OF AN ASSOCIATION AUTHORIZED TO PRACTICE LAW.**

**(j) "REASONABLE" OR "REASONABLY" WHEN USED IN RELATION TO CONDUCT BY A LAWYER DENOTES THE CONDUCT OF A REASONABLY PRUDENT AND COMPETENT LAWYER.**

**(k) "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.**

**(l) "SCREENED" DENOTES THE ISOLATION OF A LAWYER FROM ANY PARTICIPATION IN A MATTER THROUGH THE TIMELY IMPOSITION OF PROCEDURES WITHIN A FIRM THAT ARE REASONABLY ADEQUATE UNDER THE CIRCUMSTANCES TO PROTECT INFORMATION THAT THE ISOLATED LAWYER IS OBLIGATED TO PROTECT UNDER THESE RULES OR OTHER LAW.**

**(m) "SUBSTANTIAL" WHEN USED IN REFERENCE TO DEGREE OR EXTENT DENOTES A MATERIAL MATTER OF CLEAR AND WEIGHTY IMPORTANCE.**

**(n) "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.**

**(o) "WRITING" OR "WRITTEN" DENOTES A TANGIBLE OR ELECTRONIC RECORD OF A COMMUNICATION OR REPRESENTATION, INCLUDING HANDWRITING, TYPEWRITING, PRINTING, PHOTO STATING, PHOTOGRAPHY, AUDIO OR VIDEO RECORDING, AND E-MAIL. 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.**

**COMMENT**

**"Fraud" or "fraudulent"**

[1] 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"**

[2] 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(e) and 1.7(c)(1). 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. In all circumstances, the client's consent must be not only informed but also uncoerced by the lawyer or by any other person acting on the lawyer's behalf.

[3] 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 in writing. *See* Rules 1.8(a)(3) and 1.8(g). For a definition of "writing," *see* Rule 1.0(o).

**"Screened"**

[4] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[5] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend upon the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. For a further explanation of screening, *see* D.C. Bar Legal Ethics Committee Opinion 279.

[6] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

## RULE 1.1 – COMPETENCE

**(a) A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT. COMPETENT REPRESENTATION REQUIRES THE LEGAL KNOWLEDGE, SKILL, THOROUGHNESS, AND PREPARATION REASONABLY NECESSARY FOR THE REPRESENTATION.**

**(b) A LAWYER SHALL SERVE A CLIENT WITH SKILL AND CARE COMMENSURATE WITH THAT GENERALLY AFFORDED TO CLIENTS BY OTHER LAWYERS IN SIMILAR MATTERS.**

**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. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

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

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

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

**Thoroughness and Preparation**

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods, procedures, and technology meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

**Retaining or Contracting with Other Lawyers**

[6] Except when directed by a client, before a lawyer retains or contracts with other lawyers not associated with the lawyer's own firm to provide or assist in the provision of legal services to a particular client or on a particular matter, the lawyer should inform the client or clients of 1) the use and nature of the other lawyers' services; and 2) the identity of the lawyers who will participate in the representation. However, the lawyer generally need not inform the client of the identity of other lawyers who are hired to conduct document review, digest depositions, provide translations, or perform similar services. The lawyer must reasonably believe that retaining other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2, 1.4, 1.5, 1.6, and 5.5. The reasonableness of the decision to retain or contract with other lawyers not associated with 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 and professional conduct rules of the jurisdictions in which the services will be performed, particularly relating to confidential information. A division of a fee between lawyers who are not in the same firm is subject to the requirements of Rule 1.5(e).

[7] When the client directs that other lawyers not associated with the lawyer's firm assist in the provision of legal services to the client, the lawyer ordinarily should reach agreement with the client about the identity of the lawyers who will participate in the representation and about the contemplated division of responsibility among them. See Rules 1.2, 1.5. 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. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

**Maintaining Competence**

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and

engage in such continuing study and education as may be necessary to maintain competence.

## RULE 1.2 – SCOPE OF REPRESENTATION

**(a) A LAWYER SHALL ABIDE BY A CLIENT'S DECISIONS CONCERNING THE OBJECTIVES OF REPRESENTATION, SUBJECT TO PARAGRAPHS (c), (d), AND (e), AND SHALL CONSULT WITH THE CLIENT AS TO THE MEANS BY WHICH THEY ARE TO BE PURSUED. A LAWYER MAY TAKE SUCH ACTION ON BEHALF OF THE CLIENT AS IS IMPLIEDLY AUTHORIZED TO CARRY OUT THE REPRESENTATION. A LAWYER SHALL ABIDE BY A CLIENT'S DECISION WHETHER TO 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 GOVERNMENT LAWYER'S AUTHORITY AND CONTROL OVER DECISIONS CONCERNING THE REPRESENTATION MAY, BY STATUTE OR REGULATION, BE EXPANDED BEYOND THE LIMITS IMPOSED BY PARAGRAPHS (a) AND (c).**

**(e) 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.**

**(f) WHEN A LAWYER KNOWS THAT A CLIENT EXPECTS ASSISTANCE NOT PERMITTED BY THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW, THE LAWYER SHALL CONSULT WITH THE CLIENT REGARDING THE RELEVANT LIMITATIONS ON THE LAWYER'S CONDUCT.**

**COMMENT**

**Scope of Representation**

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

[2] In a case in which the client appears to be suffering mental disability, 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**

[3] 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.

**Services Limited in Objectives or Means**

[4] The objectives or scope of services provided by the lawyer may be limited by agreement with the client or by terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent. Rule 1.5(b) requires a lawyer to communicate the scope of the lawyer's representation when the lawyer establishes a new lawyer-client relationship, and it is generally prudent for the lawyer to explain in writing any limits on the objectives or scope of the lawyer's services.

[5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representa-

tion so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

[6] Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation when the lawyer has not regularly represented a client. In all matters involving limited scope representation, it is generally prudent for a lawyer to state in writing any limitation on representation, provide the client with a written summary of considerations discussed, and to receive a written informed consent from the client to the lawyer's limited representation. The term "informed consent" is defined in Rule 1.0(e) and is discussed in Comment 28 to Rule 1.7. Lawyers also should recognize that information and discussion sufficient for informed consent by more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. *See* Comment 28 to Rule 1.7.

**Criminal, Fraudulent, and Prohibited Transactions**

[7] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. 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.

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

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

[10] Paragraph (e) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction, for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (e) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (e) 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.

## RULE 1.3 – DILIGENCE AND ZEAL

**(a) A LAWYER SHALL REPRESENT A CLIENT ZEALOUSLY AND DILIGENTLY WITHIN THE BOUNDS OF THE LAW.**

**(b) A LAWYER SHALL NOT INTENTIONALLY:**

**(1) FAIL TO SEEK THE LAWFUL OBJECTIVES OF A CLIENT THROUGH REASONABLY AVAILABLE MEANS PERMITTED BY LAW AND THE DISCIPLINARY RULES; OR**

**(2) PREJUDICE OR DAMAGE A CLIENT DURING THE COURSE OF THE PROFESSIONAL RELATIONSHIP.**

**(c) A LAWYER SHALL ACT WITH REASONABLE PROMPTNESS IN REPRESENTING A CLIENT.**

**COMMENT**

[1] The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law, including the Rules of Professional Conduct and other enforceable professional regulations, such as agency regulations applicable to lawyers practicing before the agency. This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. A lawyer's workload should be controlled so that each matter can be handled adequately.

[2] This duty derives from the lawyer's membership in a profession that has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of individuals, each member of our society is entitled to have such member's conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

[3] The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, ambiguous statutes, or judicial opinions, and changing public and judicial attitudes.

[4] Where the bounds of law are uncertain, the action of a lawyer may depend on whether the lawyer is serving as advo-

cate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of a client, an advocate for the most part deals with past conduct and must take the facts as the advocate finds them. By contrast, a lawyer serving as adviser primarily assists the client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of the client doubts as to the bounds of the law, but even when acting as an advocate, a lawyer may not institute or defend a proceeding unless the positions taken are not frivolous. *See* Rule 3.1. In serving a client as adviser, a lawyer, in appropriate circumstances, should give a lawyer's professional opinion as to what the ultimate decision of the courts would likely be as to the applicable law.

[5] To prevent neglect of client matters in the event that a sole practitioner ceases to practice law, each sole practitioner should prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client that the lawyer is no longer engaged in the practice of law, and determine whether there is a need for immediate protective action. *See* D.C. App. R. XI, § 15(a) (appointment of counsel by District of Columbia Court of Appeals, on motion of Board on Professional Responsibility, where an attorney dies, disappears, or is suspended for incapacity or disability and no partner, associate or other responsible attorney is capable of conducting the attorney's affairs).

[6] In the exercise of professional judgment, a lawyer should always act in a manner consistent with the best interests of the client. However, when an action in the best interests of the client seems to be unjust, a lawyer may ask the client for permission to forgo such action. If the lawyer knows that the client expects assistance that is not in accord with the Rules of Professional Conduct or other law, the lawyer must inform the client of the pertinent limitations on the lawyer's conduct. *See* Rule 1.2(e) and (f). Similarly, the lawyer's obligation not to prejudice the interests of the client is subject to the duty of candor toward the tribunal under Rule 3.3 and the duty to expedite litigation under Rule 3.2.

[7] The duty of a lawyer to represent the client with zeal does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm. Thus, the lawyer's duty to pursue a client's lawful objectives zealously does not prevent the lawyer from acceding to reasonable requests of opposing counsel that do not prejudice the client's rights, being punctual in fulfilling all professional commitments, avoiding offensive tactics, or treating all persons involved in the legal process with courtesy and consideration.

[8] Perhaps no professional shortcoming is more widely resented by clients 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. Neglect of client matters is a serious violation of the obligation of diligence.

[9] 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 eliminated 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 but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

[10] Rule 1.3 is a rule of general applicability, and it is not meant to enlarge or restrict any specific rule. In particular, Rule 1.3 is not meant to govern conflicts of interest, which are addressed by Rules 1.7, 1.8, and 1.9.

## RULE 1.4 – COMMUNICATION

**(a) A LAWYER SHALL KEEP A CLIENT REASONABLY INFORMED ABOUT THE STATUS OF A MATTER AND PROMPTLY COMPLY WITH REASONABLE REQUESTS FOR INFORMATION.**

**(b) A LAWYER SHALL EXPLAIN A MATTER TO THE EXTENT REASONABLY NECESSARY TO PERMIT THE CLIENT TO MAKE INFORMED DECISIONS REGARDING THE REPRESENTATION.**

**(c) A LAWYER WHO RECEIVES AN OFFER OF SETTLEMENT IN A CIVIL CASE OR PROFFERED PLEA BARGAIN IN A CRIMINAL CASE SHALL INFORM THE CLIENT PROMPTLY OF THE SUBSTANCE OF THE COMMUNICATION.**

**COMMENT**

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

offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case is required to inform the client promptly of its substance. *See* Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] A client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on. The lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete.

[3] Adequacy of communication depends in part on the kind of advice or assistance involved. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of representation.

[4] 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 mental disability. *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. Practical exigency may also require a lawyer to act for a client without prior consultation. When the lawyer is conducting a trial, it is often not possible for the lawyer to consult with the client and obtain the client's acquiescence in tactical matters arising during the course of trial. It is sufficient if the lawyer consults with the client in advance of trial on significant issues that can be anticipated as arising during the course of the trial, and consults during trial to the extent practical, given the nature of the trial process.

**Withholding Information**

[5] In rare 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. Similarly, a lawyer may be justified, for humanitarian reasons, in not conveying certain information, for example, where the information would merely be upsetting to a terminally ill client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation (such as a protective order limiting access to certain types of discovery material to counsel only) may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

## RULE 1.5 – FEES

**(a) A LAWYER'S FEE SHALL BE REASONABLE. THE FACTORS TO BE CONSIDERED IN DETERMINING THE REASONABLENESS OF A FEE INCLUDE THE FOLLOWING:**

**(1) THE TIME AND LABOR REQUIRED, THE NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED, AND THE SKILL REQUISITE TO PERFORM THE LEGAL SERVICE PROPERLY;**

**(2) THE LIKELIHOOD, IF APPARENT TO THE CLIENT, THAT THE ACCEPTANCE OF THE PARTICULAR EMPLOYMENT WILL PRECLUDE OTHER EMPLOYMENT BY THE LAWYER;**

**(3) THE FEE CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR LEGAL SERVICES;**

**(4) THE AMOUNT INVOLVED AND THE RESULTS OBTAINED;**

**(5) THE LIMITATIONS IMPOSED BY THE CLIENT OR BY THE CIRCUMSTANCES;**

**(6) THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT;**

**(7) THE EXPERIENCE, REPUTATION, AND ABILITY OF THE LAWYER OR LAWYERS PERFORMING THE SERVICES; AND**

**(8) WHETHER THE FEE IS FIXED OR CONTINGENT.**

**(b) WHEN THE LAWYER HAS NOT REGULARLY REPRESENTED THE CLIENT, THE BASIS OR RATE OF THE FEE, THE SCOPE OF THE LAWYER'S REPRESENTATION, AND THE 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.**

**(c) A FEE MAY BE CONTINGENT ON THE OUTCOME OF THE MATTER FOR WHICH THE SERVICE IS RENDERED, EXCEPT IN A MATTER IN WHICH A CONTINGENT FEE IS PROHIBITED BY PARAGRAPH (d) OR OTHER LAW. A CONTINGENT FEE**

**AGREEMENT SHALL BE IN WRITING AND SHALL STATE THE METHOD BY WHICH THE FEE IS TO BE DETERMINED, INCLUDING THE PERCENTAGE OR PERCENTAGES THAT SHALL ACCRUE TO THE LAWYER IN THE EVENT OF SETTLEMENT, TRIAL, OR APPEAL, LITIGATION, OTHER EXPENSES TO BE DEDUCTED FROM THE RECOVERY, WHETHER SUCH EXPENSES ARE TO BE DEDUCTED BEFORE OR AFTER THE CONTINGENT FEE IS CALCULATED, AND WHETHER THE CLIENT WILL BE LIABLE FOR EXPENSES REGARDLESS OF THE OUTCOME OF THE MATTER. UPON CONCLUSION OF A CONTINGENT FEE MATTER, THE LAWYER SHALL PROVIDE THE CLIENT WITH A WRITTEN STATEMENT STATING THE OUTCOME OF THE MATTER, AND IF THERE IS A RECOVERY, SHOWING THE REMITTANCE TO THE CLIENT AND THE METHOD OF ITS DETERMINATION.**

**(d) A LAWYER SHALL NOT ENTER INTO AN ARRANGEMENT FOR, CHARGE, OR COLLECT A CONTINGENT FEE FOR REPRESENTING A DEFENDANT IN A CRIMINAL CASE.**

**(e) A DIVISION OF A FEE BETWEEN LAWYERS WHO ARE NOT IN THE SAME FIRM MAY BE MADE ONLY IF:**

**(1) THE DIVISION IS IN PROPORTION TO THE SERVICES PERFORMED BY EACH LAWYER OR EACH LAWYER ASSUMES JOINT RESPONSIBILITY FOR THE REPRESENTATION;**

**(2) THE CLIENT IS ADVISED, IN WRITING, OF THE IDENTITY OF THE LAWYERS WHO WILL PARTICIPATE IN THE REPRESENTATION, OF THE CONTEMPLATED DIVISION OF RESPONSIBILITY, AND OF THE EFFECT OF THE ASSOCIATION OF LAWYERS OUTSIDE THE FIRM ON THE FEE TO BE CHARGED;**

**(3) THE CLIENT GIVES INFORMED CONSENT TO THE ARRANGEMENT; AND**

**(4) THE TOTAL FEE IS REASONABLE.**

**(f) ANY FEE THAT IS PROHIBITED BY PARAGRAPH (d) ABOVE OR BY LAW IS *PER SE* UNREASONABLE.**

**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. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established, together with the scope of the lawyer's representation and the expenses for which the client will be responsible. 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.

[2] A written statement concerning the fee, required to be furnished in advance in most cases by paragraph (b), reduces the possibility of misunderstanding. In circumstances in which paragraph (b) requires that the basis for the lawyer's fee be in writing, an individualized writing specific to the particular client and representation is generally not required. Unless there are unique aspects of the fee arrangement, the lawyer may utilize a standardized letter, memorandum, or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation. Such publications would, for example, explain applicable hourly billing rates, if billing on an hourly rate basis is contemplated, and indicate what charges (such as filing fees, transcript costs, duplicating costs, long-distance telephone charges) are imposed in addition to hourly rate charges.

[3] Where the services to be rendered are covered by a fixed fee schedule that adequately informs the client of the charges to be imposed, a copy of such schedule may be utilized to satisfy the requirement for a writing. Such services as routine real estate transactions, uncontested divorces, or preparation of simple wills, for example, may be suitable for description in such a fixed-fee schedule.

**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. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

[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 the 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.

**Contingent Fees**

[6] Generally, contingent fees are permissible in all civil cases. However, paragraph (d) continues the prohibition, imposed under the previous Code of Professional Responsibility, against the use of a contingent fee arrangement by a lawyer representing a defendant in a criminal case. Applicable law may impose other limitations on contingent fees, such as a ceiling on the percentage. And in any case, if there is doubt whether a contingent fee is consistent with the client's best interests, the lawyer should explain any existing payment alternatives and their implications.

[7] Contingent fees in domestic relations cases, while rarely justified, are not prohibited by Rule 1.5. Contingent fees in such cases are permitted in order that lawyers may provide representation to clients who might not otherwise be able to afford to contract for the payment of fees on a noncontingent basis.

[8] Paragraph (c) requires that the contingent fee arrangement be in writing. This writing must explain the method by which the fee is to be computed, as well as the client's responsibility for expenses. The lawyer must also provide the client with a written statement at the conclusion of a contingent fee matter, stating the outcome of the matter and explaining the computation of any remittance made to the client.

**Division of Fee**

[9] 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.

[10] Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, represents a change from the basis for fee divisions allowed under the prior Code of Professional Responsibility. The change is intended to encourage lawyers to affiliate other counsel, who are better equipped by reason of experience or specialized background to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

[11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.

[12] The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered. The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. The referring lawyer does not, however, escape the implications of joint responsibility, *see* Comment [11], by avoiding direct participation.

[13] When fee divisions are based on assumed joint responsibility, the requirement of paragraph (a) that the fee be reasonable applies to the total fee charged for the representation by all participating lawyers.

[14] Paragraph (e) requires that the client be advised, in writing, of the fee division and states that the client must affirmatively give informed consent to the proposed fee arrangement. For the definition of "informed consent," *see* Rule 1.0(e). The Rule does not require disclosure to the client of the share that each lawyer is to receive but does require that the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm on the fee charged.

**Disputes Over Fees**

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

## RULE 1.6 – CONFIDENTIALITY OF INFORMATION

**(a) EXCEPT WHEN PERMITTED UNDER PARAGRAPH (c), (d), OR (e), A LAWYER SHALL NOT KNOWINGLY:**

**(1) REVEAL A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT;**

**(2) USE A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT TO THE DISADVANTAGE OF THE CLIENT;**

**(3) USE A CONFIDENCE OR SECRET OF THE LAWYER'S CLIENT FOR THE ADVANTAGE OF THE LAWYER OR OF A THIRD PERSON.**

**(b) "CONFIDENCE" REFERS TO INFORMATION PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE UNDER APPLICABLE LAW, AND "SECRET" REFERS TO OTHER INFORMATION GAINED IN THE PROFESSIONAL RELATIONSHIP THAT THE CLIENT HAS REQUESTED BE HELD INVIOLATE, OR THE DISCLOSURE OF WHICH WOULD BE EMBARRASSING, OR WOULD BE LIKELY TO BE DETRIMENTAL, TO THE CLIENT. 'SECRET' GENERALLY DOES NOT REFER TO LEGAL KNOWLEDGE OR LEGAL RESEARCH, TO KNOWLEDGE THE LAWYER HAS OBTAINED ABOUT THE REGULATORY ENVIRONMENT IN WHICH A CLIENT OPERATES, OR TO INFORMATION THAT IS GENERALLY KNOWN IN THE LOCAL COMMUNITY OR IN THE TRADE, FIELD, OR PROFESSION TO WHICH THE INFORMATION RELATES.**

**(c) A LAWYER MAY REVEAL CLIENT CONFIDENCES AND SECRETS, TO THE EXTENT REASONABLY NECESSARY:**

**(1) TO PREVENT A CRIMINAL ACT THAT THE LAWYER REASONABLY BELIEVES IS LIKELY TO RESULT IN DEATH OR SUBSTANTIAL BODILY HARM ABSENT DISCLOSURE OF THE CLIENT'S SECRETS OR CONFIDENCES BY THE LAWYER; OR**

**(2) TO PREVENT THE BRIBERY OR INTIMIDATION OF WITNESSES, JURORS, COURT OFFICIALS, OR OTHER PERSONS WHO ARE INVOLVED IN PROCEEDINGS BEFORE A TRIBUNAL IF THE LAWYER REASONABLY BELIEVES THAT SUCH ACTS ARE LIKELY TO RESULT ABSENT DISCLOSURE OF THE CLIENT'S CONFIDENCES OR SECRETS BY THE LAWYER.**

**(d) WHEN A CLIENT HAS USED OR IS USING A LAWYER'S SERVICES TO FURTHER A CRIME OR FRAUD, THE LAWYER MAY REVEAL CLIENT CONFIDENCES AND SECRETS, TO THE EXTENT REASONABLY NECESSARY:**

**(1) TO PREVENT THE CLIENT FROM COMMITTING THE CRIME OR FRAUD IF IT IS REASONABLY CERTAIN TO RESULT IN SUBSTANTIAL INJURY TO THE FINANCIAL INTERESTS OR PROPERTY OF ANOTHER; OR**

**(2) TO PREVENT, MITIGATE OR RECTIFY SUBSTANTIAL INJURY TO THE FINANCIAL INTERESTS OR PROPERTY OF ANOTHER THAT IS REASONABLY CERTAIN TO RESULT OR HAS RESULTED FROM THE CLIENT'S COMMISSION OF THE CRIME OR FRAUD.**

**(e) A LAWYER MAY USE OR REVEAL CLIENT CONFIDENCES OR SECRETS:**

**(1) WITH THE INFORMED CONSENT OF THE CLIENT;**

**(2) (A) WHEN PERMITTED BY THESE RULES OR REQUIRED BY LAW OR COURT ORDER; AND**

**(B) IF A GOVERNMENT LAWYER, WHEN PERMITTED OR AUTHORIZED BY LAW;**

**(3) TO THE EXTENT REASONABLY NECESSARY TO ESTABLISH A DEFENSE TO A CRIMINAL CHARGE, DISCIPLINARY CHARGE, OR CIVIL CLAIM, FORMALLY INSTITUTED AGAINST THE LAWYER, BASED UPON CONDUCT IN WHICH THE CLIENT WAS INVOLVED, OR TO THE EXTENT REASONABLY NECESSARY TO RESPOND TO SPECIFIC ALLEGATIONS BY THE CLIENT CONCERNING THE LAWYER'S REPRESENTATION OF THE CLIENT;**

**(4) WHEN THE LAWYER HAS REASONABLE GROUNDS FOR BELIEVING THAT A CLIENT HAS IMPLIEDLY AUTHORIZED DISCLOSURE OF A CONFIDENCE OR SECRET IN ORDER TO CARRY OUT THE REPRESENTATION;**

**(5) TO THE MINIMUM EXTENT NECESSARY IN AN ACTION INSTITUTED BY THE LAWYER TO ESTABLISH OR COLLECT THE LAWYER'S FEE; OR**

**(6) TO THE EXTENT REASONABLY NECESSARY TO SECURE LEGAL ADVICE ABOUT THE LAWYER'S COMPLIANCE WITH LAW, INCLUDING THESE RULES.**

**(f) A LAWYER SHALL EXERCISE REASONABLE CARE TO PREVENT:**

**(1) THE LAWYER'S EMPLOYEES, ASSOCIATES, AND OTHERS WHOSE SERVICES ARE UTILIZED BY THE LAWYER FROM DISCLOSING OR USING CONFIDENCES OR SECRETS OF A CLIENT, EXCEPT THAT SUCH PERSONS MAY REVEAL INFORMATION PERMITTED TO BE DISCLOSED BY PARAGRAPHS (C), (D), OR (E); AND**

**(2) THE UNAUTHORIZED ACCESS TO CONFIDENCES OR SECRETS OF A CLIENT.**

**(g) THE LAWYER'S OBLIGATION TO PRESERVE THE CLIENT'S CONFIDENCES AND SECRETS CONTINUES AFTER TERMINATION OF THE LAWYER'S EMPLOYMENT.**

**(h) THE OBLIGATION OF A LAWYER UNDER PARAGRAPH (a) ALSO APPLIES TO CONFIDENCES AND SECRETS LEARNED PRIOR TO BECOMING A LAWYER IN THE COURSE OF PROVIDING ASSISTANCE TO ANOTHER LAWYER.**

**(i) FOR PURPOSES OF THIS RULE, A LAWYER WHO SERVES AS A MEMBER OF THE D.C. BAR LAWYER COUNSELING COMMITTEE, OR AS A TRAINED INTERVENOR FOR THAT COMMITTEE, SHALL BE DEEMED TO HAVE A LAWYER-CLIENT RELATIONSHIP WITH RESPECT TO ANY LAWYER-COUNSELEE BEING COUNSELED UNDER PROGRAMS CONDUCTED BY OR ON BEHALF OF THE COMMITTEE. INFORMATION OBTAINED FROM ANOTHER LAWYER BEING COUNSELED UNDER THE AUSPICES OF THE COMMITTEE, OR IN THE COURSE OF AND ASSOCIATED WITH SUCH COUNSELING, SHALL BE TREATED AS A CONFIDENCE OR SECRET WITHIN THE TERMS OF PARAGRAPH (b). SUCH INFORMATION MAY BE DISCLOSED ONLY TO THE EXTENT PERMITTED BY THIS RULE.**

**(j) FOR PURPOSES OF THIS RULE, A LAWYER WHO SERVES AS A MEMBER OF THE D.C. BAR PRACTICE MANAGEMENT SERVICE COMMITTEE, FORMERLY KNOWN AS THE LAWYER PRACTICE ASSISTANCE COMMITTEE[1], OR A STAFF ASSISTANT, MENTOR, MONITOR OR OTHER CONSULTANT FOR THAT COMMITTEE, SHALL BE DEEMED TO HAVE A LAWYER-CLIENT RELATIONSHIP WITH RESPECT TO ANY LAWYER-COUNSELEE BEING COUNSELED UNDER PROGRAMS CONDUCTED BY OR ON BEHALF OF THE COMMITTEE. COMMUNICATIONS BETWEEN THE COUNSELOR AND THE LAWYER BEING COUNSELED UNDER THE AUSPICES OF THE COMMITTEE, OR MADE IN THE COURSE OF AND ASSOCIATED WITH SUCH COUNSELING, SHALL BE TREATED AS A CONFIDENCE OR SECRET WITHIN THE TERMS OF PARAGRAPH (b). SUCH INFORMATION MAY BE DISCLOSED ONLY TO THE EXTENT PERMITTED BY THIS RULE. HOWEVER, DURING THE PERIOD IN WHICH THE LAWYER-COUNSELEE IS SUBJECT TO A PROBATIONARY OR MONITORING ORDER OF THE COURT OF APPEALS OR THE BOARD ON PROFESSIONAL RESPONSIBILITY IN A DISCIPLINARY CASE INSTITUTED PURSUANT TO RULE XI OF THE RULES OF THE COURT OF APPEALS GOVERNING THE BAR, SUCH INFORMATION SHALL BE SUBJECT TO DISCLOSURE IN ACCORDANCE WITH THE ORDER.**

**(k) THE CLIENT OF THE GOVERNMENT LAWYER IS THE AGENCY THAT EMPLOYS THE LAWYER UNLESS EXPRESSLY PROVIDED TO THE CONTRARY BY APPROPRIATE LAW, REGULATION, OR ORDER.**

**COMMENT**

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

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

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] This rule prohibits a lawyer from revealing the confidences and secrets of a client except as provided in this rule or elsewhere in the Rules. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients. 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.

**Relationship Between Rule 1.6 and Attorney-Client Evidentiary Privilege and Work Product Doctrine**

[6] The principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege and the work product doctrine in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege and the 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. This rule is not intended to govern or affect judicial application of the

[1] On May 10, 2005, the D.C. Bar Board of Governors approved a name change for the Lawyer Practice Assistance Committee. Effective July 1, 2005, the Committee will be known as the Practice Management Service Committee.

attorney-client privilege or work product doctrine. The privilege and doctrine 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.

[7] The attorney-client privilege is that of the client and not of the lawyer. 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 privilege and work product doctrine.

[8] The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law; furthermore, it applies not merely to matters communicated in confidence by the client (*i.e.*, confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (*i.e.*, secrets). This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge. It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client.

**The Commencement of the Client-Lawyer Relationship**

[9] Principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Although 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, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Other duties of a lawyer to a prospective client are set forth in Rule 1.18.

**Exploitation of Confidences and Secrets**

[10] In addition to prohibiting the disclosure of a client's confidences and secrets, subparagraph (a)(2) provides that a lawyer may not use the client's confidences and secrets to the disadvantage of the client. For example, a lawyer who has learned that the client is investing in specific real estate may not seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Similarly, information acquired by the lawyer in the course of representing a client may not be used to the disadvantage of that client even after the termination of the lawyer's representation of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the former client when later representing another client. Under subparagraphs (a)(3) and (e)(1), a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the lawyer has obtained the client's informed consent to the use in question.

**Authorized Disclosure**

[11] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[12] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client gives informed consent, when necessary to perform the professional employment, when permitted by these Rules, or when required by law. For the definition of "informed consent," *see* Rule 1.0(e). Unless the client otherwise directs, a lawyer may disclose the affairs of the client to partners or associates of the lawyer's firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to nonlawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of the client and act scrupulously in the making of decisions that may involve the disclosure of information obtained in the course of the professional relationship.

[13] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibilities to comply with these Rules. In most situations disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when disclosure is not impliedly authorized, paragraph (e)(6) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct and other law.

[14] Unless the client otherwise directs, it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

[15] 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.

[16] Rule 1.6(c) describes situations presenting a sufficiently serious threat such that a client's confidences and secrets may be revealed to the extent reasonably necessary to prevent the

harm described. Thus, a lawyer may reveal confidences and secrets to the extent necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure and to prevent bribery or intimidation of witnesses, jurors, court officials, or other persons involved in proceedings before a tribunal.

[17] Rule 1.6(d) describes situations in which the client's usual expectation of confidentiality is not warranted because the client has abused the lawyer-client relationship by using the lawyer's services to further a crime or fraud. In these circumstances, Rule 1.6(d)(1) provides a limited exception to the rule of confidentiality, which permits the lawyer to reveal information to the extent reasonably necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), if such crime or fraud is reasonably certain to result in substantial injury to the financial or property interests of another. The D.C. Court of Appeals has held that the crime-fraud exception to the attorney-client privilege requires that a lawyer's services were actually used to further a crime or fraud that occurred, not merely that the client sought to do so. *See In re Public Defender Service*, 831 A.2d 890 (D.C. 2003). The Rule 1.6(d) exception to the ethical duty of confidentiality also requires that the lawyer's services actually were used to further a crime or fraud. A client can prevent disclosure by refraining from the wrongful conduct or by not using the lawyer's services to further a crime or fraud. Although Rule 1.6(d)(1) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. *See* Rule 1.2(e). Rule 1.16 addresses the lawyer's obligation or right to withdraw from the representation of the client in such circumstances if withdrawal is necessary to prevent the client from misusing the lawyer's services or if withdrawal would otherwise prevent, mitigate, or rectify substantial injury caused by the client who misused the lawyer's services. Rules 3.3(a)(1), 3.3(d) and 4.1(b) address circumstances in which disclosure may be mandatory. Rules 3.4(a), 8.1, and 8.3 do not require disclosure of information otherwise protected by Rule 1.6; disclosure that is permissive in the limited situations specified in Rule 1.6 is not mandatory under Rules 3.4(a), 8.1 or 8.3. Rule 1.6(d) applies to organizations as well as to individuals.

[18] Paragraph (d)(2) refers to situations in which the crime or fraud has already commenced and is on-going or completed such that complete prevention is not an option. Thus, the client no longer has the option of preventing disclosure by refraining from the wrongful conduct. In these circumstances, there may be situations in which the loss suffered by an affected person can be prevented, rectified, or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply to disclosure with regard to a crime or fraud committed prior to retaining the lawyer for representation concerning that offense.

[19] Rule 1.2, Comment [7] and Rule 4.1, Comment [3] acknowledge that, to avoid assisting in a client crime or fraud, a lawyer in some instances may be required to withdraw from representation, give notice of the fact of withdrawal, or disaffirm an opinion, document, affirmation or the like. In some instances when a lawyer's services have been or are being used to further a client's crime or fraud, a lawyer may conclude that more than withdrawal and disaffirmance is required to avoid assisting in the client's crime or fraud and that disclosure of client information protected by this rule is warranted. If the lawyer has such a reasonable belief, the lawyer may make such disclosures to the extent reasonably necessary to permit corrective action, for example, prompt initiation of proceedings in order to seize or recover assets fraudulently obtained by the client. Once the lawyer has disclosed information reasonably necessary to prevent, rectify, or mitigate loss, the lawyer may not take additional actions that would harm the client. Thus, a lawyer is not warranted under Rule 1.6(d) in providing legal advice or assistance to a victim as the victim's lawyer or voluntarily serving as a witness or otherwise cooperating in a proceeding brought by the victim or anyone else seeking compensation for the victim. The lawyer also may not use or disclose information for the purpose of voluntarily assisting a law-enforcement agency to apprehend and prosecute the client, unless the lawyer reasonably believes that such disclosure would be reasonably necessary to prevent, rectify, or mitigate the victim's loss.

[20] This rule permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified. In exercising the discretion conferred by this rule by paragraphs (c) and (d), the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. The lawyer's exercise of discretion in determining whether to make disclosures that are reasonably likely to prevent the death or substantial bodily injury of another requires consideration of such factors as the client's tendency to commit violent acts or, conversely, to make idle threats. When a lawyer is given discretion to disclose under this rule, the lawyer's decision not to disclose as permitted by the Rule does not violate Rule 1.6. Other Rules may impose disclosure obligations. *See* Rules 1.2(e), 2.3, 3.3, 3.4(a), 4.1(b), 8.1, and 8.3 regarding the reconciliation of the confidentiality protections of this rule with disclosure provisions of those Rules.

[21] Paragraphs (c) and (d) permit disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. The "reasonably believes" standard is applied because it is difficult for a lawyer to "know" when acts with such potentially serious consequences will actually be carried out, for the client may have a change of mind. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes

necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[22] Other law may require that a lawyer disclose information otherwise protected by Rule 1.6. Whether a law requires such disclosure is a question of law beyond the scope of these Rules. When such disclosure 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 requires disclosure, paragraph (e)(2)(A) permits the lawyer to make such disclosure as is necessary to comply with the law.

**Dispute Concerning Lawyer's Conduct**

[23] 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. Charges, in defense of which a lawyer may disclose client confidences and secrets, can arise in a civil, criminal, or professional disciplinary 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.

[24] The lawyer may not disclose a client's confidences or secrets to defend against informal allegations made by third parties; the Rule allows disclosure only if a third party has formally instituted a civil, criminal, or disciplinary action against the lawyer. Even if the third party has formally instituted such a proceeding, the lawyer should advise the client of the third party's action and request that the client respond appropriately, if this is practicable and would not be prejudicial to the lawyer's ability to establish a defense.

[25] If a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose that client's confidences and secrets in establishing a defense, without waiting for formal proceedings to be commenced. The requirement of subparagraph (e)(3) that there be "specific" charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer "did a poor job" of representing the client. But in this situation, as well as in the defense of formally instituted third-party proceedings, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

**Fee Collection Actions**

[26] Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. 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. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.

[27] If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of *in camera* proceedings.

**Disclosures Otherwise Required or Authorized**

[28] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, subparagraph (e)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

**Former Client**

[29] The duty of confidentiality continues after the client-lawyer relationship has terminated.

**Services Rendered in Assisting Another Lawyer Before Becoming a Member of the Bar**

[30] There are circumstances in which a person who ultimately becomes a lawyer provides assistance to a lawyer while serving in a nonlawyer capacity. The typical situation is that of the law clerk or summer associate in a law firm or government agency. Paragraph (h) addresses the confidentiality obligations of such a person after becoming a member of the Bar; the same confidentiality obligations are imposed as would apply if the person had been a member of the Bar at the time confidences or secrets were received. This resolution of the confidentiality obligation is consistent with the reasoning employed in D.C. Bar Legal Ethics Committee Opinion 84. For a related provision dealing with the imputation of disqualifications arising from prior participation as a summer associate or in a similar position, *see* Rule 1.10(b). For a provision addressing the imputation of disqualifications arising from prior participation as a law clerk, *see* Rule 1.11.

**Bar Sponsored Counseling Programs**

[31] Paragraph (i) adds a provision dealing specifically with the disclosure obligations of lawyers who are assisting in the counseling programs of the D.C. Bar's Lawyer Counseling Committee. Members of that committee, and lawyer-intervenors who assist the committee in counseling, may obtain information from lawyer-counselees who have sought assistance from the counseling programs offered by the committee. It is in the interest of the public to encourage lawyers who have alcohol or other substance abuse problems to seek counseling as a first step toward rehabilitation. Some lawyers who seek such assistance may have violated provisions of the Rules of Professional Conduct, or other provisions of law, including criminal statutes such as those dealing with embezzlement. In order for those who are providing counseling services to evaluate properly the lawyer-counselee's problems and enhance the prospects for rehabilitation, it is necessary for the counselors to receive completely candid information from the lawyer-counselee. Such candor is not likely if the counselor, for example, would be compelled by Rule 8.3 to report the lawyer-counselee's conduct to Disciplinary Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

[32] It is similarly in the interest of the public to encourage lawyers to seek the assistance of the D.C. Bar's Practice Management Service Committee to address management problems in their practices. In order for those who are providing counseling services through the Practice Management Service Committee to evaluate properly the lawyer-counselee's problems and enhance the prospects for self-improvement by the counselee, paragraph (j) adds a provision addressing the confidentiality obligations of lawyers who are assisting in the counseling programs of the Practice Management Service Committee.

[33] These considerations make it appropriate to treat the lawyer-counselee relationship as a lawyer-client relationship, and to create an additional limited class of information treated as secrets or confidences subject to the protection of Rule 1.6. The scope of that information is set forth in paragraph (i) and (j). The lawyer-client relationship is deemed to exist only with respect to the obligation of confidentiality created under Rule 1.6, and not to obligations created elsewhere in these Rules, including the obligation of zealous representation under Rule 1.3 and the obligation to avoid conflicts of interest set forth in Rules 1.7 and 1.9. The obligation of confidentiality extends to non-lawyer assistants of lawyers serving the committee. *See* Rule 5.1

[34] Notwithstanding the obligation of confidentiality under paragraph (j), during the period in which a lawyer-counselee is subject to a probationary or monitoring order of the Court of Appeals or the Board on Professional Responsibility in a disciplinary case instituted pursuant to Rule XI of the Rules of the Court of Appeals Governing the Bar, communications between the counselor and the lawyer being counseled under the auspices of the Practice Management Service Committee shall be subject to disclosure in accordance with an Order of the Court or the Board, since the participation of the lawyer-counselee in the programs of the committee in such circumstances is not voluntary.

[35] Ethical rules established by the District of Columbia Court of Appeals with respect to the kinds of information protected from compelled disclosure may not be accepted by other forums or jurisdictions. Therefore, the protections afforded to lawyer-counselees by paragraphs (i) and (j) may not be available to preclude disclosure in all circumstances. Furthermore, lawyers who are members of the bar of other jurisdictions may not be entitled, under the ethics rules applicable to members of the bar in such other jurisdictions, to forgo reporting violations to disciplinary authorities pursuant to the other jurisdictions' counterparts to Rule 8.3.

**Government Lawyers**

[36] Subparagraph (e)(2) was revised, and paragraph (k) was added, to address the unique circumstances raised by attorney-client relationships within the government.

[37] Subparagraph (e)(2)(A) applies to both private and government attorney-client relationships. Subparagraph (e)(2)(B) applies to government lawyers only. It is designed to permit disclosures that are not required by law or court order under Rule 1.6(e)(2)(A), but which the government authorizes its attorneys to make in connection with their professional services to the government. Such disclosures may be authorized or required by statute, executive order, or regulation, depending on the constitutional or statutory powers of the authorizing entity. If so authorized or required, subparagraph (e)(2)(B) governs.

[38] The term "agency" in paragraph (j) includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the leg-

islative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (*e.g.*, staff counsel) to counsel them. The employing agency has been designated the client under this rule to provide a commonly understood and easily determinable point for identifying the government client.

[39] Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. It is, of course, acceptable in this circumstance for a government lawyer to make disclosures about the individual representation to supervisors or others within the employing governmental agency so long as such disclosures are made in the context of, and consistent with, the agency's representation program. *See, e.g.*, 28 C.F.R. §§ 50.15 and 50.16. The relevant circumstances, including the agreement to represent the individual, may also indicate whether the individual client to whom the government lawyer is assigned will be deemed to have granted or denied informed consent to disclosures to the lawyer's employing agency. Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, and a military lawyer representing a court-martial defendant.

**Acting Competently to Preserve Confidences**

[40] When transmitting or storing confidences or secrets of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication or storage affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Among the factors to be considered in determining the reasonableness of the lawyer's conduct in transmitting or storing that information are: the sensitivity of the information; the extent to which the privacy of the client information is protected by law or by a confidentiality agreement; the cost of the security measures; and, difficulty in implementing the safeguards. A client and a lawyer may agree that the lawyer will implement special security measures beyond those required by this rule. A client may give informed consent to forgo security measures that would otherwise be required by this rule. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[41] Agreements that restrict the subsequent use of information that is not a client secret or confidence can raise concerns about the general ability of clients to obtain lawyers and the ability of lawyers to represent other clients competently and zealously. Such agreements should be viewed with caution.

## RULE 1.7 – CONFLICT OF INTEREST: GENERAL

**(a) A LAWYER SHALL NOT ADVANCE TWO OR MORE ADVERSE POSITIONS IN THE SAME MATTER.**

**(b) EXCEPT AS PERMITTED BY PARAGRAPH (c) BELOW, A LAWYER SHALL NOT REPRESENT A CLIENT WITH RESPECT TO A MATTER IF:**

**(1) THAT MATTER INVOLVES A SPECIFIC PARTY OR PARTIES AND A POSITION TO BE TAKEN BY THAT CLIENT IN THAT MATTER IS ADVERSE TO A POSITION TAKEN OR TO BE TAKEN BY ANOTHER CLIENT IN THE SAME MATTER EVEN THOUGH THAT CLIENT IS UNREPRESENTED OR REPRESENTED BY A DIFFERENT LAWYER;**

**(2) SUCH REPRESENTATION WILL BE OR IS LIKELY TO BE ADVERSELY AFFECTED BY REPRESENTATION OF ANOTHER CLIENT;**

**(3) REPRESENTATION OF ANOTHER CLIENT WILL BE OR IS LIKELY TO BE ADVERSELY AFFECTED BY SUCH REPRESENTATION;**

**(4) THE LAWYER'S PROFESSIONAL JUDGMENT ON BEHALF OF THE CLIENT WILL BE OR REASONABLY MAY BE ADVERSELY AFFECTED BY THE LAWYER'S RESPONSIBILITIES TO OR INTERESTS IN A THIRD PARTY OR THE LAWYER'S OWN FINANCIAL, BUSINESS, PROPERTY, OR PERSONAL INTERESTS.**

**(c) A LAWYER MAY REPRESENT A CLIENT WITH RESPECT TO A MATTER IN THE CIRCUMSTANCES DESCRIBED IN PARAGRAPH (b) ABOVE IF**

**(1) EACH POTENTIALLY AFFECTED CLIENT PROVIDES INFORMED CONSENT TO SUCH REPRESENTATION AFTER FULL DISCLOSURE OF THE EXISTENCE AND NATURE OF THE POSSIBLE CONFLICT AND THE POSSIBLE ADVERSE CONSEQUENCES OF SUCH REPRESENTATION; AND**

**(2) THE LAWYER REASONABLY BELIEVES THAT THE LAWYER WILL BE ABLE TO PROVIDE COMPETENT AND DILIGENT REPRESENTATION TO EACH AFFECTED CLIENT.**

**(d) IF A CONFLICT NOT REASONABLY FORESEEABLE AT THE OUTSET OF REPRESENTATION ARISES UNDER PARAGRAPH (b)(1) AFTER THE REPRESENTATION COMMENCES, AND IS NOT WAIVED UNDER PARAGRAPH (c), A LAWYER NEED NOT WITHDRAW FROM ANY REPRESENTATION UNLESS**

**THE CONFLICT ALSO ARISES UNDER PARAGRAPHS (b)(2), (b)(3), OR (b)(4).**

**COMMENT**

[1] Rule 1.7 is intended to provide clear notice of circumstances that may constitute a conflict of interest. Rule 1.7(a) sets out the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients. Rule 1.7(b) sets out those circumstances in which representation is barred in the absence of informed client consent. For the definition of "informed consent," *see* Rule 1.0(e). The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter, the lawyer is representing a single interest, but a client of the lawyer who is represented by different counsel has an interest adverse to that advanced by the lawyer. The application of Rules 1.7(a) and 1.7(b) to specific facts must also take into consideration the principles of imputed disqualification described in Rule 1.10. Rule 1.7(c) states the procedure that must be used to obtain the client's informed consent if representation is to commence or continue in the circumstances described in Rule 1.7(b). Rule 1.7(d) governs withdrawal in cases arising under Rule 1.7(b)(1).

**Representation Absolutely Prohibited – Rule 1.7(a)**

[2] Institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter. For that reason, paragraph (a) prohibits such conflicting representations, with or without client consent.

[3] The same lawyer (or law firm, *see* Rule 1.10) should not espouse adverse positions in the same matter during the course of any type of representation, whether such adverse positions are taken on behalf of clients or on behalf of the lawyer or an association of which the lawyer is a member. On the other hand, for purposes of Rule 1.7(a), an "adverse" position does not include inconsistent or alternative positions advanced by counsel on behalf of a single client. Rule 1.7(a) is intended to codify the result reached in D.C. Bar Legal Ethics Committee Opinion 204, including the conclusion that a rulemaking whose result will be applied retroactively in pending adjudications is the same matter as the adjudications, even though treated as separate proceedings by an agency. However, if the adverse positions to be taken relate to different matters, the absolute prohibition of paragraph (a) is inapplicable, even though paragraphs (b) and (c) may apply.

[4] The absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions for different clients in the same matter. It is for this reason that paragraph (a) refers to adversity with respect to a "position taken or to be taken" in a matter rather than adversity with respect to the matter or the entire representation. This approach is intended to reduce the costs of litigation in other representations where parties have common, non-adverse interests on certain issues, but have adverse (or contingently or possibly adverse) positions with respect to other issues. If, for example, a lawyer would not be required to take adverse positions in providing joint representation of two clients in the liability phase of a case, it would be permissible to undertake such a limited representation. Then, after completion of the liability phase, and upon satisfying the requirements of paragraph (c) of this rule, and of any other applicable Rules, the lawyer could represent either one of those parties as to the damages phase of the case, even though the other, represented by separate counsel as to damages, might have an adverse position as to that phase of the case. Insofar as the absolute prohibition of paragraph (a) is concerned, a lawyer may represent two parties that may be adverse to each other as to some aspects of the case so long as the same lawyer does not represent both parties with respect to those positions. Such a representation comes within paragraph (b), rather than paragraph (a), and is therefore subject to the consent provisions of paragraph (c).

[5] The ability to represent two parties who have adverse interests as to portions of a case may be limited because the lawyer obtains confidences or secrets relating to a party while jointly representing both parties in one phase of the case. In some circumstances, such confidences or secrets might be useful, against the interests of the party to whom they relate, in a subsequent part of the case. Absent the informed consent of the party whose confidences or secrets are implicated, the subsequent adverse representation is governed by the "substantial relationship" test, which is set forth in Rule 1.9.

[6] The prohibition of paragraph (a) relates only to actual conflicts of positions, not to mere formalities. For example, a lawyer is not absolutely forbidden to provide joint or simultaneous representation if the clients' positions are only nominally but not actually adverse. Joint representation is commonly provided to incorporators of a business, to parties to a contract, in formulating estate plans for family members, and in other circumstances where the clients might be nominally adverse in some respect but have retained a lawyer to accomplish a common purpose. If no actual conflict of positions exists with respect to a matter, the absolute prohibition of paragraph (a) does not come into play. Thus, in the limited circumstances set forth in Opinion 143 of the D.C. Bar Legal Ethics Committee, this prohibition would not preclude the representation of both parties in an uncontested divorce proceeding, there being no actual conflict of positions based on the facts presented in Opinion 143. For further discussion of common representation issues, including intermediation, *see* Comments [14]-[18].

**Representation Conditionally Prohibited – Rule 1.7(b)**

[7] Paragraphs (b) and (c) are based upon two principles: (1) that a client is entitled to wholehearted and zealous representation of its interests, and (2) that the client as well as the lawyer must have the opportunity to judge and be satisfied

that such representation can be provided. Consistent with these principles, paragraph (b) provides a general description of the types of circumstances in which representation is improper in the absence of informed consent. The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

[8] A client may, on occasion, adopt unreasonable positions with respect to having the lawyer who is representing that client also represent other parties. Such an unreasonable position may be based on an aversion to the other parties being represented by a lawyer, or on some philosophical or ideological ground having no foundation in the Rules regarding representation of conflicting interests. Whatever difficulties may be presented for the lawyer in such circumstances as a matter of client relations, the unreasonable positions taken by a client do not fall within the circumstances requiring notification and informed consent. Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds.

[9] If the lawyer determines or can foresee that an issue with respect to the application of paragraph (b) exists, the only prudent course is for the lawyer to make disclosure, pursuant to paragraph (c), to each affected client and enable each to determine whether in its judgment the representation at issue is likely to affect its interests adversely.

[10] Paragraph (b) does not purport to state a uniform rule applicable to cases in which two clients may be adverse to each other in a matter in which neither is represented by the lawyer or in a situation in which two or more clients may be direct business competitors. The matter in which two clients are adverse may be so unrelated or insignificant as to have no possible effect upon a lawyer's ability to represent both in other matters. The fact that two clients are business competitors, standing alone, is usually not a bar to simultaneous representation. Thus, in a matter involving a specific party or parties, paragraphs (b)(1) and (c) require notice and informed consent if the lawyer will take a position on behalf of one client adverse to another client even though the lawyer represents the latter client only on an unrelated position or in an unrelated matter. Paragraphs (b)(2), (3), (4) and (c) require disclosure and informed consent in any situation in which the lawyer's representation of a client may be adversely affected by representation of another client or by any of the factors specified in paragraph (b)(4).

**Individual Interest Conflicts**

[11] 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 adversely affect the lawyer's representation of the client. *See* D.C. Bar Legal Ethics Committee Opinion No. 210 (defense attorney negotiating position with United States Attorney's Office). 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* Comment [34] for specific commentary concerning affiliated business interests; Rule 1.8 for specific Rules pertaining to a number of individual attorney's interest conflicts, including business transactions with clients; Rule 1.8(j) for the effect of firm-wide imputation upon individual attorney interests.

[12] For the effect of a blood or marital relationship between lawyers representing different clients, *see* Rule 1.8(h). Disqualification arising from a close family relationship is not imputed. *See* Rule 1.8(j).

**Positional Conflicts**

[13] Ordinarily a lawyer may take inconsistent legal positions in different forums 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, without more, 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 in a given matter, as referred to in Rule 1.7(b), will adversely affect the lawyer's effectiveness in representing another client in the same or different matter; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position being taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the matters are pending, 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, subject to the exception provided in Rule 1.7(d). *See* D.C. Legal Ethics Committee Opinion No. 265.

**Special Considerations in Common Representation**

[14] 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. In some situations, the risk of failure is

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

[15] 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.

[16] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information relevant to the common representation will be shared, and explain the circumstances in which the lawyer may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information. 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.

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

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

**Lawyer's Duty to Make Inquiries to Determine Potential Conflicts**

[19] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

**Situations That Frequently Arise**

[20] A number of types of situations frequently arise in which disclosure and informed consent are usually required. These include joint representation of parties to criminal and civil litigation, joint representation of incorporators of a business, joint representation of a business or government agency and its employees, representation of family members seeking estate planning or the drafting of wills, joint representation of an insurer and an insured, representation in circumstances in which the personal or financial interests of the lawyer, or the lawyer's family, might be affected by the representation, and other similar situations in which experience indicates that conflicts are likely to exist or arise. For example, a lawyer might not be able to represent a client vigorously if the client's adversary is a person with whom the lawyer has longstanding personal or social

ties. The client is entitled to be informed of such circumstances so that an informed decision can be made concerning the advisability of retaining the lawyer who has such ties to the adversary. The principles of disclosure and informed consent are equally applicable to all such circumstances, except that if the positions to be taken by two clients in a matter as to which the lawyer represents both are actually adverse, then, as provided in paragraph (a), the lawyer may not undertake or continue the representation with respect to those issues even if disclosure has been made and informed consent obtained.

**Organization Clients**

[21] As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or "other constituents." Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the "client." Ordinarily that client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation's stockholders or other constituents are adverse to the corporation. *See* D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (*e.g.*, parent or subsidiary), stockholders and owners, partners, members, etc., of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

[22] However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. *See generally* ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. *Id.* The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7. *See* ABA Opinion 92-365. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (b)(4) of this rule. Thus, absent informed consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:

(a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client,

(b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or

(c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

[23] In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client-lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old representation would be so adversely affected that the conflict would not be "consentable." Although the alter ego criterion necessarily involves some imprecision, it may be usefully applied in a parent-subsidiary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable.

[24] If representation otherwise appropriate under the preceding paragraphs seeks a result that is likely ultimately to have a material adverse effect on the financial condition of the organization client, such representation is prohibited by Rule 1.7(b)(3). If the likely adverse effect on the financial condition of the organization client is not material, such representation is not prohibited by Rule 1.7(b)(3). Obviously, however, a lawyer should exercise restraint and sensitivity in determining whether to undertake such representation in a case of that type, particularly if the organization client does not realistically have the option to

discharge the lawyer as counsel to the organization client.

[25] Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under R. 1.7 through 1.12 will not expand the scope of those rules.

[26] In any event, in all cases referred to above, the lawyer must carefully consider whether Rule 1.7(b)(2) or Rule 1.7(b)(4) requires informed consent from the second client whom the lawyer proposes to represent adverse to an affiliate, owner or other constituent of the first client.

**Disclosure and Consent**

[27] Disclosure and informed consent are not mere formalities. Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue. Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.

[28] It is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. Lawyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured.

[29] The term "informed consent" is defined in Rule 1.0(e). As indicated in Comment [2] to that rule, a client's consent must not be coerced either by the lawyer or by any other person. In particular, the lawyer should not use the client's investment in previous representation by the lawyer as leverage to obtain or maintain representation that may be contrary to the client's best interests. If a lawyer has reason to believe that undue influence has been used by anyone to obtain agreement to the representation, the lawyer should not undertake the representation.

[30] The lawyer's authority to solicit and to act upon the client's consent to a conflict is limited further by the requirement that the lawyer reasonably believe that he or she will be able to provide competent and diligent representation to each affected client. Generally, it is doubtful that a lawyer could hold such a belief where the representation of one client is likely to have a substantial and material adverse effect upon the interests of another client, or where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation.

[31] Rule 1.7 permits advance waivers within certain limits and subject to certain client protections. Such waivers are permissible only if the prerequisites of the rule – namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" – are satisfied. Under the Rules' definition of "informed consent," the client must have "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action." *See* Rule 1.0(e). Ordinarily this will require that either (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (*e.g.*, a bank client for whom the lawyer performs corporate work waives the lawyer's representation of borrowers in mortgage loan transactions with that bank) or (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

[32] Rule 1.7(a) provides that a conflict arising from the lawyer's advancing adverse positions in the same matter cannot be waived in advance or otherwise. Although an advance waiver may permit the lawyer to act adversely to the waiving client in matters that are substantially related to the matter in which the lawyer represents that client, lawyers should take particular care in obtaining and acting pursuant to advance waivers where such a matter is involved.

**Withdrawal**

[33] It is much to be preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a lawyer should bear this fact in mind in considering whether disclosure should be made and informed consent obtained at the outset. If, however, a conflict arises after a representation has been undertaken, and the conflict falls within paragraph (a), or if a conflict arises under paragraph (b) and informed and uncoerced consent is not or cannot be obtained pursuant to paragraph (c), then the lawyer should withdraw from the representation, complying with Rule 1.16. Where a conflict is not foreseeable at the outset of representation and arises only under Rule 1.7(b)(1), a lawyer should seek informed consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw. In determining whether conflict is reasonably foreseeable, the test is an objective one. In determining the reasonableness of a lawyer's conduct, such factors as whether the lawyer (or lawyer's firm) has an adequate conflict-checking system in place, must be considered. Where more than one client is involved and the lawyer must withdraw because a conflict arises after representation has been undertaken, the question of whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.

**Imputed Disqualification**

[34] All of the references in Rule 1.7 and its accompanying Comment to the limitation upon a "lawyer" must be read in light of the imputed disqualification provisions of Rule 1.10,

which affect lawyers practicing in a firm.

[35] In the government lawyer context, Rule 1.7(b) is not intended to apply to conflicts between agencies or components of government (federal, state, or local) where the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity.

**Businesses Affiliated With a Lawyer or Firm**

[36] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under this rule. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make such a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not be that of a client to attorney. Second, such a related enterprise may refer a potential client to the lawyer; the lawyer should take steps to assure that the related enterprise will inform the lawyer of all such referrals. The lawyer should not accept such a referral without full disclosure of the nature and substance of the lawyer's interest in the related enterprise. *See also* Rule 7.1(b). Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to give informed consent before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that the confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible. *See* Rule 5.3.

**Sexual Relations Between Lawyer and Client**

[37] 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 may raise concerns about conflict of interest, impairment of the judgment of both lawyer and client, and preservation of attorney-client privilege. These concerns may be particularly acute when a lawyer has a sexual relationship with a client. Such a relationship may create a conflict of interest under Rule 1.7(b)(4) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

[38] Especially when the client is an individual, the client's dependence on the lawyer's knowledge of the law is likely to make the relationship between lawyer and client unequal. A sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role and thereby violate the lawyer's basic obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant risk that the lawyer's emotional involvement will impair the lawyer's independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict the extent to which client confidences will be protected by the attorney-client privilege, because client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. The client's own emotional involvement may make it impossible for the client to give informed consent to these risks.

[39] Sexual relationships with the representative of an organization client may not present the same questions of inherent inequality as the relationship with an individual client. Nonetheless, impairment of the lawyer's independent professional judgment and protection of the attorney-client privilege are still of concern, particularly if outside counsel has a sexual relationship with a representative of the organization who supervises, directs, or regularly consults with an outside lawyer concerning the organization's legal matters. An in-house employee in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization because of the employee's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver. The lawyer should consider not only the disciplinary rules but also the organization's personnel policies regarding sexual relationships (for example, prohibiting such relationships between supervisors and subordinates).

**Short-Term Limited Legal Services**

[40] For the application of this rule and Rules 1.9 and 1.10 when the lawyer undertakes to provide short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court, *see* Rule 6.5(a).

## RULE 1.8 – CONFLICT OF INTEREST: SPECIFIC RULES

**(a) A LAWYER SHALL NOT ENTER INTO A BUSINESS TRANSACTION WITH A CLIENT OR KNOWINGLY ACQUIRE AN OWNERSHIP, POSSESSORY, SECURITY, OR OTHER PECUNIARY INTEREST ADVERSE TO A CLIENT UNLESS:**

**(1) THE TRANSACTION AND TERMS ON WHICH THE LAWYER ACQUIRES THE INTEREST ARE FAIR AND REASONABLE TO THE CLIENT AND ARE FULLY DISCLOSED AND TRANSMITTED IN WRITING TO THE CLIENT IN A MANNER WHICH CAN BE REASONABLY UNDERSTOOD BY THE CLIENT;**

**(2) THE CLIENT IS GIVEN A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL IN THE TRANSACTION; AND**

**(3) THE CLIENT GIVES INFORMED CONSENT IN WRITING THERETO.**

**(b) A LAWYER SHALL NOT PREPARE AN INSTRUMENT GIVING THE LAWYER OR A PERSON RELATED TO THE LAWYER ANY SUBSTANTIAL GIFT FROM A CLIENT, INCLUDING A TESTAMENTARY GIFT, EXCEPT WHERE THE CLIENT IS RELATED TO THE DONEE. FOR PURPOSES OF THIS PARAGRAPH, RELATED PERSONS INCLUDE A SPOUSE, CHILD, GRANDCHILD, PARENT, GRANDPARENT OR OTHER RELATIVE OR INDIVIDUAL WITH WHOM THE LAWYER OR THE CLIENT MAINTAINS A CLOSE FAMILIAL RELATIONSHIP.**

**(c) 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.**

**(d) WHILE REPRESENTING A CLIENT IN CONNECTION WITH CONTEMPLATED OR PENDING LITIGATION OR ADMINISTRATIVE PROCEEDINGS, A LAWYER SHALL NOT ADVANCE OR GUARANTEE FINANCIAL ASSISTANCE TO THE CLIENT, EXCEPT THAT A LAWYER MAY PAY OR OTHERWISE PROVIDE:**

**(1) THE EXPENSES OF LITIGATION OR ADMINISTRATIVE PROCEEDINGS, INCLUDING COURT COSTS, EXPENSES OF INVESTIGATION, EXPENSES OR MEDICAL EXAMINATION, COSTS OF OBTAINING AND PRESENTING EVIDENCE; AND**

**(2) OTHER FINANCIAL ASSISTANCE WHICH IS REASONABLY NECESSARY TO PERMIT THE CLIENT TO INSTITUTE OR MAINTAIN THE LITIGATION OR ADMINISTRATIVE PROCEEDINGS.**

**(e) A LAWYER SHALL NOT ACCEPT COMPENSATION FOR REPRESENTING A CLIENT FROM ONE OTHER THAN THE CLIENT UNLESS:**

**(1) THE CLIENT GIVES INFORMED CONSENT AFTER CONSULTATION;**

**(2) THERE IS NO INTERFERENCE WITH THE LAWYER'S INDEPENDENCE OF PROFESSIONAL JUDGMENT OR WITH THE CLIENT-LAWYER RELATIONSHIP; AND**

**(3) INFORMATION RELATING TO REPRESENTATION OF A CLIENT IS PROTECTED AS REQUIRED BY RULE 1.6.**

**(f) A LAWYER WHO REPRESENTS TWO OR MORE CLIENTS SHALL NOT PARTICIPATE IN MAKING AN AGGREGATE SETTLEMENT OF THE CLAIMS FOR 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 AFTER CONSULTATION, INCLUDING DISCLOSURE OF THE EXISTENCE AND NATURE OF ALL THE CLAIMS OR PLEAS INVOLVED AND OF THE PARTICIPATION OF EACH PERSON IN THE SETTLEMENT.**

**(g) A LAWYER SHALL NOT:**

**(1) MAKE AN AGREEMENT PROSPECTIVELY LIMITING THE LAWYER'S LIABILITY TO A CLIENT FOR MALPRACTICE; OR**

**(2) SETTLE A CLAIM OR POTENTIAL CLAIM FOR MALPRACTICE ARISING OUT OF THE LAWYER'S PAST CONDUCT WITH UNREPRESENTED CLIENT OR FORMER CLIENT UNLESS THAT PERSON IS ADVISED IN WRITING OF THE DESIRABILITY OF SEEKING THE ADVICE OF INDEPENDENT LEGAL COUNSEL AND IS GIVEN A REASONABLE OPPORTUNITY TO DO SO IN CONNECTION THEREWITH.**

**(h) A LAWYER RELATED TO ANOTHER LAWYER AS PARENT, CHILD, SIBLING, OR SPOUSE SHALL NOT REPRESENT A CLIENT IN A REPRESENTATION DIRECTLY ADVERSE TO A PERSON WHO THE**

**LAWYER KNOWS IS REPRESENTED BY THE OTHER LAWYER EXCEPT UPON INFORMED CONSENT BY THE CLIENT AFTER CONSULTATION REGARDING THE RELATIONSHIP.**

**(i) A LAWYER MAY ACQUIRE AND ENFORCE A LIEN GRANTED BY LAW TO SECURE THE LAWYER'S FEES OR EXPENSES, BUT A LAWYER SHALL NOT IMPOSE A LIEN UPON ANY PART OF A CLIENT'S FILES, EXCEPT UPON THE LAWYER'S OWN WORK PRODUCT, AND THEN ONLY TO THE EXTENT THAT THE WORK PRODUCT HAS NOT BEEN PAID FOR. THIS WORK PRODUCT EXCEPTION SHALL NOT APPLY WHEN THE CLIENT HAS BECOME UNABLE TO PAY, OR WHEN WITHHOLDING THE LAWYER'S WORK PRODUCT WOULD PRESENT A SIGNIFICANT RISK TO THE CLIENT OF IRREPARABLE HARM.**

**(j) WHILE LAWYERS ARE ASSOCIATED IN A FIRM, A PROHIBITION IN THE FOREGOING PARAGRAPHS (a) THROUGH (g) AND (i) THAT APPLIES TO ANY ONE OF THEM SHALL APPLY TO ALL OF THEM.**

**COMMENT**

**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 the 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 the requirements of this rule must be met when the lawyer accepts an interest in the client's business or other non-monetary 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 and services that the client generally markets to others; for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utility 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] The client's consent need not be an actual or electronic signature but must be in written or electronic form and show the client's assent to the terms communicated by the lawyer, *e.g.*, a return electronic mail. 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, where appropriate, should explain that the client may wish to seek the advice of independent counsel.

[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 adversely affected 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. For the definition of "informed consent," *see* Rule 1.0(e). 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] 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) requires.

[5] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should be advised by the lawyer to obtain the detached advice that another lawyer can provide. Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

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

[7] This rule does not prevent a lawyer from entering into a contingent fee arrangement with a client in a civil case, if the

arrangement satisfies all the requirements of Rule 1.5(c).

**Literary Rights**

[8] 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 that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation. Paragraph (c) 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.

**Paying Certain Litigation Costs and Client Expenses**

[9] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

**Person Paying for Lawyer's Services**

[10] 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. In some circumstances, such as the relationship among insured, insurer, and defense counsel, substantive law regarding the role of the third-party payer may affect the applicability of this rule. Paragraph (e) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure. *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). The requirements of Rule 1.8(e)(1) do not apply to lawyers appointed to represent indigent criminal defendants whose fees are paid under the Criminal Justice Act or any similar statute or rule.

[11] 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(b)(4), a conflict of interest exists if there is a significant risk that the lawyer's representation will be adversely affected 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, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under Rule 1.7(a).

**Aggregate Settlements**

[12] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or *nolo contendere* plea in a criminal case. The rule stated in paragraph (f) of this rule is a corollary of both Rules 1.7 and 1.2(a), 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. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members, compensation of class counsel, and other procedural requirements designed to ensure adequate protection of the entire class.

**Limiting Liability and Settling Malpractice Claims**

[13] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited 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. Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such an agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement. Nor does the rule 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.

[14] Agreements settling a claim or potential claim for malpractice arising out of the lawyer's past conduct are not prohibited by Rule 1.8(g). Nevertheless, in view of the danger that the lawyer will take unfair advantage of an unrepresented client or a 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. Settlement of a potential claim most often will occur in the context of the resolution of an actual dispute between the attorney and the client, whether concerning the claim itself or a dispute concerning fees. The rule does not authorize the lawyer to solicit a blanket release from the client as a routine incident of the conclusion of the legal representation.

[15] Paragraph (h) applies to related lawyers who are in different firms. Related lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. Pursuant to the provisions of Rule 1.8(j), the disqualification stated in paragraph (h) is personal and is not imputed to members of firms with whom the lawyers are associated. Since each of the related lawyers is subject to paragraph (h), the effect is to require the informed consent of all materially affected clients. Romantic relationships between lawyers may create conflicts of interest under Rule 1.7(b)(4), likewise requiring informed consent of all materially affected clients.

[16] The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey*, 618 A.2d 153, 159-60 (D.C. 1992), and cases cited therein. Whether a lawyer has a lien on money or property belonging to a client is generally a matter of substantive law as to which the ethics rules take no position. Exceptions to what the common law might otherwise permit are made with respect to contingent fees and retaining liens. *See*, respectively, Rule 1.5(c) and Rule 1.8(i).

[17] Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates. Paragraph (i) of this rule states a narrow exception to 1.16(d): a lawyer may retain anything the law permits – including property – except for files. As to files, a lawyer may retain only the lawyer's own work product, and then only if the client has not paid for the work. However, if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product. Furthermore, the lawyer may not retain the work product for which the client has not paid, if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest.

[18] Under Rule 1.16(d), for example, a lawyer would be required to return all papers received from a client, such as birth certificates, wills, tax returns, or "green cards." Rule 1.8(i) does not permit retention of such papers to secure payment of any fee due. Only the lawyer's own work product – results of factual investigations, legal research and analysis, and similar materials generated by the lawyer's own effort – could be retained. (The term "work product" as used in paragraph (i) is limited to materials falling within the "work product doctrine," but includes any material generated by the lawyer that would be protected under that doctrine whether or not created in connection with pending or anticipated litigation.) And a lawyer could not withhold all the work product merely because a portion of the lawyer's fees had not been paid.

[19] There are situations in which withholding the work product would not be permissible because of irreparable harm to the client. The possibility of involuntary incarceration or criminal conviction constitutes one category of irreparable harm. The realistic possibility that a client might irretrievably lose a significant right or become subject to a significant liability because of the withholding of the work product constitutes another category of irreparable harm. On the other hand, the mere fact that the client might have to pay another lawyer to replicate the work product does not, standing alone, constitute irreparable harm. These examples are merely indicative of the meaning of the term "irreparable harm," and are not exhaustive.

**Attribution of Prohibitions**

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

**Sexual Relationships with Clients**

[21] Concerns about personal relationships, including sexual relationships, between lawyers and clients are addressed in Comments [37]-[39] to Rule 1.7.

## RULE 1.9 – CONFLICT OF INTEREST: FORMER CLIENT

**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.**

**COMMENT**

[1] After termination of client-lawyer relationship, a lawyer may not represent another client except in conformity with the Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. Similarly, a lawyer who has defended a client against charges brought by a regulatory agency concerning a transaction may not later represent another client in a private lawsuit against the client involving the same transaction, absent the first client's informed consent. For the definition of "informed consent," *see* Rule 1.0(e).

[2] The scope of a "matter" for purposes of this rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. 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. Rule 1.9 is intended to incorporate District of Columbia and federal case law defining the "substantial relationship" test. *See, e.g., Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); *T.C. Theatre Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953), and its progeny.

[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.

[4] Disqualification from subsequent representation is for the protection of clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client. The question of whether a lawyer is personally disqualified from representation in any matter on account of successive government and private employment is governed by Rule 1.11 rather than by Rule 1.9.

[5] With regard to disqualification of a firm with which a lawyer is associated, *see* Rules 1.10; for former government lawyers, *see* Rule 1.11; for former judges and law clerks, *see* Rule 1.11.

## 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:**

> **(1) THE PROHIBITION OF THE INDIVIDUAL LAWYER'S REPRESENTATION IS BASED ON AN INTEREST OF THE LAWYER DESCRIBED IN RULE 1.7(b)(4) AND THAT INTEREST DOES NOT PRESENT A SIGNIFICANT RISK OF ADVERSELY AFFECTING THE REPRESENTA-**

**TION OF THE CLIENT BY THE REMAINING LAWYERS IN THE FIRM; OR**

**(2) THE REPRESENTATION IS PERMITTED BY RULES 1.11, 1.12, OR 1.18, OR BY PARAGRAPH (b) OF THIS RULE.**

**(b)(1) EXCEPT AS PROVIDED IN SUBPARAGRAPHS (2) AND (3), WHEN A LAWYER BECOMES ASSOCIATED WITH A FIRM, THE FIRM MAY NOT KNOWINGLY REPRESENT A PERSON IN A MATTER WHICH IS THE SAME AS, OR SUBSTANTIALLY RELATED TO, A MATTER WITH RESPECT TO WHICH THE LAWYER HAD PREVIOUSLY REPRESENTED A CLIENT WHOSE INTERESTS ARE MATERIALLY ADVERSE TO THAT PERSON AND ABOUT WHOM THE LAWYER HAS IN FACT ACQUIRED INFORMATION PROTECTED BY RULE 1.6 THAT IS MATERIAL TO THE MATTER.**

**(2) THE FIRM IS NOT DISQUALIFIED BY THIS PARAGRAPH IF THE LAWYER PARTICIPATED IN A PREVIOUS REPRESENTATION OR ACQUIRED INFORMATION UNDER THE CIRCUMSTANCES COVERED BY RULE 1.6(h) OR RULE 1.18.**

**(3) THE FIRM IS NOT DISQUALIFIED BY THIS PARAGRAPH IF THE PROHIBITION IS BASED UPON RULE 1.9 AND**

**(A) THE DISQUALIFIED LAWYER IS SCREENED FROM THE MATTER AND IS APPORTIONED NO PART OF THE FEE THEREFROM; AND**

**(B) WRITTEN NOTICE IS PROMPTLY GIVEN BY THE FIRM AND THE LAWYER TO ANY AFFECTED FORMER CLIENT OF THE SCREENED LAWYER, SUCH NOTICE TO INCLUDE A DESCRIPTION OF THE SCREENING PROCEDURES EMPLOYED AND A STATEMENT OF COMPLIANCE WITH THESE RULES.**

**(c) WHEN A LAWYER HAS TERMINATED AN ASSOCIATION WITH A FIRM, THE FIRM IS NOT PROHIBITED FROM THEREAFTER REPRESENTING A PERSON WITH INTERESTS MATERIALLY ADVERSE TO THOSE OF A CLIENT WHO WAS REPRESENTED BY THE FORMERLY ASSOCIATED LAWYER DURING THE ASSOCIATION AND IS NOT CURRENTLY REPRESENTED BY THE FIRM, UNLESS:**

**(1) THE MATTER IS THE SAME OR SUBSTANTIALLY RELATED TO THAT IN WHICH THE FORMERLY ASSOCIATED LAWYER REPRESENTED THE CLIENT; AND**

**(2) ANY LAWYER REMAINING IN THE FIRM HAS INFORMATION PROTECTED BY RULE 1.6 THAT IS MATERIAL TO THE MATTER.**

**(d) A DISQUALIFICATION PRESCRIBED BY THIS RULE MAY BE WAIVED BY THE AFFECTED CLIENT UNDER THE CONDITIONS STATED IN RULE 1.7.**

**(e) A LAWYER WHO, WHILE AFFILIATED WITH A FIRM, IS MADE AVAILABLE TO ASSIST THE OFFICE OF THE ATTORNEY GENERAL OF THE DISTRICT OF COLUMBIA IN PROVIDING LEGAL SERVICES TO THAT AGENCY IS NOT CONSIDERED TO BE ASSOCIATED IN A FIRM FOR PURPOSES OF PARAGRAPH (a), PROVIDED, HOWEVER, THAT NO SUCH LAWYER SHALL REPRESENT THE OFFICE OF THE ATTORNEY GENERAL WITH RESPECT TO A MATTER IN WHICH THE LAWYER'S FIRM APPEARS ON BEHALF OF AN ADVERSARY.**

**(f) IF A CLIENT OF THE FIRM REQUESTS IN WRITING THAT THE FACT AND SUBJECT MATTER OF A REPRESENTATION SUBJECT TO PARAGRAPH (b) NOT BE DISCLOSED BY SUBMITTING THE WRITTEN NOTICE REFERRED TO IN SUBPARAGRAPH (b)(3)(B), SUCH NOTICE SHALL BE PREPARED CONCURRENTLY WITH UNDERTAKING THE REPRESENTATION AND FILED WITH DISCIPLINARY COUNSEL UNDER SEAL. IF AT ANY TIME THEREAFTER THE FACT AND SUBJECT MATTER OF THE REPRESENTATION ARE DISCLOSED TO THE PUBLIC OR BECOME A PART OF THE PUBLIC RECORD, THE WRITTEN NOTICE PREVIOUSLY PREPARED SHALL BE PROMPTLY SUBMITTED AS REQUIRED BY SUBPARAGRAPH (b)(3)(B).**

**COMMENT**

**Definition of "Firm"**

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of

lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[2] There is ordinarily no question that the members of the law department of an organization constitute a firm within the meaning of the Rules of Professional Conduct, but 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 organizations. 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.

**Principles of Imputed Disqualification**

[4] 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 paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, *see* Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

**Exception for Personal Interest of the Disqualified Lawyer**

[7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

**Lawyers Moving Between Firms**

[8] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many 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 imputed disqualification were defined 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.

[9] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[10] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impro-

priety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[11] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

**Confidentiality**

[12] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, 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 discussion 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.

[13] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[14] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of 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 substantially related matter even though the interests of the two clients conflict.

[15] 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* Rule 1.6.

**Adverse Positions**

[16] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake*, 703 F.2d 252, 257-59 (7th Cir. 1983). An exception to paragraph (b) is provided by subparagraph (b)(3).

[17] The concept of "former client" as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer-client relationship are former clients within the terms of paragraph (b).

[18] Subparagraph (b)(2) limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so-called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitations on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified but for subparagraph (b)(2). Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[19] Under certain circumstances, paragraph (c) permits a law firm 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. The firm, however, may not represent a person in a matter adverse to a current client

of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, 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 Rule 1.6.

[20] Subparagraph (b)(3) removes the imputation otherwise required by paragraphs 1.10(a) and (b), but does so without requiring informed consent by the former client of the lawyer changing firms. Instead, it requires that the procedures set out in subparagraphs (b)(3)(A) and (B) be followed. The term "screened" is defined in Rule 1.0(l) and explained in comments [4]-[6] to Rule 1.0. Lawyers should be aware, however, that even where subparagraph 1.10(b)(3) has been followed, tribunals in other jurisdictions may consider additional factors in ruling upon motions to disqualify lawyers from pending litigation. Establishing a screen under this rule does not constitute dropping an existing client in favor of another client. Cf. D.C. Legal Ethics Op. 272 (1997) (permitting lawyer to drop occasional client for whom lawyer is handling no current projects in order to accept conflicting representation).

[21] Subparagraph (b)(3)(A) 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 from which the screened lawyer is disqualified. See D.C. Legal Ethics Op. 279 (1998).

[22] The written notice required by subparagraph (b)(3)(B) generally should include a description of the screened lawyer's prior representation and an undertaking by the new law firm to respond promptly to any written inquiries or objections by the former client regarding the screening procedures. The notice should be provided as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the new firm that the screened lawyer's former client's confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the screened lawyer's former client to evaluate and comment upon the effectiveness of the screening procedures. Nothing in this rule is intended to restrict the firm and the screened lawyer's former client from agreeing to different screening procedures but those set out herein are sufficient to comply with the rule.

[23] Paragraph (f) makes it clear that a lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by subparagraph (b)(3)(B). If a client requests in writing that the fact and subject matter of the representation not be disclosed, the screened lawyer and law firm must comply with that request. If a client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading that is publicly available or making an appearance in a proceeding before a tribunal that is open to the public constitutes a public filing for purposes of this rule. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client's request not to make the notifications.

[24] Although paragraph (f) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the screened lawyer and the screened lawyer's new firm to prepare the documents described in paragraph (f) as soon as the representation commences, to file the documents with Disciplinary Counsel, and to preserve the documents for possible submission to the screened lawyer's former client if and when the client does consent to their submission or the information becomes public.

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

**Lawyers Assisting the Office of the Attorney General of the District of Columbia**

[26] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. *See* Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[27] The term "made available to assist the Office of the Attorney General in providing legal services" in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to

the Office of the Attorney General, so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[28] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer's firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[29] The absence of such a *per se* prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public's acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer's law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer's firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer's firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer's representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer's firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[30] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

## RULE 1.11 – SUCCESSIVE GOVERNMENT AND PRIVATE OR OTHER EMPLOYMENT

**(a) A LAWYER SHALL NOT ACCEPT OTHER EMPLOYMENT IN CONNECTION WITH A MATTER WHICH IS THE SAME AS, OR SUBSTANTIALLY RELATED TO, A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS A PUBLIC OFFICER OR EMPLOYEE. SUCH PARTICIPATION INCLUDES ACTING ON THE MERITS OF A MATTER IN A JUDICIAL OR OTHER ADJUDICATIVE CAPACITY.**

**(b) IF A LAWYER IS REQUIRED TO DECLINE OR TO WITHDRAW FROM EMPLOYMENT UNDER PARAGRAPH (a) ON ACCOUNT OF A PERSONAL AND SUBSTANTIAL PARTICIPATION IN A MATTER, NO PARTNER OR ASSOCIATE OF THAT LAWYER, OR LAWYER WITH AN OF COUNSEL RELATIONSHIP TO THAT LAWYER, MAY KNOWINGLY ACCEPT OR CONTINUE SUCH EMPLOYMENT EXCEPT AS PROVIDED IN PARAGRAPHS (c) AND (d) BELOW. THE DISQUALIFICATION OF SUCH OTHER LAWYERS DOES NOT APPLY IF THE SOLE FORM OF PARTICIPATION WAS AS A JUDICIAL LAW CLERK.**

**(c) THE PROHIBITION STATED IN PARAGRAPH (b) SHALL NOT APPLY IF THE PERSONALLY DISQUALIFIED LAWYER IS TIMELY SCREENED FROM ANY FORM OF PARTICIPATION IN THE MATTER OR REPRESENTATION AS THE CASE MAY BE, AND FROM SHARING IN ANY FEES RESULTING THEREFROM, AND IF THE REQUIREMENTS OF PARAGRAPHS (d) AND (e) ARE SATISFIED.**

**(d) EXCEPT AS PROVIDED IN PARAGRAPH (e), WHEN ANY OF COUNSEL, LAWYER, PARTNER, OR ASSOCIATE OF A LAWYER PERSONALLY DISQUALIFIED UNDER PARAGRAPH (a) ACCEPTS EMPLOYMENT IN CONNECTION WITH A MATTER GIVING RISE TO THE PERSONAL DISQUALIFICATION, THE FOLLOWING NOTIFICATIONS SHALL BE REQUIRED:**

**(1) THE PERSONALLY DISQUALIFIED LAWYER SHALL SUBMIT TO THE PUBLIC DEPARTMENT OR AGENCY BY WHICH THE LAWYER WAS FORMERLY EMPLOYED AND SERVE ON EACH OTHER PARTY TO ANY PERTINENT PROCEEDING A SIGNED DOCUMENT ATTESTING THAT DURING THE PERIOD OF DISQUALIFICATION THE PERSONALLY DISQUALIFIED LAWYER WILL NOT PARTICIPATE IN ANY MANNER IN THE MATTER OR THE REPRESENTATION, WILL NOT DISCUSS THE MATTER OR THE REPRESENTATION WITH ANY PARTNER, ASSOCIATE, OR OF COUNSEL LAWYER, AND WILL NOT SHARE IN ANY FEES FOR THE MATTER OR THE REPRESENTATION.**

**(2) AT LEAST ONE AFFILIATED LAWYER SHALL SUBMIT TO THE SAME DEPARTMENT OR AGENCY AND SERVE ON THE SAME PARTIES A SIGNED DOCUMENT ATTESTING THAT ALL AFFILIATED LAWYERS ARE AWARE OF THE REQUIREMENT THAT THE PERSONALLY DISQUALIFIED LAWYER BE SCREENED FROM PARTICIPATING IN OR DISCUSSING THE MATTER OR THE REPRESENTATION AND DESCRIBING THE PROCEDURES BEING TAKEN TO SCREEN THE PERSONALLY DISQUALIFIED LAWYER.**

**(e) IF A CLIENT REQUESTS IN WRITING THAT THE FACT AND SUBJECT MATTER OF A REPRESENTATION SUBJECT TO PARAGRAPH (d) NOT BE DISCLOSED BY SUBMITTING THE SIGNED STATEMENTS REFERRED TO IN PARAGRAPH (d), SUCH STATEMENTS SHALL BE PREPARED CONCURRENTLY WITH UNDERTAKING THE REPRESENTATION AND FILED WITH DISCIPLINARY COUNSEL UNDER SEAL. IF AT ANY TIME THEREAFTER THE FACT AND SUBJECT MATTER OF THE REPRESENTATION ARE DISCLOSED TO THE PUBLIC OR BECOME A PART OF THE PUBLIC RECORD, THE SIGNED STATEMENTS PREVIOUSLY PREPARED SHALL BE PROMPTLY SUBMITTED AS REQUIRED BY PARAGRAPH (d).**

**(f) SIGNED DOCUMENTS FILED PURSUANT TO PARAGRAPH (d) SHALL BE AVAILABLE TO THE PUBLIC, EXCEPT TO THE EXTENT THAT A LAWYER SUBMITTING A SIGNED DOCUMENT DEMONSTRATES TO THE SATISFACTION OF THE PUBLIC DEPARTMENT OR AGENCY UPON WHICH SUCH DOCUMENTS ARE SERVED THAT PUBLIC DISCLOSURE IS INCONSISTENT WITH RULE 1.6 OR OTHER APPLICABLE LAW.**

**(g) THIS RULE APPLIES TO ANY MATTER INVOLVING A SPECIFIC PARTY OR PARTIES.**

**(h) A LAWYER WHO PARTICIPATES IN A PROGRAM OF TEMPORARY SERVICE TO THE OFFICE OF THE DISTRICT OF COLUMBIA ATTORNEY GENERAL OF THE KIND DESCRIBED IN RULE 1.10(e) SHALL BE TREATED AS HAVING SERVED AS A PUBLIC OFFICER OR EMPLOYEE FOR PURPOSES OF PARAGRAPH (a), AND THE PROVISIONS OF PARAGRAPHS (b)-(e) SHALL APPLY TO THE LAWYER AND TO LAWYERS AFFILIATED WITH THE LAWYER.**

**COMMENT**

[1] This rule deals with lawyers who leave public office and enter other employment. It applies to judges and their law clerks as well as to lawyers who act in other capacities. It is a counterpart of Rule 1.9, as applied to an individual former government lawyer, and of Rule 1.10, as applied to a law firm.

[2] A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to this Rule 1.11 and to statutes and government regulations concerning conflict of interest. In the District of Columbia, where there are many lawyers for the federal and D.C. governments and their agencies, a number of whom are constantly leaving government and accepting other employment, particular heed must be paid to the federal conflict-of-interest statutes. *See, e.g.*, 18 U.S.C. Chapter 11 and regulations and opinions thereunder.

[3] Rule 1.11, in paragraph (a), flatly forbids a lawyer to accept other employment in a matter in which the lawyer participated personally and substantially as a public officer or employee; participation specifically includes acting on a matter in a judicial capacity. Other than as noted in Comment [10] to this rule, there is no provision for waiver of the individual lawyer's disqualification. "Matter" is defined in paragraph (g) so as to encompass only matters that are particular to a specific party or parties. The making of rules of general applicability and the establishment of general policy will ordinarily not be a "matter" within the meaning of Rule 1.11. When a lawyer is forbidden by paragraph (a) to accept private employment in a matter, the partners and associates of that lawyer are likewise forbidden, by paragraph (b), to accept the employment unless the screening and disclosure procedures described in paragraphs (c) through (f) are followed.

[4] The rule forbids lawyers to accept other employment in connection with matters that are the same as or "substantially related" to matters in which they participated personally and substantially while serving as public officers or employees. The leading case defining "substantially related" matters in the context of former government employment is *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc). There the D.C. Court of Appeals, *en banc*,

held that in the "revolving door" context, a showing that a reasonable person could infer that, through participation in one matter as a public officer or employee, the former government lawyer "may have had access to information legally relevant to, or otherwise useful in" a subsequent representation, is *prima facie* evidence that the two matters are substantially related. If this *prima facie* showing is made, the former government lawyer must disprove any ethical impropriety by showing that the lawyer "could not have gained access to information during the first representation that might be useful in the later representation." *Id.* at 49-50. In *Brown*, the Court of Appeals announced the "substantially related" test after concluding that, under former DR 9-101(B), *see* "Revolving Door," 445 A.2d 615 (D.C. 1982) (*en banc*) (*per curiam*), the term "matter" was intended to embrace all matters "substantially related" to one another – a test that originated in "side-switching" litigation between private parties. *See* Rule 1.9, Comments [2] and [3]; *Brown*, 486 A.2d at 39-40 n. 1, 41-42 & n. 4. Accordingly, the words "or substantially related to" in paragraph (a) are an express statement of the judicial gloss in *Brown* interpreting "matter."

[5] Paragraph (a)'s absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially carries forward a policy of avoiding both actual impropriety and the appearance of impropriety that is expressed in the federal conflict-of-interest statutes and was expressed in the former Code of Professional Responsibility. Paragraph (c) requires the screening of a disqualified lawyer from such a matter as a condition to allowing any lawyers in the disqualified lawyer's firm to participate in it. This procedure is permitted in order to avoid imposing a serious deterrent to lawyers' entering public service. Governments have found that they benefit from having in their service both younger and more experienced lawyers who do not intend to devote their entire careers to public service. Some lawyers might not enter into short-term public service if they thought that, as a result of their active governmental practice, a firm would hesitate to hire them because of a concern that the entire firm would be disqualified from matters as a result.

[6] There is no imputed disqualification and consequently no screening requirement in the case of a judicial law clerk. But such clerks are subject to a personal obligation not to participate in matters falling within paragraph (a), since participation by a law clerk is within the term "judicial or other adjudicative capacity."

[7] Paragraph (d) imposes a further requirement that must be met before lawyers affiliated with a disqualified lawyer may participate in the representation. Except to the extent that the exception in paragraph (e) is satisfied, both the personally disqualified lawyer and at least one affiliated lawyer must submit to the agency signed documents basically stating that the personally disqualified lawyer will be screened from participation in the matter. The personally disqualified lawyer must also state that the lawyer will not share in any fees paid for the representation in question. And the affiliated lawyer must describe the procedures to be followed to ensure that the personally disqualified lawyer is effectively screened.

[8] Paragraph (e) makes it clear that the lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by paragraph (d). If the client requests in writing that the fact and subject matter of the representation not be disclosed, the lawyer must comply with that request. If the client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading or making an appearance in a proceeding before a tribunal constitutes a public filing. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client request not to make the notifications. If a government agency has adopted rules governing practice before the agency by former government employees, members of the District of Columbia Bar are not exempted by Rule 1.11(e) from any additional or more restrictive notice requirements that the agency may impose. Thus the agency may require filing of notifications whether or not a client consents. While the lawyer cannot file a notification that the client has directed the lawyer not to file, the failure to file in accordance with agency rules may preclude the lawyer's representation of the client before the agency. Such issues are governed by the agency's rules, and Rule 1.11(e) is not intended to displace such agency requirements.

[9] Although paragraph (e) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the lawyer to prepare the documents described in paragraph (d) as soon as the representation commences and to preserve the documents for possible submission to the agency and parties to any pertinent proceeding if and when the client does consent to their submission or the information becomes public.

[10] "Other employment," as used in paragraph (a) of this rule, includes the representation of a governmental body other than an agency of the government by which the lawyer was employed as a public officer or employee, but in the case of a move from one government agency to another the prohibition provided in paragraph (a) may be waived by the government agency with which the lawyer was previously employed. As used in paragraph (a), it would not be other employment for a lawyer who has left the employment of a particular government agency and taken employment with another government agency (*e.g.*, the Department of Justice) or with a private law firm to continue or accept representation of the same government agency with which the lawyer was previously employed.

[11] Paragraph (c) does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. It prohibits directly relating the attorney's compensation in any way to the fee in the matter in which the lawyer is

disqualified. *See* D.C. Bar Legal Ethics Committee Opinion 279.

[12] Rule 1.10(e) provides an exception to the general imputation imposed by Rule 1.10(a) for lawyers assisting the Office of the District of Columbia Attorney General on a temporary basis. Rule 1.10(e) provides that lawyers providing such temporary assistance are not considered to be affiliated with their law firm during such periods of temporary assistance. However, lawyers participating in such temporary assistance programs have a potential for conflicts of interest or the abuse of information obtained while participating in such programs. It is appropriate to subject lawyers participating in temporary assistance programs to the same rules which paragraphs (a)-(g) impose on former government employees. Paragraph (h) effects this result.

[13] In addition to ethical concerns, provisions of conflict of interest statutes or regulations may impose limitations on the conduct of lawyers while they are providing assistance to the Office of the District of Columbia Attorney or after they return from such assignments. *See*, *e.g.*, 18 U.S.C. §§ 207, 208. Compliance with the Rules of Professional Conduct does not necessarily constitute compliance with all of the obligations imposed by conflict of interest statutes or regulations.

## RULE 1.12 – THIRD-PARTY NEUTRALS

**(a) EXCEPT AS STATED IN PARAGRAPH (e), A LAWYER SHALL NOT REPRESENT ANYONE IN CONNECTION WITH A MATTER IN WHICH THE LAWYER PARTICIPATED PERSONALLY AND SUBSTANTIALLY AS AN ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL, UNLESS ALL PARTIES TO THE PROCEEDINGS GIVE THEIR INFORMED CONSENT AFTER DISCLOSURE.**

**(b) A LAWYER SHALL NOT NEGOTIATE FOR EMPLOYMENT WITH ANY PERSON WHO IS INVOLVED AS A PARTY OR AS A LAWYER FOR A PARTY IN A MATTER IN WHICH THE LAWYER IS PARTICIPATING PERSONALLY AND SUBSTANTIALLY AS AN ARBITRATOR, 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) IF A CLIENT REQUESTS IN WRITING THAT THE FACT AND SUBJECT MATTER OF A REPRESENTATION SUBJECT TO PARAGRAPH (a) NOT BE DISCLOSED BY SUBMITTING THE SIGNED STATEMENTS REFERRED TO IN PARAGRAPH (c), SUCH STATEMENTS SHALL BE PREPARED CONCURRENTLY WITH UNDERTAKING THE REPRESENTATION AND FILED WITH DISCIPLINARY COUNSEL UNDER SEAL. IF AT ANY TIME THEREAFTER THE FACT AND SUBJECT MATTER OF THE REPRESENTATION ARE DISCLOSED TO THE PUBLIC OR BECOME A PART OF THE PUBLIC RECORD, THE SIGNED STATEMENTS PREVIOUSLY PREPARED SHALL BE PROMPTLY SUBMITTED AS REQUIRED BY PARAGRAPH (c).**

**(e) AN ARBITRATOR SELECTED AS A PARTISAN OF A PARTY IN A MULTIMEMBER ARBITRATION PANEL IS NOT PROHIBITED FROM SUBSEQUENTLY REPRESENTING THAT PARTY.**

**COMMENT**

[1] 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. For the definition of "informed consent," *see* Rule 1.0(e). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. *See* Rule 2.4.

[2] 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.

[3] Requirements for screening procedures are stated in Rule 1.0(l). 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. *See* D.C. Bar Legal Ethics Committee Opinion 279.

[4] 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.

[5] With respect to statements filed with Disciplinary Counsel pursuant to paragraph (d), *see* Comments [8] and [9] to Rule 1.11.

## 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, OR A VIOLATION OF LAW WHICH REASONABLY MIGHT BE IMPUTED TO THE ORGANIZATION, AND IS LIKELY TO RESULT IN SUBSTANTIAL INJURY TO THE ORGANIZATION, THE LAWYER SHALL PROCEED AS IS REASONABLY NECESSARY IN THE BEST INTEREST OF THE ORGANIZATION. 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) IN DEALING WITH AN ORGANIZATION'S DIRECTORS, OFFICERS, EMPLOYEES, MEMBERS, SHAREHOLDERS, OR OTHER CONSTITUENTS, A LAWYER SHALL EXPLAIN THE IDENTITY OF THE CLIENT WHEN IT IS APPARENT THAT THE ORGANIZATION'S INTERESTS MAY BE ADVERSE TO THOSE OF THE CONSTITUENTS WITH WHOM THE LAWYER IS DEALING.**

**(d) 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 reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the 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] When it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, paragraph (b) requires the lawyer to 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.

[6] Although Model Rule 1.13 contains a "reporting out" requirement that authorizes disclosure of confidential client information concerning an organizational client that would be prohibited with respect to other types of clients, D.C. Rule 1.13 does not expand the kinds of disclosures that are permitted for organizational clients. Under the D.C. Rules, client confidences are protected to the same degree whether the client is an organization or an individual. If a lawyer has reported a matter to the highest appropriate authority in the organization, and that authority has determined not to take any action recommended by the lawyer, the lawyer should accept that authority's decision, just as the lawyer is required to abide by the decision of an individual client to maintain confidences and secrets – unless disclosure is authorized under Rule 1.6. If a binding judicial determination is made that the disclosure limitations under D.C. Rule 1.13 are preempted by federal law conferring broader authority to disclose client confidences or secrets of certain types of organizational clients, a lawyer may exercise the broader authority granted by federal law. The strictures of the D.C. Rules, however, would continue to apply to protection of confidences and secrets of other types of organizational clients.

**Relation to Other Rules**

[7] This rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3, and 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.2(e) and 1.6 (d) can be applicable.

**Government Agency**

[8] The duty defined in this rule encompasses the representation of governmental organizations. *See* Rule 1.6 comments [37] through [40].

**Clarifying the Lawyer's Role**

[9] 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.

[10] 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**

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

**Derivative Actions**

[12] 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.

[13] 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 whether lawyers who normally serve as counsel to the corporation can properly represent both the directors and the organization.

## RULE 1.14 – CLIENT WITH DIMINISHED CAPACITY

**(a) WHEN A CLIENT'S CAPACITY TO MAKE ADEQUATELY CONSIDERED DECISIONS IN CONNECTION WITH A REPRESENTATION IS DIMINISHED, WHETHER BECAUSE OF MINORITY, MENTAL IMPAIRMENT OR FOR SOME OTHER REASON, THE LAWYER SHALL, AS FAR AS REASONABLY POSSIBLE, MAINTAIN A TYPICAL CLIENT-LAWYER RELATIONSHIP WITH THE CLIENT.**

**(b) WHEN THE LAWYER REASONABLY BELIEVES THAT THE CLIENT HAS DIMINISHED CAPACITY, IS AT RISK OF SUBSTANTIAL PHYSICAL, FINANCIAL OR OTHER HARM UNLESS ACTION IS TAKEN AND CANNOT ADEQUATELY ACT IN THE CLIENT'S OWN INTEREST, THE LAWYER MAY TAKE REASONABLY NECESSARY PROTECTIVE ACTION, INCLUDING CONSULTING WITH INDIVIDUALS OR ENTITIES THAT HAVE THE ABILITY TO TAKE ACTION TO PROTECT THE CLIENT AND, IN APPROPRIATE CASES, SEEKING THE APPOINTMENT OF A SURROGATE DECISION-MAKER.**

**(c) INFORMATION RELATING TO THE REPRESENTATION OF A CLIENT WITH DIMINISHED CAPACITY IS PROTECTED BY RULE 1.6. WHEN TAKING PROTECTIVE ACTION PURSUANT TO PARAGRAPH (b), THE LAWYER IS IMPLIEDLY AUTHORIZED UNDER RULE 1.6(a) TO REVEAL INFORMATION ABOUT THE CLIENT, BUT ONLY TO THE EXTENT REASONABLY NECESSARY TO PROTECT THE CLIENT'S INTERESTS.**

**COMMENT**

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

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a surrogate decision-maker, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. "Surrogate decision-maker" denotes an individual or entity appointed by a court or otherwise authorized by law to make important decisions on behalf of an individual who lacks capacity to make decisions in one or more significant areas of his or her life. The term "surrogate decision-maker" includes, but is not limited to, guardian ad litem, plenary or limited guardian or conservator, proxy decision-maker, or other legal representative.

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

[4] If a surrogate decision-maker has already been appointed for the client, the lawyer should ordinarily look to that person for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. In either case, the lawyer should consult with the represented person to the maximum extent possible, as indicated in comment [2] above.

**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 typical 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, the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors

as: the client's ability to articulate reasoning leading to a decision, variability of state of mind, ability to appreciate the consequences of a decision, the substantive fairness of a decision, the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If the client does not have a surrogate decision-maker, the lawyer should consider whether the appointment of a surrogate decision-maker is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a surrogate decision-maker. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, the appointment of at least some types of surrogate decision-makers may be more expensive, intrusive, or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should advocate on behalf of the client the least restrictive form of intervention in the client's decision-making.

**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. 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 surrogate decision-maker. 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) A LAWYER SHALL HOLD PROPERTY OF CLIENTS OR THIRD PERSONS THAT IS IN THE LAWYER'S POSSESSION IN CONNECTION WITH A REPRESENTATION SEPARATE FROM THE LAWYER'S OWN PROPERTY. FUNDS OF CLIENTS OR THIRD PERSONS THAT ARE IN THE LAWYER'S POSSESSION (TRUST FUNDS) SHALL BE KEPT IN ONE OR MORE TRUST ACCOUNTS MAINTAINED IN ACCORDANCE WITH PARAGRAPH (B). OTHER PROPERTY SHALL BE IDENTIFIED AS SUCH AND APPROPRIATELY SAFEGUARDED. COMPLETE RECORDS OF SUCH ACCOUNT FUNDS AND OTHER PROPERTY SHALL BE KEPT BY THE LAWYER AND SHALL BE PRESERVED FOR A PERIOD OF FIVE YEARS AFTER TERMINATION OF THE REPRESENTATION.**

**(b) ALL TRUST FUNDS SHALL BE DEPOSITED WITH AN "APPROVED DEPOSITORY" AS THAT TERM IS DEFINED IN RULE XI OF THE RULES GOVERNING THE DISTRICT OF COLUMBIA BAR. TRUST FUNDS THAT ARE NOMINAL IN AMOUNT OR EXPECTED TO BE HELD FOR A SHORT PERIOD OF TIME, AND AS SUCH WOULD NOT BE EXPECTED TO EARN INCOME FOR A CLIENT OR THIRD-PARTY IN EXCESS OF THE COSTS INCURRED TO SECURE SUCH INCOME, SHALL BE HELD AT AN APPROVED DEPOSITORY AND IN COMPLIANCE WITH THE DISTRICT OF COLUMBIA'S INTEREST ON LAWYERS TRUST ACCOUNT (DC IOLTA) PROGRAM. THE TITLE ON EACH DC IOLTA ACCOUNT SHALL INCLUDE THE NAME OF THE LAWYER OR LAW FIRM THAT CONTROLS THE ACCOUNT, AS WELL AS "DC IOLTA ACCOUNT" OR "IOLTA ACCOUNT." THE TITLE ON ALL OTHER TRUST ACCOUNTS SHALL INCLUDE THE NAME OF THE LAWYER OR LAW FIRM**

**THAT CONTROLS THE ACCOUNT, AS WELL AS "TRUST ACCOUNT" OR "ESCROW ACCOUNT." THE REQUIREMENTS OF THIS PARAGRAPH (B) SHALL NOT APPLY WHEN A LAWYER IS OTHERWISE COMPLIANT WITH THE CONTRARY MANDATES OF A TRIBUNAL; OR WHEN THE LAWYER IS PARTICIPATING IN, AND COMPLIANT WITH, THE TRUST ACCOUNTING RULES AND THE IOLTA PROGRAM OF THE JURISDICTION IN WHICH THE LAWYER IS LICENSED AND PRINCIPALLY PRACTICES.**

**(c) UPON RECEIVING FUNDS OR OTHER PROPERTY IN WHICH A CLIENT OR THIRD PERSON HAS AN INTEREST, A LAWYER SHALL PROMPTLY NOTIFY THE CLIENT OR THIRD PERSON. EXCEPT AS STATED IN THIS RULE OR OTHERWISE PERMITTED BY LAW OR BY AGREEMENT WITH THE CLIENT, A LAWYER SHALL PROMPTLY DELIVER TO THE CLIENT OR THIRD PERSON ANY FUNDS OR OTHER PROPERTY THAT THE CLIENT OR THIRD PERSON IS ENTITLED TO RECEIVE AND, UPON REQUEST BY THE CLIENT OR THIRD PERSON, SHALL PROMPTLY RENDER A FULL ACCOUNTING REGARDING SUCH PROPERTY, SUBJECT TO RULE 1.6.**

**(d) WHEN IN THE COURSE OF REPRESENTATION A LAWYER IS IN POSSESSION OF PROPERTY IN WHICH INTERESTS ARE CLAIMED BY THE LAWYER AND ANOTHER PERSON, OR BY TWO OR MORE PERSONS TO EACH OF WHOM THE LAWYER MAY HAVE AN OBLIGATION, THE PROPERTY SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THERE IS AN ACCOUNTING AND SEVERANCE OF INTERESTS IN THE PROPERTY. IF A DISPUTE ARISES CONCERNING THE RESPECTIVE INTERESTS AMONG PERSONS CLAIMING AN INTEREST IN SUCH PROPERTY, THE UNDISPUTED PORTION SHALL BE DISTRIBUTED AND THE PORTION IN DISPUTE SHALL BE KEPT SEPARATE BY THE LAWYER UNTIL THE DISPUTE IS RESOLVED. ANY FUNDS IN DISPUTE SHALL BE DEPOSITED IN A SEPARATE ACCOUNT MEETING THE REQUIREMENTS OF PARAGRAPH (A) AND (B).**

**(e) ADVANCES OF UNEARNED FEES AND UNINCURRED COSTS SHALL BE TREATED AS PROPERTY OF THE CLIENT PURSUANT TO PARAGRAPH (A) UNTIL EARNED OR INCURRED UNLESS THE CLIENT GIVES INFORMED CONSENT TO A DIFFERENT ARRANGEMENT. REGARDLESS OF WHETHER SUCH CONSENT IS PROVIDED, RULE 1.16(D) APPLIES TO REQUIRE THE RETURN TO THE CLIENT OF ANY UNEARNED PORTION OF ADVANCED LEGAL FEES AND UNINCURRED COSTS AT THE TERMINATION OF THE LAWYER'S SERVICES IN ACCORDANCE WITH RULE 1.16(D).**

**(f) NOTHING IN THIS RULE SHALL PROHIBIT A LAWYER FROM PLACING A SMALL AMOUNT OF THE LAWYER'S FUNDS INTO A TRUST ACCOUNT FOR THE SOLE PURPOSE OF DEFRAYING BANK CHARGES THAT MAY BE MADE AGAINST THAT ACCOUNT.**

**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. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

[3] Paragraph (a) concerns trust funds arising from "a representation." 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. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, *see* Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, *see* Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[5] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[6] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[7] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should 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 should be promptly distributed.

[8] 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. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," *see* Rule 1.0(e).

[10] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

## RULE 1.16 – DECLINING OR TERMINATING REPRESENTATION

**(a) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER SHALL NOT REPRESENT A CLIENT OR, WHERE REPRESENTATION HAS COMMENCED, SHALL WITHDRAW FROM THE REPRESENTATION OF A CLIENT IF:**

**(1) THE REPRESENTATION WILL RESULT**

**IN VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT OR OTHER LAW;**

**(2) THE LAWYER'S PHYSICAL OR MENTAL CONDITION MATERIALLY IMPAIRS THE LAWYER'S ABILITY TO REPRESENT THE CLIENT; OR**

**(3) THE LAWYER IS DISCHARGED.**

**(b) EXCEPT AS STATED IN PARAGRAPH (c), A LAWYER MAY WITHDRAW FROM REPRESENTING A CLIENT IF WITHDRAWAL CAN BE ACCOMPLISHED WITHOUT MATERIAL ADVERSE EFFECT ON THE INTERESTS OF THE CLIENT, OR IF:**

**(1) THE CLIENT PERSISTS IN A COURSE OF ACTION INVOLVING THE LAWYER'S SERVICES THAT THE LAWYER REASONABLY BELIEVES IS CRIMINAL OR FRAUDULENT;**

**(2) THE CLIENT HAS USED THE LAWYER'S SERVICES TO PERPETRATE A CRIME OR FRAUD;**

**(3) THE CLIENT 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;**

**(4) THE REPRESENTATION WILL RESULT IN AN UNREASONABLE FINANCIAL BURDEN ON THE LAWYER OR OBDURATE OR VEXATIOUS CONDUCT ON THE PART OF THE CLIENT HAS RENDERED THE REPRESENTATION UNREASONABLY DIFFICULT;**

**(5) THE LAWYER BELIEVES IN GOOD FAITH, IN A PROCEEDING BEFORE A TRIBUNAL, THAT THE TRIBUNAL WILL FIND THE EXISTENCE OF OTHER GOOD CAUSE FOR WITHDRAWAL.**

**(c) A LAWYER MUST COMPLY WITH APPLICABLE LAW REQUIRING NOTICE TO OR PERMISSION OF A TRIBUNAL WHEN TERMINATING A REPRESENTATION. WHEN ORDERED TO DO SO BY A TRIBUNAL, A LAWYER SHALL CONTINUE REPRESENTATION NOTWITHSTANDING GOOD CAUSE FOR TERMINATING THE REPRESENTATION.**

**(d) IN CONNECTION WITH ANY TERMINATION OF REPRESENTATION, A LAWYER SHALL TAKE TIMELY STEPS TO THE EXTENT REASONABLY PRACTICABLE TO PROTECT A CLIENT'S INTERESTS, SUCH AS GIVING REASONABLE NOTICE TO THE CLIENT, ALLOWING TIME FOR EMPLOYMENT OF OTHER COUNSEL, SURRENDERING PAPERS AND PROPERTY TO WHICH THE CLIENT IS ENTITLED, AND REFUNDING ANY ADVANCE PAYMENT OF FEE OR EXPENSE THAT HAS NOT BEEN EARNED OR INCURRED. THE LAWYER MAY RETAIN PAPERS RELATING TO THE CLIENT TO THE EXTENT PERMITTED BY RULE 1.8(i). IT IS NOT MISCONDUCT FOR A LAWYER TO RETAIN COPIES OF DOCUMENTS RELATING TO THE CLIENT.**

**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.

**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. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that irreconcilable differences between the lawyer and client require termination of the representation ordinarily should be accepted as sufficient.

**Discharge**

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

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

[6] If the client has 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 a special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for the appointment of a surrogate decision-maker or similar protection of the client. *See* Rule 1.14.

**Optional Withdrawal**

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

[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 the timely payment of the lawyer's fees, court costs or other out-of-pocket expenses of the representation, or an agreement limiting the objectives of the representation.

**Assisting the Client Upon Withdrawal**

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by Rule 1.8(i).

**Compliance With Requirements of a Tribunal**

[10] Paragraph (c) reflects the possibility that a lawyer may, by appearing before a tribunal, become subject to the tribunal's power in some circumstances to prevent a withdrawal that would otherwise be proper. Paragraph (c) requires the lawyer who is ordered to continue a representation before a tribunal to do so. However, paragraph (c) is not intended to prevent the lawyer from challenging the tribunal's order as beyond its jurisdiction, arbitrary, or otherwise improper while, in the interim, continuing the representation.

**Return of Client's Property or Money**

[11] Paragraph (d) requires a lawyer to make timely return to the client of any property or money "to which the client is entitled." Where a lawyer holds property or money of a client at the termination of a representation and there is a dispute concerning the distribution of such property or money – whether such dispute is between the lawyer and a client, the lawyer and another lawyer who is owed a fee in the matter, or between either the lawyer or the client and a third party – the lawyer must segregate the disputed portion of such property or money, hold that property or money in trust as required by Rule 1.15, and promptly distribute any undisputed amounts. *See* Rule 1.15 and Comments [4] and [5] thereto; *see In re Haar*, 667 A.2d 1350 (D.C. 1995), 698 A.2d 412 (D.C. 1997). Notwithstanding the foregoing, where a lawyer has a valid lien covering undisputed amounts of property or money, the lawyer may continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted. *See generally* Rules 1.8, 1.15(b).

[12] Information contained in copies of client documents retained by the lawyer following the conclusion of a representation may not be revealed or used where such revelation or use is prohibited by Rule 1.6 or other of these Rules (e.g., Rule 1.9, 1.7, 3.3).

## RULE 1.17 – SALE OF LAW PRACTICE

**A LAWYER OR A LAW FIRM MAY SELL OR PURCHASE A LAW PRACTICE, OR AN AREA OF LAW PRACTICE, INCLUDING GOOD WILL, IF THE FOLLOWING CONDITIONS ARE SATISFIED:**

**(a) THE SELLER CEASES TO ENGAGE IN THE PRIVATE PRACTICE OF LAW, OR IN THE AREA OF PRACTICE THAT HAS BEEN SOLD, IN THE JURISDICTION IN WHICH THE PRACTICE HAS BEEN CONDUCTED;**

**(b) THE ENTIRE PRACTICE IS SOLD TO ONE OR MORE LAWYERS OR LAW FIRMS OR AN ENTIRE AREA OF PRACTICE IS SOLD TO ONE PURCHASER (EITHER A SOLO PRACTITIONER OR A SINGLE LAW FIRM);**

**(c) THE SELLER GIVES A WRITTEN NOTICE TO EACH OF THE SELLER'S CLIENTS REGARDING:**

**(1) THE PROPOSED SALE;**

**(2) THE CLIENT'S RIGHT TO RETAIN OTHER COUNSEL, TO TAKE POSSESSION OF THE FILE OR OF ANY FUNDS OR PROPERTY TO WHICH THE CLIENT IS ENTITLED; AND**

**(3) THE FACT THAT THE CLIENT'S CONSENT TO THE TRANSFER TO THE PURCHASING LAWYER OR LAW FIRM OF THE CLIENT'S FILES, OF THE REPRESENTATION AND OF ANY CLIENT FUNDS HELD BY THE SELLING LAWYER OR LAW FIRM 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 AUTHORIZ-**

**ING BY A COURT HAVING JURISDICTION. THE SELLER MAY DISCLOSE TO THE COURT *IN CAMERA* INFORMATION RELATING TO THE REPRESENTATION ONLY TO THE EXTENT NECESSARY TO OBTAIN AN ORDER AUTHORIZING THE TRANSFER OF A FILE.**

**ONCE A CLIENT HAS CONSENTED TO THE TRANSFER TO THE PURCHASING LAWYER OR LAW FIRM OF THE CLIENT'S FILES, FUNDS AND REPRESENTATION OR THE CLIENT FAILS TO TAKE ACTION OR OTHERWISE OBJECT WITHIN NINETY (90) DAYS OF THE NOTICE, THEN THE PURCHASING LAWYER IS RESPONSIBLE FOR THE CLIENT'S MATTER(S).**

**(d) THE FEES CHARGED CLIENTS SHALL NOT BE INCREASED BY REASON OF THE SALE.**

**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, or ceases to practice in an area of law, and other lawyers or firms take 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.

**Termination of Practice by the Seller**

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state.

[5] This rule also permits a lawyer or law firm to sell an area of practice, although, in contrast to the ABA Model Rule and to the provisions of this rule with respect to the sale of an entire practice, a sale of an area of practice can only be made to a single purchaser. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves the jurisdiction typically would sell the entire practice, this rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

**Sale of Entire Practice or Entire Area of Practice**

[6] The rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

**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 merger between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information may 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, and the purchasing attorney is thereafter responsible for all aspects of the client representation for which the selling lawyer or law firm previously had responsibility. So long as the client does not object or instruct otherwise, the transfer of the representation includes

the transfer of client funds or property held by the selling lawyer or law firm directly to the purchasing lawyer or law firm; the contrary guidance contained on the issue of client funds or property in D.C. Legal Ethics Committee Opinion 294 is not adopted. The provision concerning transfer of the representation is added to the ABA Model Rule to ensure that clients are fully aware and fully protected when a lawyer or law firm sells a law practice.

[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 and of the representation generally, 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 and representation so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[9] All 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 or area of 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 arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. The purchasing lawyer must comply with all existing rules concerning fee arrangements, such as Rule 1.5.

**Other Applicable Ethical Standards**

[11] Lawyers participating in the sale 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(e) for the definition of informed consent); and the obligation to protect 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 may 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 which does not conform to the requirements of this rule, the representatives of the seller as well as the purchasing lawyer may be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement, plans 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 or an area of practice.

**Other**

[16] This rule generally follows the discussion and views concerning the sale of a law practice expressed in D.C. Bar Legal Ethics Committee Opinion 294. The provisions of that Opinion not inconsistent with this rule and Comments remain as appropriate guidance.

## RULE 1.18 – DUTIES TO PROSPECTIVE CLIENT

**(a) A PERSON WHO DISCUSSES WITH A LAWYER THE POSSIBILITY OF FORMING A CLIENT-LAWYER RELATIONSHIP WITH RESPECT TO A MATTER IS A PROSPECTIVE CLIENT.**

**(b) EVEN WHEN NO CLIENT-LAWYER RELATIONSHIP ENSUES, A LAWYER WHO HAS HAD DISCUSSIONS WITH A PROSPECTIVE CLIENT SHALL NOT USE OR REVEAL INFORMATION LEARNED IN THE CONSULTATION, EXCEPT AS PERMITTED BY RULE 1.6.**

**(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 A CONFIDENCE OR SECRET FROM THE PROSPECTIVE CLIENT, 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 A CONFIDENCE OR SECRET FROM THE PROSPECTIVE CLIENT, REPRESENTATION IS PERMISSIBLE IF:**

**(1) BOTH THE AFFECTED CLIENT AND THE PROSPECTIVE CLIENT HAVE GIVEN INFORMED CONSENT, OR**

**(2) THE DISQUALIFIED LAWYER IS TIMELY SCREENED FROM ANY PARTICIPATION IN THE MATTER.**

**COMMENT**

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. The principle of loyalty diminishes in importance if the sole reason for an individual lawyer's disqualification is the lawyer's initial consultation with a prospective new client with whom no client-lawyer relationship was ever formed, either because the lawyer detected a conflict of interest as a result of an initial consultation, or for some other reason (*e.g.*, the prospective client decided not to retain the firm). Hence, prospective clients should receive some but not all of the protection afforded clients.

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

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining whether the client wishes to form 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. Such information is generally protected by Rule 1.6, even if the client or lawyer decides not to proceed with the representation. *See* Rule 1.6, Comment [9]. Paragraph (b) of Rule 1.18 prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.6. The duty to protect confidences and secrets exists regardless of how brief the initial conference may be. The prohibition against use or disclosure of information received from the prospective client may in turn cause the individual lawyer to be disqualified pursuant to Rule 1.7(b)(4) from representing a current or future client of the firm adverse to the prospective client because that lawyer's inability to use or disclose information from the prospective client may adversely affect that lawyer's professional judgment on behalf of the current or future client of the firm whose interests are adverse to the interests of the prospective client.

[4] In order to avoid acquiring confidences and secrets from a prospective client, a lawyer considering whether or not to undertake a new matter may limit the initial interview only to information that does not constitute a confidence or secret, if the lawyer can do so and still determine whether a conflict of interest or other reason for non-representation exists. An individual lawyer of the firm who obtains information from a prospective client is permitted by Rule 1.6(a) to disclose that information to other persons in the lawyer's firm, but any such dissemination may cause additional individual lawyers of the firm to be personally disqualified. If a firm wishes to keep open the screening option under paragraph (d)(2) which permits lawyers who are not personally disqualified to represent clients in the same or substantially related matters, the firm must limit and control dissemination of information obtained from the prospective client. Where the information from the prospective client indicates that any 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 informed consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. For the definition of "informed consent," *see* Rule 1.0(e). If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received confidences and secrets from the prospective client. ABA Model Rule 1.18 provides for personal disqualification only if the information received by the lawyer could be significantly harmful if used in the matter, but the trigger in D.C. Rule 1.18 is receipt of any confidence or secret because of the interest in more broadly protecting the prospective client and the difficulty of determining whether use of the information would be significantly harmful to the prospective client.

[7] Under paragraph (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent of both the prospective and affected clients. In

the alternative, imputation may be avoided under paragraph (d)(2) if all disqualified lawyers are timely screened. *See* Rule 1.0(l) (requirements for screening procedures). When a firm may wish to rely on paragraph (d)(2) to avoid imputed disqualification of the firm as a whole, it should take affirmative steps – as soon as an actual or potential conflict is suspected – to prevent a personally disqualified lawyer from disseminating any information about the potential client that is protected by Rule 1.6, except as necessary to investigate potential conflicts of interest, to any other person in the firm, including non-lawyer staff. Any lawyer in the firm who actually receives, directly or indirectly, protected information provided by a prospective client is disqualified. Unlike ABA Model Rule 1.18, this rule does not condition use of screening on the taking of reasonable measures by the personally disqualified lawyer to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; that is because the screen protects the prospective client regardless of the amount of information received by the personally disqualified lawyer, and this standard may be difficult to apply in practice. This rule does not prohibit the screened lawyer from receiving any part of the fee, in contrast to ABA Model Rule 1.18, because the substantial administrative burden of complying with such a prohibition exceeds any marginal benefit.

[8] This rule, unlike ABA Model Rule 1.18, does not require notice to the prospective client that lawyers in the firm who are not personally disqualified are representing a client adverse to the prospective client in the same or substantially related matters subject to the screening requirement, because the lack of such a notice requirement under the prior D.C. Rule concerning prospective clients (Rule 1.10(a)) did not prove problematic and it is not clear that the notice requirement materially advances any significant interest of the prospective client.

[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.

# AMENDMENTS TO RULE 1: CLIENT-LAWYER RELATIONSHIP

## RULE 1.10 (IMPUTED DISQUALIFICATION: GENERAL RULE)

Rule 1.10 and its comments were amended to permit ethical screening (without client consent) of lawyers moving laterally between private employers with certain initial notice requirements to former clients. New subparagraph (f) was added to address situations in which a law firm cannot provide required notifications without violating confidentiality obligations to an existing client. (10/0/15)

## RULE 1.15 (SAFEKEEPING PROPERTY)

Rule 1.15(a) and 1.15(b) were amended to require all D.C. Bar members who possess Interest on Lawyers Trust Account (IOLTA) eligible funds to maintain such funds in a pooled-client D.C. IOLTA account, unless the lawyer falls within certain limited exceptions found in Rule 1.15(b). Rule 1.15(b) defines IOLTA eligible funds. Comments [2] through [5] were added to Rule 1.15 to provide further guidance on the amendments and its narrow exceptions. (8/1/2010)

New Comment [2] of Rule 1.15 was adopted to provide more detailed guidance to lawyers on financial record keeping for trust accounts. The guidance on financial record keeping was revised to (1) reflect the purpose of the "complete records" language of Rule 1.15 as interpreted and explained by the D.C. Court of Appeals in *In re Clower*, 831 A.2d 1030 (D.C. 2003); and (2) encourage lawyers to consult the 2010 ABA Model Rules on Client Trust Records. (10/8/15)

## RULE 1.19 (TRUST ACCOUNT OVERDRAFT NOTIFICATION)

Rule 1.19 was deleted in its entirety. (8/1/10)

*Related Changes*

*A new Section 20 was added to Rule XI of the District of Columbia Court of Appeals Rules Governing the Bar titled "Approved Depositories for Lawyers' Trust Accounts and District of Columbia Interest on Lawyers Trust Accounts Program. (8/1/2010)*

*Appendix B of the District of Columbia Court of Appeals Rules Governing the Bar titled "Interest on Lawyers' Trust Accounts Program" was deleted in its entirety. (8/1/2010)*

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

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

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

**Offering Advice**

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act 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. 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 2.3 – 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 THE LAWYER REASONABLY BELIEVES THAT MAKING THE EVALUATION IS COMPATIBLE WITH OTHER ASPECTS OF THE LAWYER'S RELATIONSHIP WITH THE CLIENT.**

**(b) WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE EVALUATION IS LIKELY TO AFFECT THE CLIENT'S INTERESTS MATERIALLY AND ADVERSELY, THE LAWYER SHALL NOT PROVIDE THE EVALUATION UNLESS THE CLIENT GIVES INFORMED CONSENT.**

**(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 or when impliedly authorized in order to carry out the representation. *See* Rule 1.2. Such an evaluation may be 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.

[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 on 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. If a lawyer learns that the client has used or will use an evaluation in a crime or fraud, the lawyer may have a duty under Rule 4.1(b) to take action to avoid assisting in the crime or fraud.

**Obtaining Client's Informed Consent**

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. *See* Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. *See* Rules 1.6(a) and 1.0(e).

**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 decision-maker 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 applies 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 prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike non-lawyers 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 proceedings, 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.

[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(n)), 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 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 FOR THE RESPONDENT IN A PROCEEDING THAT COULD RESULT IN INVOLUNTARY INSTITUTIONALIZATION, SHALL, IF THE CLIENT ELECTS TO GO TO TRIAL OR TO A CONTESTED FACT-FINDING HEARING, NEVERTHELESS SO DEFEND THE PROCEEDING AS TO REQUIRE THAT THE GOVERNMENT CARRY ITS BURDEN OF PROOF.**

**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. Lawyers, however, are required to 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 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] In criminal cases or proceedings in which the respondent can be involuntarily institutionalized, such as juvenile delinquency and civil commitment cases, the lawyer is not only permitted, but is indeed required, to put the government to its proof whenever the client elects to contest adjudication. The lawyer's obligations under this rule are subordinate to federal or state 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.

## RULE 3.2 – EXPEDITING LITIGATION

**(a) IN REPRESENTING A CLIENT, A LAWYER SHALL NOT DELAY A PROCEEDING WHEN THE LAWYER KNOWS OR WHEN IT IS OBVIOUS THAT SUCH ACTION WOULD SERVE SOLELY TO HARASS OR MALICIOUSLY INJURE ANOTHER.**

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

## RULE 3.3 – CANDOR TO 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, UNLESS CORRECTION WOULD REQUIRE DISCLOSURE OF INFORMATION THAT IS PROHIBITED BY RULE 1.6;**

**(2) COUNSEL OR ASSIST A CLIENT TO ENGAGE 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;**

**(3) FAIL TO DISCLOSE TO THE TRIBUNAL**

**LEGAL AUTHORITY IN THE CONTROLLING JURISDICTION NOT DISCLOSED BY OPPOSING COUNSEL AND KNOWN TO THE LAWYER TO BE DISPOSITIVE OF A QUESTION AT ISSUE AND DIRECTLY ADVERSE TO THE POSITION OF THE CLIENT; OR**

**(4) OFFER EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE, EXCEPT AS PROVIDED IN PARAGRAPH** (b)**. 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) WHEN THE WITNESS WHO INTENDS TO GIVE EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE IS THE LAWYER'S CLIENT AND IS THE ACCUSED IN A CRIMINAL CASE, THE LAWYER SHALL FIRST MAKE A GOOD-FAITH EFFORT TO DISSUADE THE CLIENT FROM PRESENTING THE FALSE EVIDENCE; IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT, THE LAWYER SHALL SEEK LEAVE OF THE TRIBUNAL TO WITHDRAW. IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT OR TO WITHDRAW WITHOUT SERIOUSLY HARMING THE CLIENT, THE LAWYER MAY PUT THE CLIENT ON THE STAND TO TESTIFY IN A NARRATIVE FASHION, BUT THE LAWYER SHALL NOT EXAMINE THE CLIENT IN SUCH MANNER AS TO ELICIT TESTIMONY WHICH THE LAWYER KNOWS TO BE FALSE, AND SHALL NOT ARGUE THE PROBATIVE VALUE OF THE CLIENT'S TESTIMONY IN CLOSING ARGUMENT.**

**(c) THE DUTIES STATED IN PARAGRAPH (a) CONTINUE TO THE CONCLUSION OF THE PROCEEDING.**

**(d) A LAWYER WHO RECEIVES INFORMATION CLEARLY ESTABLISHING THAT A FRAUD HAS BEEN PERPETRATED UPON THE TRIBUNAL SHALL PROMPTLY TAKE REASONABLE REMEDIAL MEASURES, INCLUDING DISCLOSURE TO THE TRIBUNAL TO THE EXTENT DISCLOSURE IS PERMITTED BY RULE 1.6**(d)**.**

**COMMENT**

[1] This rule defines the duty of candor to the tribunal. See Rule 1.0(l) for the definition of "tribunal." The rule 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. In dealing with a tribunal the lawyer is also required to comply with the general requirements of Rule 1.2(e) and (f). However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

**Representations by a Lawyer**

[2] An assertion purported to be made by the lawyer, 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 may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. If the lawyer comes to know that a statement of material fact or law that the lawyer previously made to the tribunal is false, the lawyer has a duty to correct the statement, unless correction would require a disclosure of information that is prohibited by Rule 1.6. This provision in paragraph (a)(1) differs from ABA Model Rule 3.3(a)(1), which requires a lawyer to disclose information otherwise protected by Rule 1.6 if necessary to correct the lawyer's false statement. If Rule 1.6 permits a lawyer to disclose a client confidence or secret, D.C. Rule 3.3(a)(1) requires the lawyer to disclose that information to the extent reasonably necessary to correct a false statement of material fact or law. Nothing in D.C. Rule 3.3(a)(1) limits any disclosure duty under Rule 4.1(b) when substantive law requires a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud. The obligation prescribed in Rule 1.2(e) not to counsel a client to commit or assist the client in committing a fraud applies in litigation but is subject to Rule 3.3(b) and (d). Regarding compliance with Rule 1.2(e), see the Comment to that Rule. See also Rule 8.4.

**Misleading Legal Argument**

[3] 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 subparagraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party and that is dispositive of a question at issue. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

**Offering Evidence**

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes. 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.

[5] 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. Regardless of the

client's wishes, however, a lawyer may not offer evidence of a client if the evidence is known by the lawyer to be false, except to the extent permitted by paragraph (b) where the client is a defendant in a criminal case. The lawyer is obligated not only to refuse to offer false evidence under subparagraph (a)(4) but also to take reasonable remedial measures under paragraph (d) if the false evidence has been offered.

[6] The prohibition against offering false evidence applies only if the lawyer knows that the evidence is false. A lawyer's knowledge that evidence is false can be inferred from the circumstances. See Rule 1.0(f). 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.

[7] Although paragraph (a)(4) prohibits a lawyer from offering evidence only if the lawyer knows it to be false, it also 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, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

**Remedial Measures**

[8] Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must take reasonable remedial measures. If the lawyer's client is implicated in the fraud, the lawyer should ordinarily first call upon the client to rectify the fraud. If the client is unwilling to do so, the lawyer should consider other remedial measures. The lawyer may not, however, disclose information otherwise protected by Rule 1.6, unless the client has used the lawyer's services to further a crime or fraud and disclosure is permitted by Rule 1.6(d). In other cases, the lawyer may learn of the client's intention to present false evidence before the client has had a chance to do so. In this situation, paragraphs (a)(4) and (b) forbid the lawyer to present the false evidence, except in rare instances where the witness is the accused in a criminal case, the lawyer is unsuccessful in dissuading the client from going forward, and the lawyer is unable to withdraw without causing serious harm to the client. In addition, Rule 1.6(c) may permit disclosure of client confidences and secrets when the lawyer learns of a prospective fraud on the tribunal involving, for example, bribery or intimidation of witnesses. The terms "criminal case" and "criminal defendant" as used in Rule 3.3 and its Comment include juvenile delinquency proceedings and the person who is the subject of such proceedings.

**Perjury by a Criminal Defendant**

[9] Paragraph (b) allows the lawyer to permit a client who is the accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner. Even in a criminal case the lawyer must seek to persuade the defendant-client to refrain from perjurious testimony. There has been dispute concerning the lawyer's duty when that persuasion fails. Paragraph (b) requires the lawyer to withdraw rather than offer the client's false testimony, if this can be done without seriously harming the client.

[10] Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, such as by express or implied divulgence of information otherwise protected by Rule 1.6. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available. In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with examination of the client and closing argument subject to the limitations of paragraph (b).

**Refusing to Offer Proof of a Non-client Known to Be False**

[11] Generally speaking, a lawyer may not offer testimony or other proof, through a non-client, that the lawyer knows to be false. Furthermore, a lawyer may not offer evidence of a client if the evidence is known by the lawyer to be false, except to the extent permitted by paragraph (b) where the client is a defendant in a criminal case.

**Duration of Obligation**

[12] A practical time limit on the obligation to take reasonable remedial measures concerning criminal and fraudulent conducted related to the proceeding is needed. The conclusion of the proceeding is an appropriate and 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. If the lawyer withdraws before the conclusion of the proceeding, the lawyer's obligation ends at the time of withdrawal.

**Withdrawal**

[13] A lawyer's compliance with the duty of candor imposed by this rule might require that the lawyer withdraw from the representation of a client. 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, or with the requirements of Rule 1.6(c), results in the lawyer's inability to represent the client in accordance with

these Rules. See also 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 information relating to the representation only to the extent permitted by Rule 1.6.

## RULE 3.4 – FAIRNESS TO OPPOSING PARTY AND COUNSEL

**A LAWYER SHALL NOT:**

**(a) OBSTRUCT ANOTHER PARTY'S ACCESS TO EVIDENCE OR ALTER, DESTROY, OR CONCEAL EVIDENCE, OR COUNSEL OR ASSIST ANOTHER PERSON TO DO SO, IF THE LAWYER REASONABLY SHOULD KNOW THAT THE EVIDENCE IS OR MAY BE THE SUBJECT OF DISCOVERY OR SUBPOENA IN ANY PENDING OR IMMINENT PROCEEDING. UNLESS PROHIBITED BY LAW, A LAWYER MAY RECEIVE PHYSICAL EVIDENCE OF ANY KIND FROM THE CLIENT OR FROM ANOTHER PERSON. IF THE EVIDENCE RECEIVED BY THE LAWYER BELONGS TO ANYONE OTHER THAN THE CLIENT, THE LAWYER SHALL MAKE A GOOD-FAITH EFFORT TO PRESERVE IT AND TO RETURN IT TO THE OWNER, SUBJECT TO RULE 1.6;**

**(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 EFFORTS TO COMPLY WITH A LEGALLY PROPER DISCOVERY REQUEST BY AN OPPOSING PARTY;**

**(e) IN TRIAL, ALLUDE TO ANY MATTER THAT THE LAWYER DOES NOT REASONABLY BELIEVE IS RELEVANT OR THAT WILL NOT BE SUPPORTED BY ADMISSIBLE EVIDENCE, ASSERT PERSONAL KNOWLEDGE OF FACTS IN ISSUE EXCEPT WHEN TESTIFYING AS A WITNESS, OR STATE A PERSONAL OPINION AS TO THE JUSTNESS OF A CAUSE, THE CREDIBILITY OF A WITNESS, THE CULPABILITY OF A CIVIL LITIGANT, OR THE GUILT OR INNOCENCE OF AN ACCUSED;**

**(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; OR**

**(g) PEREMPTORILY STRIKE JURORS FOR ANY REASON PROHIBITED BY LAW.**

**COMMENT**

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled 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. To the extent clients are involved in the effort to comply with discovery requests, the lawyer's obligations are to pursue reasonable efforts to assure that documents and other information subject to proper discovery requests are produced. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or a proceeding whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] Paragraph (a) permits, but does not require, the lawyer to accept physical evidence (including the instruments or proceeds of crime) from the client or any other person. Such receipt is, as stated in paragraph (a), subject to other provisions of law and the limitations imposed by paragraph (a) with respect to obstruction of access, alteration, destruction, or concealment, and subject also to the requirements of paragraph (a) with respect to return of property to its rightful owner, and to the obligation to comply with subpoenas and discovery requests. The term "evidence" includes any document or physical object that the lawyer reasonably should know may be the subject of discovery or subpoena in any pending or imminent litigation. See D.C. Bar Legal Ethics Committee Opinion No. 119 (test is whether destruction of document is directed at concrete litigation that is either pending or almost certain to be filed).

[4] A lawyer should ascertain that the lawyer's handling of documents or other physical objects does not violate any other law. Federal criminal law may forbid the destruction of documents or other physical objects in circumstances not covered by the ethical rule set forth in paragraph (a). See, e.g., 18 U.S.C. § 1503 (obstruction of justice); 18 U.S.C. § 1505 (obstruction of proceedings before departments, agencies, and committees); 18 U.S.C. § 1510 (obstruction of criminal investigations). And it is a crime in the District of Columbia for one who knows or has reason to know that an official proceeding has begun or is likely to be instituted to alter, destroy, or conceal a document with intent to impair its integrity or availability for use in the proceeding. D.C. Code § 22-723 (2001). Finally, some discovery rules having the force of law may prohibit the destruction of documents and other material even if litigation is not pending or imminent. This rule does not set forth the scope of a lawyer's responsibilities under all applicable laws. It merely imposes on the lawyer an ethical duty to make reasonable efforts to comply fully with those laws. The provisions of paragraph (a) prohibit a lawyer from obstructing another party's access to evidence, and from altering, destroying, or concealing evidence. These prohibitions may overlap with criminal obstruction provisions and civil discovery rules, but they apply whether or not the prohibited conduct violates criminal provisions or court rules. Thus, the alteration of evidence by a lawyer, whether or not such conduct violates criminal law or court rules, constitutes a violation of paragraph (a).

[5] Because of the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's informed consent. In some cases, the Office of Disciplinary Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences. However, Disciplinary Counsel may refuse to accept evidence; thus lawyers should keep the following in mind before accepting evidence from a client, and should discuss with Disciplinary Counsel's office the procedures that may be employed in particular circumstances.

[6] First, if the evidence received from the client is subpoenaed or otherwise requested through the discovery process while held by the lawyer, the lawyer will be obligated to deliver the evidence directly to the appropriate persons, unless there is a basis for objecting to the discovery request or moving to quash the subpoena. A lawyer should therefore advise the client of the risk that evidence may be subject to subpoena or discovery, and of the lawyer's duty to turn the evidence over in that event, before accepting it from the client.

[7] Second, if the lawyer has received physical evidence belonging to the client, for purposes of examination or testing, the lawyer may later return the property to the client pursuant to Rule 1.15, provided that the evidence has not been subpoenaed. The lawyer may not be justified in returning to a client physical evidence the possession of which by the client would be per se illegal, such as certain drugs and weapons. And if it is reasonably apparent that the evidence is not the client's property, the lawyer may not retain the evidence or return it to the client. Instead, the lawyer must, under paragraph (a), make a good-faith effort to return the evidence to its owner. Rule 3.4(a) makes this duty subject to Rule 1.6. Rules 1.6(c), (d) and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. If such circumstances exist, the lawyer may, but is not required to, reveal information otherwise protected by Rule 1.6 as part of a good-faith effort to preserve the evidence and return it to the owner pursuant to Rule 3.4(a).

[8] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate a witness for loss of time in preparing to testify, in attending, or in testifying. A fee for the services of a witness who will be proffered as an expert may be made contingent on the outcome of the litigation, provided, however, that the fee, while conditioned on recovery, shall not be a percentage of the recovery.

[9] 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.

[10] Paragraph (g) prohibits any lawyer from exercising peremptory challenges to prospective jurors on any impermissible ground. Impermissible grounds include race, sex, and other factors that have been determined in binding judicial decisions to be discriminatory in jury selection.

## 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, EITHER EX PARTE OR WITH OPPOSING COUNSEL, 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 OR PROSPECTIVE JUROR HAS MADE KNOWN TO THE LAWYER A DESIRE NOT TO COMMUNICATE; OR**

**(3) THE COMMUNICATION INVOLVES MISREPRESENTATION, COERCION, DURESS, OR HARASSMENT; OR**

**(d) ENGAGE IN CONDUCT INTENDED TO DISRUPT ANY PROCEEDING OF A TRIBUNAL, INCLUDING A DEPOSITION.**

**COMMENT**

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in 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, even though the proceeding has not ended. The lawyer may do so, either ex parte or with opposing counsel, unless the communication is prohibited by law or a court order. The lawyer, however, must respect the desire of the juror or prospective juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[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.

## RULE 3.6 – TRIAL PUBLICITY

**A LAWYER ENGAGED IN A CASE BEING TRIED TO A JUDGE OR JURY SHALL NOT MAKE AN EXTRAJUDICIAL STATEMENT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW WILL BE DISSEMINATED BY MEANS OF MASS PUBLIC COMMUNICATION AND WILL CREATE A SERIOUS AND IMMINENT THREAT OF MATERIAL PREJUDICE TO THE PROCEEDING.**

**COMMENT**

[1] It is difficult to strike a proper balance between protecting the right to a fair trial and safeguarding the right of free expression, which are both guaranteed by the Constitution. On one hand, publicity should not be allowed to influence the fair administration of justice. On the other hand, litigants have a right to present their side of a dispute to the public, and the public has an interest in receiving information about matters that are in litigation. Often a lawyer involved in the litigation is in the best position to assist in furthering these legitimate objectives. No body of rules can simultaneously satisfy all interests of fair trial and all those of free expression.

[2] The special obligations of prosecutors to limit comment on criminal matters involve considerations in addition to those implicated in this rule, and are dealt with in Rule 3.8(f). Furthermore, this rule is not intended to abrogate special court rules of confidentiality in juvenile or other cases. Lawyers are bound by Rule 3.4(c) to adhere to any such rules that have not been found invalid.

[3] Because administrative agencies should have the prerogative to determine the ethical rules for prehearing publicity, this rule does not purport to apply to matters before administrative agencies.

## RULE 3.7 – LAWYER AS WITNESS

**(a) A LAWYER SHALL NOT ACT AS ADVOCATE AT A TRIAL IN WHICH THE LAWYER IS LIKELY TO BE A NECESSARY WITNESS EXCEPT WHERE:**

**(1) THE TESTIMONY RELATES TO AN UNCONTESTED ISSUE;**

**(2) THE TESTIMONY RELATES TO THE NATURE AND VALUE OF LEGAL SERVICES RENDERED IN THE CASE; OR**

**(3) DISQUALIFICATION OF THE LAWYER WOULD WORK SUBSTANTIAL HARDSHIP ON THE CLIENT.**

**(b) A LAWYER MAY NOT ACT AS ADVOCATE IN A TRIAL IN WHICH ANOTHER LAWYER IN THE LAWYER'S FIRM IS LIKELY TO BE CALLED AS A WITNESS IF THE OTHER LAWYER WOULD BE PRECLUDED FROM ACTING AS ADVOCATE IN THE TRIAL BY RULE 1.7 OR RULE 1.9. THE PROVISIONS OF THIS PARAGRAPH (b) DO NOT APPLY IF THE LAWYER WHO IS APPEARING AS AN ADVOCATE IS EMPLOYED BY, AND APPEARS ON BEHALF OF, A GOVERNMENT AGENCY.**

**COMMENT**

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

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

[3] Subparagraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Subparagraph (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.

[4] Apart from these two exceptions, subparagraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether 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] If the only reason for not permitting a lawyer to combine the roles of advocate and witness is possible prejudice to the opposing party, there is no reason to disqualify other lawyers in the testifying lawyer's firm from acting as advocates in that trial. In short, there is no general rule of imputed disqualification applicable to Rule 3.7. However, the combination of roles of advocate and witness may involve an improper conflict of interest between the lawyer and the client in addition to or apart from possible prejudice to the opposing party. Whether there is such a client conflict is determined by Rule 1.7 or 1.9. For example, if there is likely to be a significant conflict between the testimony of the client and that of the lawyer, the representation is improper by the standard of Rule 1.7(b) without regard to Rule 3.7(a). 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 such a conflict exists is, in the first instance, the responsibility of the lawyer involved. See Comment to Rule 1.7. Rule 3.7(b) states that other lawyers in the testifying lawyer's firm are disqualified only when there is such a client conflict and the testifying lawyer therefore could not represent the client under Rule 1.7 or 1.9. The principles of client consent, embodied in Rules 1.7 and 1.9, also apply to paragraph (b). Thus, the reference to Rules 1.7 and 1.9 incorporates the client consent aspects of those Rules. Paragraph (b) is designed to provide protection for the client, not rights of disqualification to the adversary. Subject to the disclosure and consultation requirements of Rules 1.7 and 1.9, the client may consent to the firm's continuing representation, despite the potential problems created by the nature of the testimony to be provided by a lawyer in the firm.

[6] Even though a lawyer's testimony does not involve a conflict with the client's interests under Rule 1.7 or 1.9 and would not be precluded under Rule 3.7, the client's interests might nevertheless be harmed by the appearance as a witness of a lawyer in the firm that represents the client. For example, the lawyer's testimony would be vulnerable to impeachment on the grounds that the lawyer-witness is testifying to support the position of the lawyer's own firm. Similarly, a lawyer whose firm colleague is testifying in the case should recognize the possibility that the lawyer might not scrutinize the testimony of the colleague carefully enough and that this could prejudice the client's interests, whether the colleague is testifying for or against the client. In such instances, the lawyer should inform the client of any possible adverse effects on the client's interests that might result from the lawyer's relationship with the colleague-witness, so that the client may make a meaningful choice whether to retain the lawyer for the representation in question.

## RULE 3.8 – SPECIAL RESPONSIBILITIES OF A PROSECUTOR

**THE PROSECUTOR IN A CRIMINAL CASE SHALL NOT:**

**(a) IN EXERCISING DISCRETION TO INVESTIGATE OR TO PROSECUTE, IMPROPERLY FAVOR OR INVIDIOUSLY DISCRIMINATE AGAINST ANY PERSON;**

**(b) FILE IN COURT OR MAINTAIN A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY PROBABLE CAUSE;**

**(c) PROSECUTE TO TRIAL A CHARGE THAT THE PROSECUTOR KNOWS IS NOT SUPPORTED BY EVIDENCE SUFFICIENT TO ESTABLISH A PRIMA FACIE SHOWING OF GUILT;**

**(d) INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE, UPON REQUEST AND AT A TIME WHEN USE BY THE DEFENSE IS REASONABLY FEASIBLE, ANY EVIDENCE OR INFORMATION, WHICH CAN INCLUDE IMPEACHMENT INFORMATION OR INFORMATION TENDING TO SUPPORT A MOTION TO SUPPRESS EVIDENCE, THAT THE PROSECUTOR KNOWS OR REASONABLY SHOULD KNOW TENDS TO NEGATE THE GUILT OF THE ACCUSED**

**OR TO MITIGATE THE OFFENSE, OR IN CONNECTION WITH SENTENCING, INTENTIONALLY FAIL TO DISCLOSE TO THE DEFENSE ANY UNPRIVILEGED MITIGATING INFORMATION KNOWN TO THE PROSECUTOR AND NOT REASONABLY AVAILABLE TO THE DEFENSE, EXCEPT WHEN THE PROSECUTOR IS RELIEVED OF THIS RESPONSIBILITY BY A PROTECTIVE ORDER OF THE TRIBUNAL;**

**(e) INTENTIONALLY AVOID PURSUIT OF EVIDENCE OR INFORMATION, OR UNREASONABLE DELAY THE DISCLOSURE OF INFORMATION OR EVIDENCE THAT TENDS TO NEGATE THE GUILT OF THE ACCUSED OR TO MITIGATE THE OFFENSE, BECAUSE IT MAY DAMAGE THE PROSECUTION'S CASE OR AID THE DEFENSE;**

**(f) EXCEPT FOR STATEMENTS WHICH ARE NECESSARY TO INFORM THE PUBLIC OF THE NATURE AND EXTENT OF THE PROSECUTOR'S ACTION AND WHICH SERVE A LEGITIMATE LAW ENFORCEMENT PURPOSE, MAKE EXTRAJUDICIAL COMMENTS WHICH SERVE TO HEIGHTEN CONDEMNATION OF THE ACCUSED; OR**

**(g) IN PRESENTING A CASE TO A GRAND JURY, INTENTIONALLY INTERFERE WITH THE INDEPENDENCE OF THE GRAND JURY, PREEMPT A FUNCTION OF THE GRAND JURY, ABUSE THE PROCESSES OF THE GRAND JURY, OR FAIL TO BRING TO THE ATTENTION OF THE GRAND JURY MATERIAL FACTS TENDING SUBSTANTIALLY TO NEGATE THE EXISTENCE OF PROBABLE CAUSE.**

**(h) WHEN A PROSECUTOR KNOWS OF INFORMATION THAT THE PROSECUTOR KNOWS OR REASONABLY SHOULD KNOW RAISES A SUBSTANTIAL QUESTION ABOUT WHETHER A PERSON WAS CONVICTED OF AN OFFENSE THAT THE PERSON DID NOT COMMIT, THE PROSECUTOR SHALL**

> **(1) PROMPTLY DISCLOSE THAT INFORMATION TO: (i) THE CHIEF PROSECUTOR OF THE JURISDICTION WHERE THE CONVICTION WAS OBTAINED; (ii) THE COURT IN WHICH THE CONVICTION WAS OBTAINED; AND, UNLESS THE COURT AUTHORIZES A DELAY, (iii) THE CONVICTED PERSON AND (iv) IF KNOWN, THE PERSON'S LAWYER; AND**
>
> **(2) IF THE PROSECUTION OCCURRED IN THE PROSECUTOR'S JURISDICTION AND UNDER THE AUTHORITY OF THE PROSECUTOR'S OFFICE, UNDERTAKE FURTHER INVESTIGATION, OR MAKE REASONABLE EFFORTS TO CAUSE AN INVESTIGATION, TO DETERMINE WHETHER THE PERSON WAS CONVICTED OF AN OFFENSE THAT THE PERSON DID NOT COMMIT.**
>
> **(3) IF THERE ARE MULTIPLE PROSECUTORIAL AUTHORITIES IN THE JURISDICTION, THE DISCLOSURE SHOULD BE MADE TO THE PROSECUTORIAL AUTHORITY RESPONSIBLE FOR THE CONVICTION AT ISSUE.**
>
> **(4) A PROSECUTOR DOES NOT VIOLATE SUBPARAGRAPH (h) BY FAILING TO NOTIFY A PERSON OR PERSONS OR COURT WHOSE IDENTITY OR LOCATION REMAINS UNKNOWN TO THE PROSECUTOR AFTER UNDERTAKING REASONABLE EFFORTS.**

**(i) WHEN A PROSECUTOR KNOWS OF INFORMATION THAT THE PROSECUTOR KNOWS CONSTITUTES CLEAR AND CONVINCING EVIDENCE ESTABLISHING THAT A PERSON WAS CONVICTED IN THE PROSECUTOR'S JURISDICTION AND UNDER THE AUTHORITY OF THE PROSECUTOR'S OFFICE OF AN OFFENSE THAT THE PERSON DID NOT COMMIT, THE PROSECUTOR SHALL SEEK TO REMEDY THE CONVICTION.**

**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 and that guilt is decided upon the basis of sufficient evidence. The constitutional protections in the criminal context serve a fundamentally different purpose than disciplinary proceedings in the ethical context. While this rule may overlap with what constitutional due process requires, it is a rule to govern professional conduct; its requirements are not co-extensive with due process or with statutory obligations or court procedural rules. Paragraph (d) requires disclosure of information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense. However, because the failure to disclose must be intentional, the rule only requires disclosure of such information when its existence is known to the prosecutor. Although another government actor's knowledge will not be imputed to the prosecutor, a prosecutor's knowledge may be inferred from circumstances under Rule 1.0(f). Moreover, paragraph (e) independently imposes obligations concerning the intentional avoidance of the pursuit of evidence or information. The disclosure duty under paragraph (d) exists regardless of whether that information might later be deemed immaterial to the outcome of the case and regardless of the prosecutor's assessment of how the information might be explained away or discredited at trial or ultimately rejected by the fact-finder. For further guidance, see *In re Kline*, 113 A.3d 202 (D.C. 2015).

[2] Apart from the special responsibilities of a prosecutor

under this rule, prosecutors are subject to the same obligations imposed upon all lawyers by these Rules of Professional Conduct, including Rule 3.4 prohibiting the discriminatory use of peremptory strikes, and Rule 5.3, relating to responsibilities regarding nonlawyers who work for or in association with the lawyer's office. Indeed, because of the power and visibility of a prosecutor, the prosecutor's compliance with these Rules, and recognition of the need to refrain even from some actions technically allowed to other lawyers under the Rules, may, in certain instances, be of special importance. For example, Rule 3.6 prohibits extrajudicial statements that will have a substantial likelihood of destroying the impartiality of the judge or jury. In the context of a criminal prosecution, pretrial publicity can present the further problem of giving the public the incorrect impression that the accused is guilty before having been proven guilty through the due processes of the law. It is unavoidable, of course, that the publication of an indictment may itself have severe consequences for an accused. What is avoidable, however, is extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that occurs, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

[3] Nothing in this Comment, however, is intended to suggest that a prosecutor may not inform the public of such matters as whether an official investigation has ended or is continuing, or who participated in it, and the prosecutor may respond to press inquiries to clarify such things as technicalities of the indictment, the status of the matter, or the legal procedures that will follow. Also, a prosecutor should be free to respond, insofar as necessary, to any extrajudicial allegations by the defense of unprofessional or unlawful conduct on the part of the prosecutor's office.

[4] Rectifying the conviction and preventing the incarceration of an innocent person are core values of the judicial system and matters of vital concern to the legal profession. When a prosecutor knows of information that the prosecutor knows or reasonably should know raises a substantial question about whether a person was convicted of an offense that the person did not commit, paragraph (h) requires prompt disclosure to the chief prosecutor of the jurisdiction where the conviction occurred as well as the court in which the conviction was obtained. Prompt disclosure under paragraph (h)(1) does not preclude a reasonable period of time for consultation with the chief prosecutor of the jurisdiction where the conviction was obtained. A disclosure made to a convicted person pursuant to paragraph (h) does not violate Rule 4.2(a) of these Rules. As used in this Rule, the "chief prosecutor" includes the head of the organization or any managerial lawyer in the chief prosecutor's office. The notification obligations in paragraph (h) assume that the prosecutor knows, or through reasonable efforts can ascertain, the identity and location (i.e., mailing address, email address, or telephone number) of the persons and court to be notified.

[5] Not every piece of information raising a question about whether a person was convicted of an offense that the person did not commit need be disclosed. Rather, this rule limits the disclosure requirement to information that is sufficient to cause a reasonable lawyer to believe there is substantial question about whether a person was convicted of an offense that the person did not commit. See Rule 1.0(j) for the definition of "reasonable." The phrase "substantial question" refers to the degree of concern the particular information triggers about whether the person was convicted of an offense that the person did not commit, and not the quantum of information of which the lawyer is aware. See Rule 1.0(m) for the definition of "substantial." In order to comply with paragraph (h), a prosecutor need not disclose information that the prosecutor knows was previously disclosed, and a prosecutor need not undertake an investigation or take steps to initiate an investigation when the prosecutor knows another prosecutor is already doing so. A prosecutor may not decline to disclose information under Rule 3.8(h) merely because the prosecutor subjectively believes that the information is not credible. On the other hand, whether the information is objectively plausible or could reasonably be credited can appropriately be taken into account when determining whether information 'raises a substantial question' of innocence.

[6] A prosecutor who knows of information that could raise a substantial question about whether a person was convicted of an offense that the person did not commit may, but is not required to, disclose that information as directed in paragraph (h) without further inquiry into whether the information actually raises such a question. A prosecutor's disclosure of information pursuant to this Rule is not an admission or concession that such information raises a substantial question about whether a person was convicted of an offense that he or she did not commit.

[7] Under paragraph (i), remedial steps may include requesting that the court appoint counsel for an unrepresented defendant. In order to comply with paragraph (i), a prosecutor need not seek to remedy a conviction where the prosecutor knows another prosecutor is already doing so.

## RULE 3.9 – ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS

**A LAWYER REPRESENTING A CLIENT BEFORE A LEGISLATIVE OR ADMINISTRATIVE BODY IN A NONADJUDICATIVE PROCEEDING SHALL DISCLOSE THAT THE APPEARANCE IS IN A REPRESENTATIVE CAPACITY AND SHALL CONFORM TO THE PROVISIONS OF RULES 3.3, 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 should deal with it honestly and in conformity with applicable rules of procedure.

[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, such as nonlawyer lobbyists, 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 does not apply to representation of a client in a negotiation or other bilateral transaction with a government agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

[4] This rule is closely related to Rules 3.3 through 3.5, which deal with conduct regarding tribunals. The term "tribunal," as defined Rule 1.0(n), refers to adjudicative or quasi-adjudicative bodies.

# 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. The term "third person" as used in paragraphs (a) and (b) refers to any person or entity other than the lawyer's client.

**Statements of Fact**

[2] This rule refers to material statements of fact. Whether a particular statement should be regarded as material, and 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. There may be other analogous situations.

**Fraud by Client**

[3] Under Rule 1.2(e), 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(e) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose client information to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing such client information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. If, in the particular circumstances in which the lawyer finds himself or herself, the lawyer has discretion to disclose a client confidence or secret under Rule 1.6(c), (d), or (e), disclosure is not prohibited by Rule 1.6, and the lawyer must disclose the information if otherwise required by this rule.

## RULE 4.2 – COMMUNICATION BETWEEN LAWYER AND PERSON REPRESENTED BY COUNSEL

**(a) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER SHALL NOT COMMUNICATE OR CAUSE ANOTHER TO COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A PERSON KNOWN TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE PRIOR CONSENT OF THE LAWYER REPRESENTING SUCH OTHER PERSON OR IS AUTHORIZED BY LAW OR A COURT ORDER TO DO SO.**

**(b) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER MAY COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A NONPARTY EMPLOYEE OF AN ORGANIZATION WITHOUT OBTAINING THE CONSENT OF THAT ORGANIZATION'S LAWYER. IF THE ORGANIZATION IS AN ADVERSE PARTY, HOWEVER, PRIOR TO COMMUNICATING WITH ANY SUCH NONPARTY EMPLOYEE, A LAWYER MUST DISCLOSE TO SUCH EMPLOYEE BOTH THE LAWYER'S IDENTITY AND THE FACT THAT THE LAWYER REPRESENTS A PARTY THAT IS ADVERSE TO THE EMPLOYEE'S EMPLOYER.**

**(c) FOR PURPOSES OF THIS RULE, THE TERM "PARTY" OR "PERSON" INCLUDES ANY PERSON OR**

**ORGANIZATION, INCLUDING AN EMPLOYEE OF AN ORGANIZATION, WHO HAS THE AUTHORITY TO BIND AN ORGANIZATION AS TO THE REPRESENTATION TO WHICH THE COMMUNICATION RELATES.**

**(d) THIS RULE DOES NOT PROHIBIT COMMUNICATION BY A LAWYER WITH GOVERNMENT OFFICIALS WHO HAVE THE AUTHORITY TO REDRESS THE GRIEVANCES OF THE LAWYER'S CLIENT, WHETHER OR NOT THOSE GRIEVANCES OR THE LAWYER'S COMMUNICATIONS RELATE TO MATTERS THAT ARE THE SUBJECT OF THE REPRESENTATION, PROVIDED THAT IN THE EVENT OF SUCH COMMUNICATIONS THE DISCLOSURES SPECIFIED IN (B) ARE MADE TO THE GOVERNMENT OFFICIAL TO WHOM THE COMMUNICATION IS MADE.**

**COMMENT**

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

[2] This rule does not prohibit communication with a person or party, or an employee or agent of an organization, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. In addition, a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.

[3] In the case of an organization, and other than as noted in Comment [5], this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this rule.

[4] The rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. See D.C. Bar Legal Ethics Committee Opinion No. 129. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

[5] Because this rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization. If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.

[6] Consent of the organization's lawyer is not required where a lawyer seeks to communicate with a former constituent of an organization. In making such contact, however, the lawyer may not seek to obtain information that is otherwise protected.

[7] This rule also does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

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

[9] This rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this rule require.

[10] Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.

[11] Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the

course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

[12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

## RULE 4.3 – DEALING WITH UNREPRESENTED PERSON

**(a) IN DEALING ON BEHALF OF A CLIENT WITH A PERSON WHO IS NOT REPRESENTED BY COUNSEL, A LAWYER SHALL NOT:**

> **(1) GIVE ADVICE TO THE UNREPRESENTED PERSON OTHER THAN THE ADVICE TO SECURE COUNSEL, IF THE INTERESTS OF SUCH PERSON ARE OR HAVE A REASONABLE POSSIBILITY OF BEING IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT; OR**
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> **(2) STATE OR IMPLY TO UNREPRESENTED PERSONS WHOSE INTERESTS ARE NOT IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT THAT THE LAWYER IS DISINTERESTED.**

**(b) WHEN THE LAWYER KNOWS OR REASONABLY SHOULD KNOW THAT THE UNREPRESENTED PERSON MISUNDERSTANDS THE LAWYER'S ROLE IN THE MATTER, THE LAWYER SHALL MAKE REASONABLE EFFORTS TO CORRECT THE MISUNDERSTANDING.**

**COMMENT**

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client. In dealing personally with any unrepresented third party on behalf of the lawyer's client, a lawyer must take great care not to exploit these assumptions. See D.C. Bar Legal Ethics Committee Opinion 321.

[2] The rule distinguishes between situations involving unrepresented third parties whose interests may be adverse to those of the lawyer's client and those in which the third party's interests are not in conflict with the client's. In the former situation, the possibility of the lawyer's compromising the unrepresented person's interests is so great that the rule prohibits the giving of any advice, apart from the advice that the unrepresented person obtain counsel. A lawyer is free to give advice to unrepresented persons whose interests are not in conflict with those of the lawyer's client, but only if it is made clear that the lawyer is acting in the interests of the client. Thus the lawyer should not represent to such persons, either expressly or implicitly, that the lawyer is disinterested. Furthermore, if it becomes apparent that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer must take whatever reasonable, affirmative steps are necessary to correct the misunderstanding.

[3] 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.

[4] This rule is not intended to restrict in any way law enforcement efforts by government lawyers that are consistent with constitutional requirements and applicable federal law.

## 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 KNOWINGLY USE METHODS OF OBTAINING EVIDENCE THAT VIOLATE THE LEGAL RIGHTS OF SUCH A PERSON.**

**(b) A LAWYER WHO RECEIVES A WRITING RELATING TO THE REPRESENTATION OF A CLIENT AND KNOWS, BEFORE EXAMINING THE WRITING, THAT IT HAS BEEN INADVERTENTLY SENT, SHALL NOT EXAMINE THE WRITING, BUT SHALL NOTIFY THE SENDING PARTY AND ABIDE BY THE INSTRUCTIONS OF THE SENDING PARTY REGARDING THE RETURN OR DESTRUCTION OF THE WRITING.**

**(c) A LAWYER WHO BEGINS TO EXAMINE A WRITING RELATING TO THE REPRESENTATION OF**

**A CLIENT AND ONLY THEN REALIZES THAT THE WRITING RELATES TO THE REPRESENTATION OF A CLIENT AND HAS BEEN INADVERTENTLY SENT TO THE LAWYER SHALL STOP EXAMINING THE WRITING, SHALL NOTIFY THE SENDING PARTY, AND SHALL ABIDE BY THE INSTRUCTIONS OF THE SENDING PARTY REGARDING THE RETURN OR DESTRUCTION OF THE WRITING.**

**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) addresses, for example, the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by another lawyer and who knows that the sending lawyer inadvertently included these writings. As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is "an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient." Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in these circumstances, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.

[3] Where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials. See D.C. Legal Ethics Committee Opinion 256 (addressing writings containing client secrets or confidences). See also D.C. Legal Ethics Committee Opinion 341 (applying paragraph (b) to the receipt of inadvertently disclosed metadata imbedded in electronic files).

[4] Whether the privileged status of a writing has been waived is a matter of law beyond the scope of these Rules. Similarly, this rule does not address the duties of a lawyer who receives a writing that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. But see D.C. Bar Legal Ethics Committee Opinion 318 (analyzing a lawyer's ethical obligations when receiving privileged documents that may have been taken without authorization from an opposing party) and Rules 1.1, 1.3, 1.6, 1.15 and 8.4.

# 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 OR GOVERNMENT AGENCY, SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE FIRM HAS IN EFFECT MEASURES GIVING REASONABLE ASSURANCE THAT ALL LAWYERS IN THE FIRM OR AGENCY 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 HAS DIRECT SUPERVISORY AUTHORITY OVER THE OTHER LAWYER OR IS A PARTNER OR HAS COMPARABLE MANAGERIAL AUTHORITY IN THE LAW FIRM OR GOVERNMENT AGENCY IN WHICH THE OTHER LAWYER PRACTICES, AND KNOWS OR REASONABLY SHOULD KNOW 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 or government agency. 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 the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. For the broad definition of "firm," see Rule 1.0(c). Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers.

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

[4] Paragraph (c) sets forth general principles of imputed responsibility for the misconduct of others. Subparagraph (c)(1) makes any lawyer who orders or, with knowledge, ratifies misconduct responsible for that misconduct. See also Rule 8.4(a). Subparagraph (c)(2) extends that responsibility to any lawyer who is a partner or person in comparable managerial authority in the firm in which the misconduct takes place, or who has direct supervisory authority over the lawyer who engages in misconduct, when the lawyer knows or should reasonably know of the conduct and could intervene to ameliorate its consequences. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. A lawyer with direct supervisory authority is a lawyer who has an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation. A lawyer who is technically a "supervisor" in organizational terms, but is not involved in directing the effort of other lawyers in a particular representation, is not a supervising lawyer with respect to that representation.

[5] The existence of actual knowledge is also a question of fact; whether a lawyer should reasonably have known of misconduct by another lawyer in the same firm is an objective standard based on evaluation of all the facts, including the size and organizational structure of the firm, the lawyer's position and

responsibilities within the firm, the type and frequency of contacts between the various lawyers involved, the nature of the misconduct at issue, and the nature of the supervision or other direct responsibility (if any) actually exercised. The mere fact of partnership or a position as a principal in a firm is not sufficient, without more, to satisfy this standard. Similarly, the fact that a lawyer holds a position on the management committee of a firm, or heads a department of the firm, or has comparable management authority in some other form of organization or a government agency is not sufficient, standing alone, to satisfy this standard.

[6] Appropriate remedial action would depend on the immediacy of the involvement and the seriousness of the misconduct. The 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 a negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[7] 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.

[8] 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.

[9] The duties imposed by this rule on managing and supervisory 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 – SUBORDINATE LAWYERS

**(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 OR A LAWYER WHO INDIVIDUALLY OR TOGETHER WITH OTHER LAWYERS POSSESSES COMPARABLE MANAGERIAL AUTHORITY IN A LAW FIRM OR GOVERNMENT AGENCY SHALL MAKE REASONABLE EFFORTS TO ENSURE THAT THE FIRM OR AGENCY 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 REQUESTS OR, WITH KNOWLEDGE OF THE SPECIFIC CONDUCT, RATIFIES THE CONDUCT INVOLVED; OR**

**(2) THE LAWYER HAS DIRECT SUPERVISORY AUTHORITY OVER THE PERSON, OR IS A PARTNER OR A LAWYER WHO INDIVIDUALLY OR TOGETHER WITH OTHER LAWYERS POSSESS COMPARABLE MANAGERIAL AUTHORITY IN THE LAW FIRM OR GOVERNMENT AGENCY IN WHICH THE PERSON IS EMPLOYED, 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] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Just as lawyers in private practice may direct the conduct of investigators who may be independent contractors, prosecutors and other government lawyers may effectively direct the conduct of police or other governmental investigative personnel, even though they may not have, strictly speaking, formal authority to order actions by such personnel, who report to the chief of police or the head of another enforcement agency. Such prosecutors or other government lawyers have a responsibility with respect to police or investigative personnel, whose conduct they effectively direct, equivalent to that of private lawyers with respect to investigators whom they retain. See also Comments [4], [5], and [6] to Rule 5.1, in particular, the concept of what constitutes direct supervisory authority, and the significance of holding certain positions in a firm. Comments [4], [5], and [6] of Rule 5.1 apply as well to Rule 5.3.

**Nonlawyers Not Associated With the Firm**

[3] A lawyer may use nonlawyers not associated with the lawyer's own firm to assist the lawyer in rendering legal services to the client. Examples include the retention of 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 and scanning, and using an internet-based service to store client information. Unless directed by the client to use specified nonlawyers not associated with the firm, in using such services a lawyer must make reasonable efforts and communicate appropriate directions 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 service 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, 1.2, 1.4, 1.6, 5.4, and 5.5.

[4] When the client directs the selection of a nonlawyer service provider not associated with the lawyer's firm, the lawyer ordinarily should reach agreement with the client about the scope of the lawyer's representation and the division of responsibility among the lawyer, the client, and the service provider. When making such a division 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. If at any time the lawyer reasonably believes that the client's direction does not contribute to the competent and ethical representation of the client or materially changes an existing agreement between the client and the lawyer or law firm, the lawyer should inform the client and may withdraw from the representation pursuant to Rule 1.16.

## RULE 5.4 – PROFESSIONAL INDEPENDENCE OF A LAWYER

**(a) A LAWYER OR LAW FIRM SHALL NOT SHARE LEGAL FEES WITH A NONLAWYER, EXCEPT THAT:**

**(1) AN AGREEMENT BY A LAWYER WITH THE LAWYER'S FIRM, PARTNER, OR ASSOCIATE MAY PROVIDE FOR THE PAYMENT OF MONEY, OVER A REASONABLE PERIOD OF TIME AFTER THE LAWYER'S DEATH, TO THE LAWYER'S ESTATE OR TO ONE OR MORE SPECIFIED PERSONS;**

**(2) A LAWYER WHO UNDERTAKES TO COMPLETE UNFINISHED LEGAL BUSINESS OF A DECEASED LAWYER MAY PAY TO THE ESTATE OF THE DECEASED LAWYER THAT PROPORTION OF THE TOTAL COMPENSATION WHICH FAIRLY REPRESENTS THE SERVICES RENDERED BY THE DECEASED LAWYER. 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;**

**(4) SHARING OF FEES IS PERMITTED IN A PARTNERSHIP OR OTHER FORM OF ORGANIZATION WHICH MEETS THE REQUIREMENTS OF PARAGRAPH (b); AND**

**(5) A LAWYER MAY SHARE LEGAL FEES, WHETHER AWARDED BY A TRIBUNAL OR RECEIVED IN SETTLEMENT OF A MATTER, WITH A NONPROFIT ORGANIZATION THAT EMPLOYED, RETAINED, OR RECOMMENDED EMPLOYMENT OF THE LAWYER IN THE MATTER AND THAT QUALIFIES UNDER SECTION 501(c)(3) OF THE INTERNAL REVENUE CODE.**

**(b) A LAWYER MAY PRACTICE LAW IN A PARTNERSHIP OR OTHER FORM OF ORGANIZATION IN WHICH A FINANCIAL INTEREST IS HELD OR MANAGERIAL AUTHORITY IS EXERCISED BY AN INDIVIDUAL NONLAWYER WHO PERFORMS PROFESSIONAL SERVICES WHICH ASSIST THE ORGANIZATION IN PROVIDING LEGAL SERVICES TO CLIENTS, BUT ONLY IF:**

**(1) THE PARTNERSHIP OR ORGANIZATION HAS AS ITS SOLE PURPOSE PROVIDING LEGAL SERVICES TO CLIENTS;**

**(2) ALL PERSONS HAVING SUCH MANAGERIAL AUTHORITY OR HOLDING A FINANCIAL INTEREST UNDERTAKE TO ABIDE BY THESE RULES OF PROFESSIONAL CONDUCT;**

**(3) THE LAWYERS WHO HAVE A FINANCIAL INTEREST OR MANAGERIAL AUTHORITY IN THE PARTNERSHIP OR ORGANIZATION UNDERTAKE TO BE RESPONSIBLE FOR THE NONLAWYER PARTICIPANTS TO THE SAME EXTENT AS IF NONLAWYER PARTICIPANTS WERE LAWYERS UNDER RULE 5.1;**

**(4) THE FOREGOING CONDITIONS ARE SET FORTH IN WRITING.**

**(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.**

**COMMENT**

[1] The provisions of this rule express traditional limitations on sharing fees with nonlawyers. (On sharing fees among lawyers not in the same firm, see Rule 1.5(e).) 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] Traditionally, the canons of legal ethics and disciplinary rules prohibited lawyers from practicing law in a partnership that includes nonlawyers or in any other organization where a nonlawyer is a shareholder, director, or officer. Notwithstanding these strictures, the profession implicitly recognized exceptions for lawyers who work for corporate law departments, insurance companies, and legal service organizations.

[3] As the demand increased for a broad range of professional services from a single source, lawyers employed professionals from other disciplines to work for them. So long as the nonlawyers remained employees of the lawyers, these relationships did not violate the disciplinary rules. However, when lawyers and nonlawyers considered forming partnerships and professional corporations to provide a combination of legal and other services to the public, they faced serious obstacles under the former rules.

[4] This rule rejects an absolute prohibition against lawyers and nonlawyers joining together to provide collaborative services, but continues to impose traditional ethical requirements with respect to the organization thus created. Thus, a lawyer may practice law in an organization where nonlawyers hold a financial interest or exercise managerial authority, but only if the conditions set forth in subparagraphs (b)(1), (b)(2), and (b)(3) are satisfied, and pursuant to subparagraph (b)(4), satisfaction of these conditions is set forth in a written instrument. The requirement of a writing helps ensure that these important conditions are not overlooked in establishing the organizational structure of entities in which nonlawyers enjoy an ownership or managerial role equivalent to that of a partner in a traditional law firm.

[5] Nonlawyer participants under Rule 5.4 ought not be confused with nonlawyer assistants under Rule 5.3. Nonlawyer participants are persons having managerial authority or financial interests in organizations that provide legal services. Within such organizations, lawyers with financial interests or managerial authority are held responsible for ethical misconduct by nonlawyer participants about which the lawyers know or reasonably should know. This is the same standard of liability contemplated by Rule 5.1, regarding the responsibilities of lawyers with direct supervisory authority over other lawyers.

[6] Nonlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization. Lawyers having direct supervisory authority over nonlawyer assistants are held responsible only for ethical misconduct by assistants about which the lawyers actually know.

[7] As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met.

[8] Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

[9] The term "individual" in subparagraph (b) is not intended to preclude the participation in a law firm or other organization by an individual professional corporation in the same manner as lawyers who have incorporated as a professional corporation currently participate in partnerships that include professional corporations.

[10] Some sharing of fees is likely to occur in the kinds of organizations permitted by paragraph (b). Subparagraph (a)(4) makes it clear that such fee sharing is not prohibited.

[11] Subparagraph (a)(5) permits a lawyer to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter. A lawyer may decide to contribute all or part of legal fees recovered from the opposing party to a nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the lawyer's fees does not inherently compromise the lawyer's professional independence, whether the lawyer is employed by the organization or was only retained or recommended by it. A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of Model Rule 5.4(a)(5), this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception. To prevent abuse of this broader exception, it applies only if the nonprofit organization qualifies under Section 501(c)(3) of the Internal Revenue Code.

## RULE 5.5 – UNAUTHORIZED PRACTICE

**A LAWYER SHALL NOT:**

**(a) PRACTICE LAW IN A JURISDICTION WHERE DOING SO VIOLATES THE REGULATION OF THE LEGAL PROFESSION IN THAT JURISDICTION; OR**

**(b) ASSIST A PERSON WHO IS NOT A MEMBER OF THE BAR IN THE PERFORMANCE OF ACTIVITY THAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.**

**COMMENT**

[1] This rule concerns the unauthorized practice of law by District of Columbia Bar members in other jurisdictions and assistance by District of Columbia Bar members in the unauthorized practice of law by lawyers not admitted in this jurisdiction or by non-lawyers. The provisions concerning the unauthorized practice of law in the District of Columbia, including those activities in which a lawyer not admitted in the District of Columbia may and may not engage, are set forth in Rule 49 of the Rules of the District of Columbia Court of Appeals.

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

## 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 RIGHTS OF A LAWYER TO PRACTICE AFTER TERMINATION OF THE RELATIONSHIP, EXCEPT AN AGREEMENT CONCERNING BENEFITS UPON RETIREMENT; OR**

**(b) AN AGREEMENT IN WHICH A RESTRICTION ON THE LAWYER'S RIGHT TO PRACTICE IS PART OF THE SETTLEMENT OF A CONTROVERSY BETWEEN PARTIES.**

**COMMENT**

[1] An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm. Whether provisions limiting benefits are retirement provisions, excepted by this rule, will depend on a number of factors. See Neuman v. Akman, 715 A.2d 127 (D.C. 1998).

[2] Restrictions, other than those concerning retirement benefits, that impose a substantial financial penalty on a lawyer who competes after leaving the firm may violate paragraph (a).

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

[4] Although a lawyer may agree to work exclusively on behalf of a single client for a given period, in light of the strong policy in favor of providing a free choice of counsel, *see, e.g., Jacobson Holman PLLC v. Gentner*, 244 A.3d 690, 700-03 (D.C. 2021), outside of such an exclusive relationship, a lawyer should not agree to restrictions a client seeks to place on the lawyer's ability to represent other individuals or entities whose representation is not otherwise precluded by these rules if those restrictions would unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession.

[5] This rule does not 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 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 a separate entity. The rule identifies the circumstances in which all 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 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 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 should be made before entering into an agreement for provision of or providing law-related services, and preferably should 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 that 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(b)(2)-(4) and 1.8(a) and (e)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure and use of confidential information. See also Comment [26] to Rule 1.7. The promotion of the law-related services must also in all respects comply with Rule 7.1, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction decisional law. Rule 1.8 addresses a lawyer's provision of non-law-related services to a client.

[11] When the full protections of all 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 confidentiality of information, conflicts of interest and permissible business relationships with clients. Rule 5.7 does not limit the protection provided by any other Rule, including but not limited to Rule 8.4, which prohibits, among other things, conduct involving dishonesty or fraud whether or not the lawyer engages in such conduct in connection with the rendering of law-related services.

# PUBLIC SERVICE

## RULE 6.1 – PRO BONO PUBLICO SERVICE

**A LAWYER SHOULD PARTICIPATE IN SERVING THOSE PERSONS, OR GROUPS OF PERSONS, WHO ARE UNABLE TO PAY ALL OR A PORTION OF REASONABLE ATTORNEY'S FEES OR WHO ARE OTHERWISE UNABLE TO OBTAIN COUNSEL. A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING PROFESSIONAL SERVICES AT NO FEE, OR AT A SUBSTANTIALLY REDUCED FEE, TO PERSONS AND GROUPS WHO ARE UNABLE TO AFFORD OR OBTAIN COUNSEL, OR BY ACTIVE PARTICIPATION IN THE WORK OF ORGANIZATIONS THAT PROVIDE LEGAL SERVICES TO THEM. WHEN PERSONAL REPRESENTATION IS NOT FEASIBLE, A LAWYER MAY DISCHARGE THIS RESPONSIBILITY BY PROVIDING FINANCIAL SUPPORT FOR ORGANIZATIONS THAT PROVIDE LEGAL REPRESENTATION TO THOSE UNABLE TO OBTAIN COUNSEL.**

**COMMENT**

[1] This rule reflects the long-standing ethical principle underlying Canon 2 of the previous Code of Professional Responsibility that "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." The rule incorporates the legal profession's historical commitment to the principle that all persons in our society should be able to obtain necessary legal services. The rule also recognizes that the rights and responsibilities of individuals and groups in the United States are increasingly defined in legal terms and that, as a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do. The rule also recognizes that a lawyer's *pro bono* services are sometimes needed to assert or defend public rights belonging to the public generally where no individual or group can afford to pay for the services.

[2] This rule carries forward the ethical precepts set forth in the Code. Specifically, the rule recognizes that the basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and that every lawyer, regardless of professional prominence or professional work load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.

[3] The rule also acknowledges that while the provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services. A lawyer also should not refuse a request from a court or bar association to undertake representation of a person unable to obtain counsel except for compelling reasons such as those listed in Rule 6.2.

[4] This rule expresses the profession's traditional commitment to make legal counsel available, but it is not intended that the rule be enforced through disciplinary process. Neither is it intended to place any obligation on a government lawyer that is inconsistent with laws such as 18 U.S.C. §§ 203 and 205 limiting the scope of permissible employment or representational activities.

[5] In determining their responsibilities under this rule, lawyers admitted to practice in the District of Columbia should be guided by the Resolutions on Pro Bono Services passed by the Judicial Conferences of the District of Columbia and the D.C. Circuit as amended from time to time. Those resolutions as adopted in 2009 and 2010, respectively, call on members of the D.C. Bar, at a minimum, each year to (1) accept one court appointment, (2) provide 50 hours of *pro bono* legal service, or (3) when personal representation is not feasible, contribute the lesser of $750 or 1 percent of earned income to a legal assistance organization that services the community's economically disadvantaged, including *pro bono* referral and appointment offices sponsored by the Bar and the courts.

[6] Law firms and other organizations employing lawyers should act reasonably to enable and encourage all lawyers in the organization 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 A SUBSTANTIAL AND UNREASONABLE 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**

[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* public 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 substantially and unreasonably burdensome, such as 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 WOULD BE INCOMPATIBLE WITH THE LAWYER'S OBLIGATIONS TO A CLIENT UNDER RULE 1.7; OR**

**(b) WHERE THE DECISION COULD HAVE A MATERIAL ADVERSE EFFECT ON THE REPRESENTATION OF A CLIENT OF THE ORGANIZATION WHOSE INTERESTS ARE ADVERSE TO A CLIENT OF THE LAWYER.**

**COMMENT**

[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) A LAWYER SHOULD ASSIST IN IMPROVING THE ADMINISTRATION OF JUSTICE. A LAWYER MAY DISCHARGE THIS REQUIREMENT BY RENDERING SERVICES IN ACTIVITIES FOR IMPROVING THE LAW, THE LEGAL SYSTEM, OR THE LEGAL PROFESSION.**

**(b) 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 BENEFITED BY A DECISION IN WHICH THE LAWYER PARTICIPATES, THE LAWYER SHALL DISCLOSE THAT FACT BUT NEED NOT IDENTIFY THE CLIENT.**

**COMMENT**

[1] Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to

recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients. Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, the lawyer should endeavor by lawful means to obtain appropriate changes in the law. This rule expresses the policy underlying Canon 8 of the previous Code of Professional Responsibility that "A lawyer should assist in improving the legal system," but it is not intended that it be enforced through disciplinary process.

[2] 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 benefited.

## 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 SUBJECT TO RULES 1.7 AND 1.9 ONLY IF THE LAWYER KNOWS THAT THE REPRESENTATION OF THE CLIENT INVOLVES A CONFLICT OF INTEREST; AND**

**(2) 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 WITH RESPECT TO THE MATTER.**

**(b) EXCEPT AS PROVIDED IN PARAGRAPH (a)(2), 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. For the purposes of this rule, short-term limited legal services normally do not include appearing before a tribunal on behalf of a client.

[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 Rule 1.6, 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 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 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)(2). Paragraph (a)(2) 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. 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 and 1.10 become applicable.

[6] This rule serves the public interest by making it easier for lawyers affiliated with firms to provide *pro bono* legal services. Rule 1.10(e) contains a similarly-motivated exception from imputation for attorneys who, while affiliated with a firm, assist the District of Columbia Attorney General with certain matters.

# AMENDMENTS TO RULE 6: PUBLIC SERVICE

## RULE 6.1 (PRO BONO PUBLICO SERVICE)

Comment [5] was revised to reflect more recent resolutions on Pro Bono Services passed by the Judicial Conferences of the District of Columbia (2009) and District of Columbia Circuit (2010), to call on members of the D.C. Bar, at a minimum, to (1) accept one court appointment, (2) provide 50 hours (up from 40) of pro bono legal service, or (3) when personal representation is not feasible, to contribute the lesser of $750 (up from $400) or 1 percent of earned income to a legal assistance organization that services the community's economically disadvantaged, including pro bono referral and appointment offices sponsored by the Bar and the courts.

# INFORMATION ABOUT LEGAL SERVICES

## RULE 7.1 – COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

**(a) 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:**

> **(1) CONTAINS A MATERIAL MISREPRESENTATION OF FACT OR LAW, OR OMITS A FACT NECESSARY TO MAKE THE STATEMENT CONSIDERED AS A WHOLE NOT MATERIALLY MISLEADING; OR**
>
> **(2) CONTAINS AN ASSERTION ABOUT THE LAWYER OR THE LAWYER'S SERVICES THAT CANNOT BE SUBSTANTIATED.**

**(b) A LAWYER SHALL NOT SEEK BY IN-PERSON CONTACT, EMPLOYMENT (OR EMPLOYMENT OF A PARTNER OR ASSOCIATE) BY A NONLAWYER WHO HAS NOT SOUGHT THE LAWYER'S ADVICE REGARDING EMPLOYMENT OF A LAWYER, IF:**

> **(1) THE SOLICITATION INVOLVES USE OF A STATEMENT OR CLAIM THAT IS FALSE OR MISLEADING, WITHIN THE MEANING OF PARAGRAPH (a);**
>
> **(2) THE SOLICITATION INVOLVES THE USE OF COERCION, DURESS OR HARASSMENT; OR**
>
> **(3) THE POTENTIAL CLIENT IS APPARENTLY IN A PHYSICAL OR MENTAL CONDITION WHICH WOULD MAKE IT UNLIKELY THAT THE POTENTIAL CLIENT COULD EXERCISE REASONABLE, CONSIDERED JUDGMENT AS TO THE SELECTION OF A LAWYER.**

**(c) A LAWYER SHALL NOT PAY MONEY OR GIVE ANYTHING OF MATERIAL VALUE TO A PERSON (OTHER THAN THE LAWYER'S PARTNER OR EMPLOYEE) IN EXCHANGE 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 AND REASONABLE FEES OR DUES CHARGED BY A LEGAL SERVICE PLAN OR A LAWYER REFERRAL SERVICE;**
>
> **(3) PAY FOR A LAW PRACTICE IN ACCORDANCE WITH RULE 1.17; AND**
>
> **(4) REFER CLIENTS TO ANOTHER LAWYER OR 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:**
>
> > **(A) THE RECIPROCAL AGREEMENT IS NOT EXCLUSIVE, AND**
> >
> > **(B) THE CLIENT IS INFORMED OF THE EXISTENCE AND NATURE OF THE AGREEMENT.**

**(d) A LAWYER SHALL NOT KNOWINGLY ASSIST AN ORGANIZATION THAT FURNISHES OR PAYS FOR LEGAL SERVICES TO OTHERS TO PROMOTE THE USE OF THE LAWYER'S SERVICES OR THOSE OF THE LAWYER'S PARTNER OR ASSOCIATE, OR ANY OTHER LAWYER AFFILIATED WITH THE LAWYER OR THE LAWYER'S FIRM, AS A PRIVATE PRACTITIONER, IF THE PROMOTIONAL ACTIVITY INVOLVES THE USE OF COERCION, DURESS, COMPULSION, INTIMIDATION, THREATS, OR VEXATIOUS OR HARASSING CONDUCT.**

**(e) NO LAWYER OR ANY PERSON ACTING ON BEHALF OF A LAWYER SHALL SOLICIT OR INVITE OR SEEK TO SOLICIT ANY PERSON FOR PURPOSES OF REPRESENTING THAT PERSON FOR A FEE PAID BY OR ON BEHALF OF A CLIENT OR UNDER THE CRIMINAL JUSTICE ACT, D.C. CODE ANN. §11-2601 (2001) *ET SEQ.*, IN ANY PRESENT OR FUTURE CASE IN THE DISTRICT OF COLUMBIA COURTHOUSE, ON THE SIDEWALKS ON THE NORTH, SOUTH, AND WEST SIDES OF THE COURTHOUSE, OR WITHIN 50 FEET OF THE BUILDING ON THE EAST SIDE.**

**(f) ANY LAWYER OR PERSON ACTING ON BEHALF OF A LAWYER WHO SOLICITS OR INVITES OR SEEKS TO SOLICIT ANY PERSON INCARCERATED AT THE DISTRICT OF COLUMBIA JAIL, THE CORRECTIONAL TREATMENT FACILITY OR ANY DISTRICT OF COLUMBIA JUVENILE DETENTION**

**FACILITY FOR THE PURPOSE OF REPRESENTING THAT PERSON FOR A FEE PAID BY OR ON BEHALF OF THAT PERSON OR UNDER THE CRIMINAL JUSTICE ACT, D.C. CODE ANN. §11-2601 (2001) *ET SEQ.*, IN ANY THEN-PENDING CRIMINAL CASE IN WHICH THAT PERSON IS REPRESENTED, MUST PROVIDE TIMELY AND ADEQUATE NOTICE TO THE PERSON'S THEN-CURRENT LAWYER PRIOR TO ACCEPTING ANY FEE FROM OR ON BEHALF OF THE INCARCERATED PERSON.**

**COMMENT**

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

**Advertising**

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

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

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (*see* Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

[6] Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4

[7] A lawyer 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 money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

**Payments for Advertising**

[8] A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

**Solicitations in the Vicinity of the District of Columbia Courthouse**

[9] Paragraph (e) is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph (e) as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

**Solicitations of Inmates**

[10] Paragraph (f) is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

## 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 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. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm. It is also misleading to continue to use the name of a lawyer formerly associated with the firm who currently is practicing elsewhere. *See* D.C. Bar Legal Ethics Committee Opinion 277.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

# AMENDMENTS TO RULE 7: INFORMATION ABOUT LEGAL SERVICES

## RULE 7.1 (COMMUNICATIONS CONCERNING A LAWYER'S SERVICES)

Rule 7.1 and its comments were amended to prohibit the payment of referral fees. Lawyers are still permitted to pay the usual and reasonable fees of a lawyer referral service and may still share fees with other lawyers under Rule 1.5(e). These changes restore the approach the District of Columbia used prior to the 1991 adoption of a rule allowing the use of paid intermediaries or "runners," which was repealed in 2007. (10/8/15)

# 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 FACT; OR**

**(b) FAIL TO DISCLOSE A FACT NECESSARY TO CORRECT A MISAPPREHENSION KNOWN BY THE LAWYER OR APPLICANT TO HAVE ARISEN IN THE MATTER, OR KNOWINGLY FAIL TO RESPOND REASONABLY 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 knowingly makes a false statement of fact 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. Lack of materiality does not excuse a knowingly false statement of fact. 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 knowingly to 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 factual misstatement in the matter that the lawyer or applicant may have made, including affirmative clarification of any factual 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 corresponding provisions of state constitutions. 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. For example, Rule 1.6 may prohibit disclosures, which would otherwise be required, by a lawyer serving in such representative capacity. Information that is a client confidence or secret under Rule 1.6 is "protected by Rule 1.6" within the meaning of Rule 8.1(b), even if a permissive disclosure option applies. Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by 1.6. In such circumstances, a lawyer acting in a representative capacity may, but is not required to, make disclosures otherwise required by this rule. This rule refers to demands for information from an admissions or disciplinary authority. If a lawyer appears in an adjudicative proceeding regarding admission or bar discipline as a witness or client representative, the lawyer's conduct is governed by Rule 3.3.

## 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 APPROPRIATE PROFESSIONAL AUTHORITY.**

**(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 APPROPRIATE AUTHORITY.**

**(c) THIS RULE DOES NOT REQUIRE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY RULE 1.6 OR OTHER LAW.**

**COMMENT**

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

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. Information that is a client confidence or secret under Rule 1.6 is "otherwise protected by Rule 1.6" within the meaning of Rule 8.3(c). Rule 1.6(c), (d), and (e) describe circumstances in which a lawyer may reveal information otherwise protected by Rule 1.6. In such circumstances, a lawyer may, but is not required to, make disclosures otherwise required by this rule.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the Office of Disciplinary Counsel. A lawyer who believes that another lawyer has a significant problem of alcohol or other substance abuse which does not require reporting to Disciplinary Counsel under this rule, may nonetheless wish to report the perceived situation to the Lawyer Counseling Committee, operated by the D.C. Bar, which assists lawyers having such problems.

[4] The duty to report 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 1.6(c), (d), and (e) give a lawyer discretion to reveal information otherwise protected by Rule 1.6 in some circumstances, despite a client-lawyer relationship. If such circumstances exist, the lawyer may, but is not required, to reveal the information as part of a report of misconduct under this rule. The duty to report may also be limited by other law, including court rules or orders, protective orders, and laws restricting disclosure of grand jury or tax information.

[5] Rule 1.6(h) brings within the protections of Rule 1.6 certain types of information gained by lawyers participating in lawyer counseling programs of the D.C. Bar Lawyer Counseling Committee. To the extent information concerning violations of the Rules of Professional Conduct falls within the scope of Rule 1.6(h), a lawyer-counselor would not be required or permitted to inform the "appropriate professional authority" referred to in Rule 8.3. Where disclosure is permissive under Rule 1.6 (see paragraph 1.6(c), (d), and (e) for cases of permitted disclosures), discretion to disclose to the "appropriate professional authority" would also exist pursuant to paragraph 8.3(c). See also Comment to Rule 1.6, paragraphs [29], [30], and [31].

## 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 SERIOUSLY INTERFERES WITH THE ADMINISTRATION OF JUSTICE;**

**(e) STATE OR IMPLY AN ABILITY TO INFLUENCE IMPROPERLY A GOVERNMENT AGENCY OR OFFICIAL;**

**(f) KNOWINGLY ASSIST A JUDGE OR JUDICIAL OFFICER IN CONDUCT THAT IS A VIOLATION OF APPLICABLE RULES OF JUDICIAL CONDUCT OR OTHER LAW; OR**

**(g) SEEK OR THREATEN TO SEEK CRIMINAL CHARGES OR DISCIPLINARY CHARGES SOLELY TO OBTAIN AN ADVANTAGE IN A CIVIL MATTER.**

**COMMENT**

[1] 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.

[2] Paragraph (d)'s prohibition of conduct that "seriously interferes with the administration of justice" includes conduct proscribed by the previous Code of Professional Responsibility under DR 1-102(A)(5) as "prejudicial to the administration of

justice." The cases under paragraph (d) include acts by a lawyer such as: failure to cooperate with Disciplinary Counsel; failure to respond to Disciplinary Counsel's inquiries or subpoenas; failure to abide by agreements made with Disciplinary Counsel; failure to appear in court for a scheduled hearing; failure to obey court orders; failure to turn over the assets of a conservatorship to the court or to the successor conservator; failure to keep the Bar advised of respondent's changes of address, after being warned to do so; and tendering a check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client. Paragraph (d) is to be interpreted flexibly and includes any improper behavior of an analogous nature to these examples.

[3] A lawyer violates paragraph (d) by offensive, abusive, or harassing conduct that seriously interferes with the administration of justice. Such conduct may include words or actions that manifest bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.

## 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 MAY BE SUBJECT TO THE DISCIPLINARY AUTHORITY OF BOTH THIS JURISDICTION AND ANOTHER JURISDICTION WHERE THE LAWYER IS ADMITTED 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 TRIBUNAL, THE RULES TO BE APPLIED SHALL BE THE RULES OF THE JURISDICTION IN WHICH THE TRIBUNAL SITS, UNLESS THE RULES OF THE TRIBUNAL PROVIDE OTHERWISE, AND**
>
> **(2) FOR ANY OTHER CONDUCT,**
>
> > **(i) IF THE LAWYER IS LICENSED TO PRACTICE ONLY IN THIS JURISDICTION, THE RULES TO BE APPLIED SHALL BE THE RULES OF THIS JURISDICTION, AND**
> >
> > **(ii) IF THE LAWYER IS LICENSED TO PRACTICE IN THIS AND ANOTHER JURISDICTION, THE RULES TO BE APPLIED SHALL BE THE RULES OF THE ADMITTING JURISDICTION IN WHICH THE LAWYER PRINCIPALLY PRACTICES; PROVIDED, HOWEVER, THAT IF PARTICULAR CONDUCT CLEARLY HAS ITS PREDOMINANT EFFECT IN ANOTHER JURISDICTION IN WHICH THE LAWYER IS LICENSED TO PRACTICE, THE RULES OF THAT JURISDICTION SHALL BE APPLIED TO THAT CONDUCT.**

**COMMENT**

**Disciplinary Authority**

[1] Paragraph (a) restates long-standing law.

**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. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that 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, it takes the approach of (i) providing that any particular conduct of an attorney shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a matter pending before a tribunal the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another similar such company. The exception

would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

[5] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[6] 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.

# NONDISCRIMINATION BY MEMBERS OF THE BAR

## RULE 9.1 – NONDISCRIMINATION

**A LAWYER SHALL NOT DISCRIMINATE AGAINST ANY INDIVIDUAL IN CONDITIONS OF EMPLOYMENT BECAUSE OF THE INDIVIDUAL'S RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, SEXUAL ORIENTATION, FAMILY RESPONSIBILITY, OR PHYSICAL HANDICAP.**

**COMMENT**

[1] This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.

[2] The investigation and adjudication of discrimination claims may involve particular expertise of the kind found within the D.C. Office of Human Rights and the federal Equal Employment Opportunity Commission. Such experience may involve, among other things, methods of analysis of statistical data regarding discrimination claims. These agencies also have, in appropriate circumstances, the power to award remedies to the victims of discrimination, such as reinstatement or back pay, which extend beyond the remedies that are available through the disciplinary process. Remedies available through the disciplinary process include such sanctions as disbarment, suspension, censure, and admonition, but do not extend to monetary awards or other remedies that could alter the employment status to take into account the impact of prior acts of discrimination.

[3] If proceedings are pending before other organizations, such as the D.C. Office of Human Rights or the Equal Employment Opportunity Commission, the processing of complaints by Disciplinary Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Disciplinary Counsel and material allegations involved in such other proceedings. See §19(d) of Rule XI of the Rules Governing the District of Columbia Bar.

## LIST OF INDICES

Index A . . . . . Topical Index

Index B . . . . . Index of Cases Cited

Index C . . . . . Cross Reference Index from the Amended D.C. Rules of Professional Conduct to the Former D.C. Rules of Professional Conduct

Index D . . . . . Index of Rules Cited in Opinions

Index E . . . . . D.C. Ethics Opinions Citator

Index F . . . . . Index of Other Ethics Opinions Cited by D.C. Bar Opinions

Index G . . . . . Table of Opinions Substantively Affected by Amended Rules

## A

**Account:**
sale/assignment to collection agency: 298
**Advancing costs, etc.: Rule 1.8(d)**
immigration, affidavit of support re Form I-864: 354
reimbursement of interest charges: 345
sharing legal fees with clients: 351
**Advertising: Rule 7.1**
by prepaid legal service: 225
chat rooms: 316
claims that cannot be substantiated are prohibited: 249
firm names, solo: 224, 332; of counsel: 338
full, accurate disclosure of contract lawyer's services: 255
L.L.P., etc., abbreviations in firm names permissible: 254
misleading partnership name: 224, 332
participation in Internet-based lawyer referral services: 342
referrals by clinical program: 261
upon dissolution of law firm: 372
using client's publicly available information: 335
using social media: 370, 371
**AFDC program, ethical conflicts: 240**
**Arbitration:**
mandated for all disputes by retainer agreement: 211
mandated for fee disputes only: 218

## B

**Business transactions with clients: Rule 1.8(a)**
acceptance of cryptocurrency as payment of legal fees: 378
mandatory fee arbitration clauses in retainers: 376
practicing law while selling insurance: 306

## C

**Candor to the Tribunal Rule 3.3(a)**
duty to correct misrepresentations: 350
related to use of social media: 370, 371
**Chinese wall: Rule 1.11(c) – (f)**
using wall to prevent disqualification: 279
**Chose-in-Action: 319**
**Class action:**
solicitation of plaintiffs via the Internet: 302
**Client Files**
Disposition if closed client files: 283
duty to turn over successor counsel: 250
electronic files: 357
surrendering entire file upon termination: 333
upon dissolution of law firm: 372
**Client with disability: Rule 1.14, 295**
conflict between surrogate decision-maker and lawyer: 353
direct contact barred: 295
lawyer as guardian ad litem (GAL): 295, 336
lawyer as guardian only: 336
minority-aged client: 252
scope of representation: 353
terminating representation: 353
**Collection agency:**
sale/assignment of account to: 298
threat of criminal referral: 339
**Communication with opposing parties: Rule 4.2**
adoption matters: 366
attorney proceeding pro se: 258
bright line drawn, discussion of: 295
child abuse and neglect proceedings, scope of discussed: 295
civil protection order: 321
contact through social worker barred: Rule 4.2, 8.4, 295
direct contact barred: 295
ex parte contact with former employees of party-opponents: 287
lawyer as GAL: 295
party-opponents: 287
lawyer's consent required even where not represented: 263
non-substantive information as subject of communication: 295
parents cannot waive lawyer's permission: Rule 4.2, 295
Rule 4.2 discussed: 295
with government officials in litigated matters: 340
**Competence: Rule 1.1**
Duties when a lawyer is impaired: 377
Related to technology: 370, 371, 378
**Confidences and secrets: Rule 1.6**
blogs: 370
chat rooms: 316, 370
compliance with subpoena: 288
continuing duty to corporations: 298
credit card payment of legal fees: 348
definitions: Rule 1.6(b)
disclosure by third party: 318
disclosure of, auditors request: 290
disclosure of, deceased client's file: 324
disclosure of client's name to IRS: 214
disclosure of, embedded in metadata: 341
disclosure of, federal regulations require: 219
disclosure of, for collection of fees: 236
disclosure of, in claim against employer/client for employment discrimination: 363
disclosure of, in negotiated rulemaking: 297
disclosure of, in response to ineffective assistance of counsel claim: 364
disclosure of, to collection agency: 298
disclosure to funding organization (LSC): 223
disclosure to lawyer purchasing law practice: 124, 246, 294
duties of lawyer employing a social worker who is obliged to report child abuse: 282
duty of confidentiality to a prospective client: 346, 374
duty to corporate client after corporate "death": 299
implied authorization to disclose: Rule 1.6(d)(4), 290, 296
inadvertent disclosure of privileged material: 256, 341
lawyer counseling committee member: Rule 1.6(h)
obligations to client/trust: 230
preservation of, for trust client: 230
preservation of, where representing insured: 290
protection of former client files: 237, 294
protection of, in sale of law practice: Rule 1.6(a), 294
public information in settlement agreements: 335

subsequent use of confidential information in same matter: 275
temporary contract lawyers: 352
transmission of confidential information by electronic mail: 281
when client using lawyers services in crime fraud: 350
when crowdfunding: 375
when disclosure permitted: Rule 1.6(c) & (d)
**Conflict of interest: Rules 1.7 – 1.9**
absence of conflict when lawyer cannot identify affected clients and nature of conflict: 356
advance waivers: 309, 317, 334
attorney/real estate broker: 226
between settlement lawyer and parties: 247
business/personal transactions: Rule 1.8, 306, 319
changing firms, conflicts check: 312
chat rooms: 316
class action: 301
contract lawyer: Rule 1.7(b)(4) issues: 255
corporation counsel representing AFDC clients: 240
defense attorney applying for prosecutor job: 210
defense attorney charged with a crime: 257
disclosure of protected information of insured to insurers and outside auditing agencies: 290
disclosure to third parties: Rule 1.6, Comment [6]
former client: Rule 1.9, 212, 239, 259, 343
furlough, government agency lawyer: 365
general rule: Rule 1.7
"hot potato": 272
immigration, affidavit of support re Form I-864: 354
imputed between law firm and "of counsel" lawyer: 247
informed consent required, joint representation: 296
joint defense agreements: 349
joint representation: 248, 327
joint representation, discussion of: Rule 1.7(b)(2), (b)(3), 296
lawyer as legislator: 231
lawyer-mediator and conflicts checks: 276
lawyer seeking employment with entity or person adverse to client: 367
lobbying activities not deemed to involve practice of law: 344
media rights: 334
minority-aged client's inability to waive conflict: 252
multiple clients: 232
non-waivable: Rule 1.7(a)
not reasonably foreseeable: Rule 1.7(d), 292
outset of representation, meaning of: Rule 1.7(d), 272, 292
ownership interest as fee: Rule 1.7(b)(4), 300
providing volunteer assistance to corporation counsel: 268
referral arrangement, lawyer and non-lawyer: 361
referral fee arrangement, law firm and insurance company: 253
referral of a person adverse to a client of another: 326
representations involving estates: 259
representation of witness in unrelated matter: 237
representing class and individual class member: Rule 1.7, 301
repudiation of waiver: 317
role as in-house and outside counsel: 226
sale of law practice: 294
simultaneous representation; conflict on unrelated matters: 265
simultaneous representation: two plaintiffs against common defendant in separate but related lawsuits: 301
social media: 370, 371
substantial relationship, former government employment: 297
substantial relationship, limiting representation: 343
"thrust upon": Rule 1.7, 1.16, 292
"thrust upon" exception where lawyer cannot seek informed consent: 356
unbundling legal services: 330
when crowdfunding: 375
**Contacts with third parties: Rule 4.2**
civil protection order: 321
with nonparty treating physicians: 360
communication between a lawyer and members of a licensing board: 280
disclosure of client confidences and secrets barred: 290
meeting with prospective, represented client: 215
notification of and consent from, where required in child abuse proceeding: 295
particular claim required where property disputed: 293
property claims, where disputed: 293
with GAL, when represented by another lawyer: 252, 295
with governmental officials: Rule 4.2(d), 340
with in-house counsel: 331
with nonparty employees: Rule 4.2(b)
with opposing parties: Rule 4.2(a), 263, 295
**Contract Lawyer:**
ethical considerations: 352
**Corporation, counsel for: Rule 1.13**
closely-held corporation: 216
continuing attorney–client privilege after corporate "death": 299
lawyer's obligation to clarify role in internal corporate investigation: 269
**Criminal defendant, representation of:**
authority to make decisions: Rule 1.2(a)
client perjury: Rule 3.3(b)
contingency fee disallowed: Rule 1.5(d)
jury nullification: 320
multiple clients: 232
putting government to its proof: Rule 3.1
receipt of evidence: Rule 3.4(a)

**D**

**Disclosure/consent requirements:**
civil protection order: 321
class action, elements of consent in: Rule 1.7, Comment [7], 265, 301
insurance contract, effect of: Rule 1.8(e), 290
Mandatory fee arbitration clauses in retainers: 376
not assumed to third parties: Rule 1.6, 1.8(e), 290
opposing counsel in child abuse and neglect proceeding: 295

scope of representation issues: Rule 1.2, 248
settlement agreements: 335
upon dissolution of law firm: 372
waivable conflicts—"full disclosure" discussed: 248, 253
when attorney is being prosecuted: 257
when attorney transfers missing client's funds required by law: 359
when contacting a government official in a litigated matter: 340
when court ordered representation of client in criminal domestic violence matter who is a party to a parallel civil protective order: 373
when crowdfunding: 375
when disclosure requested by insurance company or auditor: 290
when opposing party counsel not representing party: 263
when referral fee is paid under Rule 7.1: 253
when using social media: 371
where client is a child: 252
**Discovery Services:**
non-lawyer owners: 362
Ediscovery: 362

**E**

**Employment/employment agreements:**
agreements not to share client's publicly available information: 335
defense attorney applying for prosecutor job: 210
discrimination by lawyer: Rule 9.1
discrimination by lawyer in another jurisdiction: 222
D.C. Human Rights Act compared to Rule 9.1: 222
employment/partnership agreements: 221, 241, 368
ERISA representations, conflicts in: 292
former government employment, impact on current clients: 297
nonprofit fee arrangement: 329
restriction on right to practice law prohibited: Rule 5.6(a), 335, 291
restrictions on departing lawyer who competes with former firm: 368
solicitation of, by lawyer: Rule 7.1(b)–(e), 342
**Evidence:**
adverse, duty to inform court: 213
metadata, duties to preserve, disclose in discovery: 341
receipt of, from client or other person: Rule 3.4
**Expert witness fee: Rule 3.4, Comment [8]**

**F**

**Fees/fee agreements/fee division: Rule 1.5**
acceptance of cryptocurrency as payment of legal fees: 378
advances: Rule 1.15(d)
advising and billing clients for temporary lawyers: 284
charging interest: 310
collection of, assignment/sale to collection agency: 298
collection of, in a bankruptcy proceeding: 236
contingent: Rule 1.5(c), Comments [6] – [8]
contingent fees in a criminal case: 262 credit card payment of legal fees: 348
disclosure of billing practices: 267
division between firm and departing lawyer: 221
division of: Rule 1.5(e), Comments [9] – [14]
fee litigation: Rule 1.6(d)(5), 298
fixed-fee agreements: 238
flat fees and trust accounts, In re Mance: 355 GSA 1% fee: Rule 5.4, 307, see 7.1(b)(2)
mandatory fee arbitration clauses in retainers: 211, 218, 376
nonprofit fee arrangement: Rule 5.4(a)(5), 329, 369
payment to retiring lawyer: Rule 1.5(a), 1.5(e), 1.17(d), 294
percentage fee to nonlawyer: Rule 5.4, 322, 342, 369
placement fee payment once temporary lawyer offered permanent job: 291
prepaid legal services: 225
property in lieu of fee: Rule 1.5, Comment [4], 300
reasonableness, discussed generally: Rule 1.5(a)
refunding special retainers: 264
reimbursement of interest charges: 345
required writing: Rule 1.5(b), Comments [2] & [3], 238
reverse contingent fee: 347
sharing legal fees with clients: 351
sharing legal fees with a lawyer referral service: 369
stock in lieu of fee: Rule 1.8(a), 300
success fees to nonlawyer consultants: 233
when crowdfunding: 375
**Fee sharing: Rule 5.4**
ban against sharing legal fee with nonlawyer: Rule 5.4(a), 329, 351
fee paid by third party: Rule 5.4(c)
fee paid to retiring lawyer: Rule 1.5(e), 386, 294, 369
fee sharing with 501(c)(3) allowed: Rule 5.4(a)(5), 342
nonlawyer partner exception: Rule 5.4(b)
referral fees: 253, 329, 342, 369
**Financial assistance to client: Rule 1.8(d)**
**Former client:**
corporate client that has ceased operations, lawyer's duties to: 298 former law firm: 239
limiting representation of new client: 343
PDS representation where former client is witness: 237
records maintained in electronic form: 357
representation against: Rule 1.9, 212
**Fraud upon a tribunal: Rule 3.3(d)**
disclosure required: 219, 336, 350
jury nullification: 320
unbundling legal services: 330
**Funds of client:**
commingling with firm's general funds: 264
generally: Rule 1.15(a) & (b)
property/funds in dispute: Rule 1.15(c), 293

**G**

**Government lawyers:**
agency as client: Rule 1.6(k), Comments [36] – [39]
Chinese wall: Rule 1.11(c) – (f)
communicating directly with government officials: Rule 4.2(d), 340
continued representation: 313, 315

entering private practice: Rule 1.11
furlough-related employment complaints: 365
GAL: 252, 295
leaving private practice: 308
participation in public meetings when represented claimants are present: 274
prosecutor, responsibilities as: Rule 3.8
scope of representation: Rule 1.2(d)
successive government and private employment: 297, 313, 315

**H**

**Human Resources:**
management by employee management company: 304

**I**

**Imputed disqualification: Rule 1.10**
availability of screening as cure for imputed disqualification: 279
contract lawyer's disqualification not imputed to firm: 255
inapplicable against government agency: 240
joint defense agreements: 349
representation adverse to former client: 212
screening permitted for paralegal: 227
**Inactive members, business cards/letterhead: 271**
**Intermediary:**
allocating funds among clients: 217
lawyer as: Rule 1.7, Comments [14]–[18]
**Internet:**
chat rooms: 316
social media use: 370, 371
using to solicit legal work: 302, 335, 342

**J**

**Joint representation: Rule 1.7, Comments [6] & [19]**
chat rooms: 316
class action and individual class member: 301
confidentiality discussed: 296
in divorce cases: 243
intermediary: Rule 1.7, Comments [14]–[18]
**Jurisdiction: Rule 8.5**
Rule 9.1, effect of: 222
Choice of law: 311
When using social media: 370

**L**

**Law clerk: Rule 1.11(b)**
**Law firms/offices**
abbreviations in firm names permissible (L.L.P., etc.): 254
"contract lawyer": 255
definition of firm: Rule 1.10, Comment [1]
dissolution of law firm: 372
duties when a lawyer is impaired: 377
ethical considerations of lawyers moving between law firms: 273
joint representation: 296
lawyer operating in nonlawyer capacity: 306
limited liability partnership/company: 235
managing human resources with employee management company: 304
misleading partnership name: 224
names and letterhead: Rule 7.5
nonlawyer partner: Rule 5.4(b)
nonlawyer personnel: Rule 5.3
nonlawyer supervisor: 314
"of counsel" relationships: 338
partner/supervisory lawyer responsibilities: Rule 5.1
partnership with foreign lawyer: 278
retaining name after partner withdraws: 277
sale of law practice by retiring lawyer: 294, *see* Rule 1.17
social media use: 370, 371
solo firms: 332
"special counsel" designation inappropriate: 255
subordinate lawyers: Rule 5.2
transferring work to another lawyer in the same firm, exclusion of: 294
**Lawyer–client relationship**
between settlement lawyer and parties: 247
continuing duty to corporate client: 297
duty to clarify: Rule 4.3, 240
exception to duty of loyalty discussed: 293
mandatory fee arbitration clauses in retainers: 376
relationship not formed when appointed as guardian only: 336
**Legal fees:**
acceptance of cryptocurrency as payment of legal fees: 378
acceptance of ownership interest in lieu of: 300
sharing in adoption matters: 366
legal fees with clients: 351
mandatory fee arbitration clauses in retainers: 376
sharing legal fees with a lawyer referral service: 369
**Liens on client files: Rule 1.8(i)**
lien rights under current Rules: 230
surrendering file: 333
work product exception narrowly construed/applied: 250
**Literary/media rights: Rule 1.8(c)**
**Lobbying/lobbyists: Rule 3.9**
lobbying activities not deemed to involve practice of law: 344

**M**

**Malpractice:**
agreements limiting liability: Rule 1.8(g)
**Metadata: 341**
**Misconduct by lawyer: Rule 8.4**
agreements limiting professional liability: 260
civil protection order: 321
duties when a lawyer is impaired: 377
duty to report: Rule 8.3
involving attorney dishonesty, fraud, deceit, or misrepresentation: 336, 341
jury nullification: 320
misrepresentation by government attorney: Rule 8.4, 323
non-judicial proceedings: 311
selling accounts receivable to collection agency: 298
surreptitious tape recording by attorney: 239
threatening criminal or disciplinary charges: Rule 8.4(g), 339

threats to file disciplinary charges: 220
when crowdfunding: 375
**Multiple representation: Rule 1.7, Comments [6] and [19]**
multiple clients in criminal matter: 232
representation of class and individual class member: 265, 301
representation of group of claimants: 217, 265, 301

**N**

**Nonadjudicative proceedings: Rule 3.9**
**Nonlawyer partner: Rule 5.4(b), Comments [7] – [10]**
inclusion of name in firm name: 244
upon dissolution of law firm: 372
**Nonlawyer personnel: Rule 5.3**
duties when a lawyer is impaired: 377
nonlawyer former government employee: 285
nonlawyer supervisor: 314
social media use: 370
social worker obligated to report child abuse: 282

**O**

**Office space:**
unaffiliated lawyer sharing: 303
**Organization as client: Rule 1.13**
closely-held corporation: 216
duties after organization ceases corporate operations: 299
nonlawyer supervisor: 314
representation of constituents of an organization: 328
**Ownership interest in-lieu-of-fees: 300**

**P**

**Perjury by client: Rule 3.3(b)**
duty of defense counsel: 234
**Prepaid legal services**
law firm participation in and obligations to clients: 225
**Pro bono publico service: Rule 6.1**
accepting appointments: Rule 6.2
**Property: Rule 1.15**
flat fees and trust accounts, In re Mance: 355
safeguarding client property: 293, 359
settlement proceeds, disposition of when disputed: Rule 1.15(b), 1.15(c), 293, 351
superiority of third party just claim: 293
third party just claim required: Rule 1.15, Comment [5], 293
**Prospective Client: Rule 1.18**
ethical obligations regarding information: 374
required elements for triggering a duty of confidentiality: 346
when using social media: 370

**R**

referrals in adoption matters: 366
**Referral fees: Rule 7.1**
contingent referral fees: 286, see Rule 7.1(b)(2)
payment of fees for Internet-based referral services: 342
payment to lawyer for referral: 245, 329, 361
payment to non-lawyer for referral: 361
sharing of legal fees with a lawyer referral service: 369
with Rule 5.4: 253, see Rule 7.1(b)(2)
**Related lawyers on opposite sides: Rule 1.8(h)**
**Reporting professional misconduct: Rule 8.3**
acting through third party barred: Rule 8.4, 295
duties of subordinate lawyer: 270
mere suspicions insufficient under rule: 239
requirements to be met before lawyer must report: 246
threats under Rule 8.4(g) not protected: 220
**Representation:**
adoption matters: 366
chat rooms: 316
client by lawyer seeking employment with entity or person adverse to client: 367
client not required to accept, in sale of law practice: 266, 270, 273, 294
court ordered representation of client in criminal domestic violence matter who is a party to a parallel civil protective order: 373
defined and discussed: 272, 292
former client, limiting scope: 343
negotiated rulemaking: 297
objective facts required to determine potential conflicts: 292
responsibility for, in sale of law practice: Rule 1.15(b), 1.16(d), 294, see Rule 1.17
restrictions on GAL communication with represented parent: 295
settlement agreement that attempts to limit right: 335
**Respect for Rights of Third Persons: Rule 4.4**
contact with nonparty treating physicians: 360
**Restrictions on right to practice: Rule 5.6**
agreement to distribute former firm profits violates rules: 325
contract may not prohibit temporary lawyer from seeking permanent job: 221, 281
corporate client may offer temporary lawyer permanent employment: 291
former government employment, discussion of: Rule 1.11, 297
notice of permanent employment permissible: 291
permanent employment not contingent on fee payment to placement agency: 291
placement agency cannot restrict: 291
prohibited: 291, 335
upon dissolution of law firm: 372

**S**

**Safekeeping property: Rule 1.15**
acceptance of cryptocurrency as payment of legal fees: 378
applicability of Rule to inadvertent disclosure: 256 credit card payment of legal fees: 348
disposition of closed client files: 283
disposition of missing client's trust account monies: 359
duty to prospective client: 374
flat fees and trust accounts, In re Mance: 355
obligation to retain disputed settlement proceeds: 251
obligations regarding disputed property: 242, 293
records maintained in electronic form: 357

return of client's property: Rule 1.15(b), 1.16(d), 293
return of third person's property: Rule 1.15(b), 3.4(a)
separate account required: 293
settlement proceeds disputed: 293
sharing legal fees with clients: 351
upon dissolution of law firm: 372
when crowdfunding: 375
**Sale of law practice: Rule 1.17**
considerations involved, discussion of: 294
disclosure of retiring lawyer's interests to client required: 294
duty to protect client: 294
elements of required disclosure, discussion of Rule 1.16, 294
permissible communication: Rule 7.1(b), 249, 294
**Scope of representation: Rule 1.2**
assisting in wrongful conduct by client: 350
chat rooms: 316
class action and individual class member, generally: 301
consultation and consent requirements: 248
Court ordered representation of client in criminal domestic violence matter who is a party to a parallel civil protective order: 373
limiting representation in new matter: 343
obligations of a minor's guardian ad litem (GAL): 252, 295
unbundling of legal services: 330
**Settlement offers: Rule 1.2(a)**
restricting clients' rights to waive attorney's fees or agree to a confidential settlement: 289
validity of client requiring attorney to keep confidential public information: 335
**Simultaneous representation:**
conflict of interest: 301
**Solicitation of plaintiffs in class actions/legal work via the Internet: 302, 342**
**Subsequent adverse representation: Rule 1.9 & 1.10**
against former client in related matter: 212, 292
withdrawal required: Rule 1.7(d), 292

**T**

**Temporary lawyers: Rule 5.6(a), 291**
contract lawyers: 352
**Terminating representation: Rule 1.16**
client agreement, where required: Rule 1.16(d), 294
when selling law practice: 294
**Testamentary gifts: Rule 1.8(b)**
**Threats of criminal/disciplinary charges: Rule 8.4(g)**
in civil debt collection matter: 339
"sole" purpose examined; applied to nonlawyers: 220
used to gain advantage in a civil matter: 263
**Trade associations: representation of: 305**
**Trust accounts: Rule 1.15(e)**
**Truthfulness to others: Rule 4.1**
when crowdfunding: 375
when federal regulations require disclosure: 219
when making statements of law: 339
when using social media: 371

**U**

**Unauthorized practice of law: Rule 5.5**
prepaid legal services: 225

**W**

**Waiver: 309, 317, 334**
**Website:**
chat rooms: 316
participation in Internet-based lawyer referral services: 342
social media: 370, 371
solicitation of plaintiffs in class actions/legal work: 302
when crowdfunding: 375
**Withdrawal from representation: Rule 1.16**
clients with directly adverse interests: Rule 1.7(d), 292
duties when a lawyer is impaired: 377
lawyer unable to get client's consent to disclose, joint representation: 296
"noisy" withdrawal, joint representation: 296
requiring court approval: 266
substantial relationship examined: Rule 1.7(b)(1), 292
"thrust upon" conflicts: 292
upon dissolution of law firm: 372
**Witness, lawyer as: Rule 3.7**
pretrial participation: 228
**Witness, Physicians:**
communication with opposing counsel: 360
**Witness, Subpoenaing Witnesses:**
Subpoenaing witness when lawyer knows witness will decline to answer questions on claim of privilege: 358

**Z**

**Zealous representation: Rule 1.3(a)**
chat rooms: 316
civil protection order: 321
conflict between client and referring insurance company: 253
duties when a lawyer is impaired: 377
joint representation: 248
jury nullification: 320
unbundling of legal services: 330
use of social media: 370, 371

**INDEX OF CASES CITED**
Opinions 210–378


| *Case* | *Opinion* |
|---|---|
| *1618 Twenty-First Street Tenants' Ass'n v. Phillips Collection*, 829 A.2d 201 (D.C. 2003) | 344 |
| *A. v. B.*, 726 A.2d 924 (N.J. 1999) | 327 |
| *Adams v. Franklin*, No. 05-CV-233 (D.C. May 10, 2007) | 341, 364 |
| *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 393 A.2d 1175 (Pa. 1978) | 221, 273 |
| *Aerojet-General Corp. v. Transport Indemnity Insurance,* 22 Cal. Rptr. 862 (Ct. App. 1993) | 256 |
| *Aiken v. Business and Industry Health Group, Inc.,* 885 F. Supp. 1474 (D. Kan. 1995) | 287 |
| *Airline Pilots Ass'n v. O'Neill,* 499 U.S. 51 (1991) | 314 |
| *All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2009-1 Trade Cas. (CCH) ¶76,465 (N.D. Cal. Dec. 18, 2008), *order clarified* by 2009-1 Trade Cas. (CCH) ¶76,501 (N.D. Cal. Feb. 5, 2009) | 349 |
| *Allied Realty, Inc. v. Exchange Nat'l Bank,* 283 F. Supp. 464 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir. 1969) | 313 |
| *Alpers v. Hunt*, 86 Cal. 78 (Cal. 1890) | 329 |
| *American Guarantee & Liab. Ins. Co. v. Timothy S. Keiter, P.A.,* 360 F.3d 13, 16 (1st Cir. 2004) | 361 |
| *AmSouth Bank v. Drummond Company, Inc.,* 589 So.2d 715 (Ala. 1991) | 272, 292, 356 |
| *Anonymous Members of the So. Carolina Bar,* 367 S.E. 2d 17 (SC 1988) | 322 |
| *Apple Corp Ltd. v. International Collectors Soc.,* 15 F.Suppl 2d 456 (D.NJ 1998) | 323 |
| *Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir. 1980) | 279 |
| *Armstrong v. McAlpin,* 449 U.S. 1106 (1981) | 279 |
| *Artromick Int'l, Inc. v. Drustar, Inc.,* 134 F.R.D. 226 (S.D. Ohio 1991) | 317 |
| *Ashcraft & Gerel v. Coady,* 244 F.3d 948 (D.C. Cir. 2001) | 368 |
| *Attorney Grievance Comm'n v. Richardson*, 712 A.2d 525 (Md. 1998) | 358 |
| *Baidoo v. Blood-Dzraku*, 5 N.Y.S. 3d 709, (Sup. Ct., N.Y. Cty., 2015) | 371 |
| *Barr v. Day*, 879 P.2d 912 (Wash. 1994) | 317 |
| *Bates v. District of Columbia Bd. Of Elections & Ethics*, 625 A.2d 891 (D.C. 1993) | 344 |
| *Bates v. State Bar*, 433 U.S. 350 (1977) | 332, 335 |
| *Baxter v. Palmigiano*, 425 U.S. 308 (1976) | 358 |
| *Beckham v. United States,* 609 A.2d 1122 (D.C. 1992) | 263 |
| *Beckman v. Farmer,* 579 A.2d 618 (D.C. 1990) | 368 |
| *Belli v. Shaw,* 657 P.2d 315 (Wash. 1983) | 317 |
| *Berg Electronics, Inc., v. Molex, Inc.,* 94-470 (D.Del. Feb. 8, 1995) | 256 |
| *Bergman v. District of Columbia*, 986 A.2d 1208, 1230 (D.C. 2010) | 359 |
| *Bittaker v. Woodford,* 331 F.3d 715 (9th Cir. 2003) | 364 |
| *Blum v. Stenson*, 465 U.S. 886 (1984) | 329 |
| *Bobbit v. Victorian House, Inc.,* 545 F. Supp. 1124 (N.D. Ill. 1982) | 216, 259 |
| *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin,* 828 P.2d 745 (Alaska 1992) | 253 |
| *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP*, 844 A. 2d 521 (N.J. 2004) | 325 |
| *Bottaro v. Hatton Associates,* 680 F.2d 1288 (2d Cir. 1982) | 228 |
| *Brennan's, Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168 (5th Cir. 1979) | 255 |
| *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983) | 359 |
| *Brotherhood of Railway Carmen v. Delpro Co.,* 549 F.Supp. 780 (D.Del. 1982) | 228 |
| *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37 (D.C. 1984) | 237, 273, 285, 308, 309, 312, 315, 343 |
| *Brown v. St. Joseph County,* 148 F.R.D. 246 (N.D. Ind. 1993) | 258 |
| *Brown & Sturm v. Frederick Road L.P.*, 768 A.2d 62 (Md. Ct. Spec. App. 2001) | 347 |
| *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000) | 363 |
| *Butler v. United States,* 414 A.2d 844, (D.C. App. 1979) | 213 |
| *Camden v. State of Maryland,* 910 F. Supp. 1115 (D. Md. 1996) | 285, 287 |
| *Cannon v. U.S. Acoustics Corp., 532 F.2d 1118 (7th Cir. 1976)* | 236 |
| *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.,* 747 A.2d 564, 567 (D.C. 2000*)* | 378 |
| *Carey v. Crane Serv. Co., Inc., 457 A.2d 1102, 1108 (D.C.1983)* | 344 |
| *Carl v. Children's Hospital*, 702 A.2d 159 (D.C. 1997) | 363 |
| *Carter v. Cathedral Ave. Coop, Inc.,* 566 A.2d 716 (D.C. App. 1989) | 211 |
| *Carter v. Kamaras,* 430 A.2d 1058 (R.I. 1981) | 258, 263 |

*Central Fidelity Bank v. McLellan,* 563 A.2d 358 (D.C. App. 1989) ..... 211
*Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co.*, 76 F.3d 114, 116 (7th Cir. 1996) ..... 351
*Chase v. Gilbert,* 499 A.2d 1203 (D.C. 1985) ..... 310, 345
*Chrysler Corp. v. Brown,* 441 U.S. 281 (1979) ..... 219
*Chubb Integrated Systems, Ltd., v. Nat'l Bank of Washington,* 103 F.R.D. 52 (D.D.C. 1984) ..... 256
*City of Cleveland v. Cleveland Elec. Illuminating Co.,* 440 F. Supp. 193 (N.D. Ohio 1976), aff'd mem., 573 F.2d 1310 (6th Cir. 1977) ..... 309
*City of Epaso v. Salas-Porras,* 6 F. Supp. 2d 616 (W.D.Texas 1998) ..... 309
*Cloutterbuck v. Cloutterbuck*, 556 A.2d 1082 (D.C. 1989) ..... 373
*Cohen v. Graham,* 722 P.2d 1388 (Wash. 1986) ..... 291
*Cohen v. Lord, Day and Lord*, 550 NE 2d 410 (N.Y. 1989) ..... 325, 368
*Cohen v. Radio-Electronics Offices Union,* 645 A.2d 1248 (N.J. Super. 1994) ..... 264
*Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343 (1985) ..... 230
*Committee on Legal Ethics v. Pritz*, 416 S.E. 2d 720 (1992) ..... 339
*Comm. on Legal Ethics of the West Virginia State Bar v. Smith,* 194 S.E.2d 665 (W.Va. 1973) ..... 260
*Connelly v. Swick & Shapiro, P.C., "49 A.2d 1264, 1268 (D.C. 2000)* ..... 378
*Corrigan v. Armstrong, Teasdale, Schlafy, Davis & Dicus,* 824 S.W.2d 92 (Mo. Ct. App. 1992) ..... 283,333
*Costello v. Burskin,* 395 NYS2d. 116 (App. 1977) ..... 317
*Costello v. Ten Eyck,* 49 N.W. 152 (Mich. 1891) ..... 256
*Crabtree v. Academy Life Ins.,* 878 F. Supp. 727 (E.D. Pa. 1995) ..... 317
*Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) ..... 363
*Culebras Enterprises Corp. v. Riverios-Rios,* 846 F.2d 94 (1st Cir. 1988) ..... 228
*Cunetto House of Pasta v. Tuma,* 689 S.W.2d 690 (Mo. Ct. App. 1985) ..... 277
*Curley v. Cumberland Farms, Inc.,* 134 F.R.D. 77 (N.D.J. 1991) ..... 258
*Dalrymple v. National Bank & Trust Co. of Traverse City,* 615 F. Supp. 979 (W.D. Mich. 1985) ..... 216
*Darwin Nat'l Assurance Co. v. Hellyer*, 2011 U.S. Dist. LEXIS 60592 (N.D. Ill. June 7, 2011) (No 10 C 50224) ..... 361
*Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11-cv-632, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) ..... 371
*Dean v. Dean,* 607 So.2d 494 (Fla. Dist. Ct. App.) ..... 242
*Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985) ..... 211
*Decato's Case*, 379 A. 2d 825 (N.H. 1977) ..... 339
*Denbury v. Parker Chapin Flattau & Klimpl,* 624 N.E. 2d 995 (N.Y. 1993) ..... 368
*Derrickson v. Derrickson,* 541 A.2d 149 (D.C.C.A. 1988) ..... 272, 346, 349
*District Cablevision Limited Partnership v. Bassin,* 828 A.2d 714 (D.C. 2005) ..... 368
*Doe v. Federal Grievance Committee,* 847 F.2d 57 (2d Cir. 1988) ..... 246
*Dolan v. Hickey, 385 Mass. 234,* 431 N.E. 2d 229 (1982) ..... 321
*Douglas v. United States*, 2011 WL 335861 at *1 (S.D.N.Y. Jan 28, 2011) ..... 364
*Dugan v. Dugan,* 457 A.2d 1 (N.J. 1983) ..... 294
*Duggan v. Keto,* 554 A.2d 1126 (D.C. App. 1989) ..... 211
*Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1248 (D.C. 2000) ..... 344
*Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001) ..... 330
*Dwyer v. Jung,* 336 A.2d 498 (N.J. Super. Ct. 1975) ..... 291
*Eastland v. United States Serviceman's Fund,* 421 U.S. 491 (1975) ..... 288
*Eckhaus v. Alfa-Laval, Inc.*, 764 F. Supp. 34 (S.D.N.Y. 1991) ..... 363
*Egan v. McNamara,* 467 A.2d 733 (D.C. App. 1983) ..... 216
*Elliott v. McFarland,* 165 Cal. App. 3d 562 (App. 1985) ..... 317
*Emmons v. State Bar of California,* 6 Cal. App. 3d 565, 86 Cal. Rptr. 367 (Ct App. 3d Dist., 1970) ..... 307, 329
*Emmons, Williams, Mires & Leech v. California State Bar*, 6 Cal. App. 3d 565, 573-74, 86 Cal. Rptr. 367, 372 (Ct. App. 1970) ..... 351
*Eureka Inv. Corp., N.V. v. Chicago Title Ins. Co.*, 743 F.2d 932 (D.C. Cir. 1984) ..... 327
*Evans v. Atwood,* 177 F.R.D. 1 (D.D.C. 1997) ..... 312
*Evans v. Jeff D,* 475 U.S. 717 (1986) ..... 288, 351
*Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989) ..... 333
*Feldman v. Minars,* 658 N.Y.S. 2d 614 (App. Div. 1997) ..... 368

*F.W. Bolgiano & Co. v. Brown,* 333 A.2d 674 (D.C. App. 1975) ..... 211
*Fidelity Nat'l Title Ins. Co. v. Intercountry Nat'l Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005) ..... 337
*Financial General Bankshares, Inc. v. Metzger,* 680 F.2d 768 (D.C. Cir. 1982*)* ..... 216
*First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F. R.D. 557 (S.D.N.Y. 1986)..... 364
*Fisher v. Klingenberger,* 576 N.Y.S. 2d 476 (Rochester City Ct. 1991) ..... 256
*Fisons Corp. v. Atochem North Amer., Inc.,* 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990) ..... 309
*Flannery v. Prentice*, 28 P.3d 860, 862 (Cal. 2001) ..... 351
*Florida Ins. Guaranty Ass'n, Inc. v. Carey Canada, Inc.,* 749 F. Supp. 255 (S.D. Fla. 1990) ..... 309, 317
*Francis v. Bartlett,* 121 So.2d 18 (La. App. 1960) ..... 317
*Frey v. Dep't of Health and Human Serv.,* 106 F.R.D. 32 (E.D.N.Y. 1985) ..... 258
*Garcia v. Zenith Electronic Corp.,* 58 F.3d 1171 (7th Cir. 1995) ..... 314
*Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3, (D.N.J. Mar. 25, 2013) ..... 371
*General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Calif. 1994) ..... 363
*General Mill Supply Co. v. SCA Services,* 697 F. Supp. 784 (S.D.N.Y. 1988) ..... 228
*General Motors v. City of N.Y.,* 501 F.2d 639 (2d Cir. 1974) ..... 313
*Gibson v. Johnson,* 35 Ore. App. 493 (1978) ..... 240
*Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981) ..... 305, 328
*Goldberg v. Frye,* 266 Cal. Rptr. 483 (Ct. App. 1990) ..... 259
*Gould, Inc. v. Mitsui Min. & Smelting Co.,* 738 F. Supp. 1121 (N.D. Ohio 1990) ..... 272
*Granada Corp. v. First Court of Appeals,* 844 S.W.2d 223 (Tex. 1992) ..... 256
*Graubard, Mollen, Dannett & Horowitz v. Moskovitz,* 653 N.W.2d 1179 (N.Y. 1995) ..... 273
*Gray v. Martin,* 663 P.2d 1285 (Ore. 1983) ..... 241, 325
*Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) ..... 360
*Griva v. Davison,* 637 A.2d 830 (D.C. 1994) ..... 301, 309, 317, 327, 367
*Griva v. Davison,* 92-CV-992 (D.C. Ct. App. Feb 10, 1994), 122 Wash. D.L. Rep. 441. pet. reh. pending ..... 248
*GTE Prods. Corp. v. Steward,* 610 N.E.2d 892 (1993) ..... 242
*Gulf Oil v. Bernard*, 452 U.S. 89 (1981) ..... 302
*Gwin v. National Marine Engineers Beneficial Ass'n,* 966 F. Supp. 4 (D.D.C. 1997), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998) ..... 314
*Hanntz v. Shiley, Inc.,* 766 F. Supp. 258 (D.N.J. 1991) ..... 258
*Harrison v. Mississippi Bar*, 637So2d 204 (Miss. 1994) ..... 334
*Harte Biltmore Ltd. v. First Pennsylvania Bank,* 655 F. Supp. 419 (S.D. Fla. 1987) ..... 272
*Hasco, Inc. v. Roche,* 700 N.E. 2d 768 (Ill. App. 1998) ..... 309
*Hartford Accident & Indemnity Co. v. RJR Nabisco, Inc.,* 721 F. Supp. 534 (S.D.N.Y. 1989) ..... 272
*H.B.A. Management Inc. v. Estate of Schwartz,* 693 So.2d 541 (Fla. 1997) ..... 287
*Holland v. United States,* 348 U.S. 121 (1954) ..... 214
*Hopkins v. Oceans,* 637 A.2d 424 (D.C. 1993) ..... 259
*Horning v. District of Columbia,* 254 U.S. 135 (1920) ..... 320
*Howard v. Babcock,* 863 P.2d 150 (Calif. 1993) ..... 368
*Ibanez v. Florida Dept. of Business and Professional Regulation,* 512 U.S. 136 (1994) ..... 249, 332
*Illinois Mun. League Risk Mgt. v. Siebert,* 585 N.E.2d 1130 (Ill. App. 4th Dist. 1992) ..... 253
*In re Abrams,* 687 A.2d 6 (DC 1997) ..... 323
*In re Admonition,* 533 N.W.2d 852 (Minn. 1995) ..... 317
*In re Advisory Opinion 544,* 500 A.2d 609 (N.J. 1986) ..... 223
*In re Anonymous,* 379 S.E. 2d 723 (SC 1989) ..... 317
*In re Anonymous Member of the South Carolina Bar,* 367 S.E.2d 17 (SC 1998) ..... 322
*In re Appert,* 315 N.W.2d 204 (Minn. 1981) ..... 261
*In re Austern,* 524 A.2d 680 (D.C. App. 1987) ..... 213
*In re Banks,* 283 Or. 459, 584 P.2d 284 (1978) ..... 216
*In re Berlant,* 328 A.2d 471 (Pa. 1974), cert. denied, 421 U.S. 964 (1975) ..... 261
*In re Blackwelder,* 615 N.E.2d 106 (Ind. 1993) ..... 260
*In re Boone,* 83 F. 944 (N.D. Calif. 1897) ..... 309
*In re Brown*, 930 A.2d 249 (D.C. 2007), *aff 'g* 2006 D.C. Super. LEXIS 5 (D.C. Super. Ct.Feb. 22, 2006) (Adm. No. 1274-03) ..... 361

*In re Brownstein,* 602 P.2d 655 (Or. 1979) ..... 216
*In re Cassidy,* 432 N.E. 2d 274 (1982) ..... 251
*In re Christoff*, 690 N.E. 2d 1135 (Ind. 1997) ..... 358
*In re Coe, 731 P.2d 1028 (Or. 1987)* ..... 266
*In re Cooperman,* 611 N.Y.S.2d 465 (Ct. App. 1994) ..... 264
*In re Del-Val Financial Corp. Securities Litigation,* 158 F.R.D. 270 (S.D.N.Y. 1994) ..... 279
*In re E.D.R.,* 772 A.2d 1156 (D.C. 2001) ..... 366
*In re Ethics Advisory Panel Op. 92-1,* 627 A.2d 317 (R.I. 1993) ..... 246
*In re Evans,* 902 A.2d 56 (D.C. 2006) ..... 367
*In re First Escrow, Inc., In re Best Escrow, Inc.,* 840 S.W. 2d 839 (1992) ..... 247
*In re Gabapentin Patent Litig.* 407 F. Supp. 2d 607 (D.N.J. 2005), *reconsideration denied*, 432 F. Supp. 2d 461 (D.N.J. 2006) ..... 349
*In re Gatti,* 8 P3d 966 (Or 2000) ..... 323
*In re Golden*, 496 S.E.2d 619 (S.C. 1998) ..... 358
*In re Gonzalez,* 773 A.2d 1026 (D.C. 2001) ..... 311, 364
*In Re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)) ..... 346
*In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)) ..... 349
*In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F.Supp. 2d 270 (S.D.N.Y. 2001) ..... 344
*In re Gregory,* 574 A.2d 265 (D.C. 1990) ..... 261
*In re Grievance Committee of U.S. District Court,* 847 F.2d 57 (2d Cir. 1988) ..... 213
*In re Grievance Proceeding,* 2002 WL 31106389 (D. Conn. 2002) ..... 331
*In re Grand Jury Proceedings,* 727 F.2d 1352 (4th Cir. 1984) ..... 256
*In re Grand Jury Proceedings of Berkley & Co.,* 466 F. Supp. 863 (D. Minn. 1979) ..... 318
*In re Grand Jury Proceedings (Robin v. U.S.),* 896 F.2d 1267 (11th Cir. 1990) ..... 214
*In re Grand Jury Proceedings (U.S. v. Jones),* 517 F.2d 666 (5th Cir. 1975) ..... 214
*In re Grand Jury Investigation 83-2-35,* 723 F.2d 447 (6th Cir. 1983) ..... 214
*In re Haar*, 667 A.2d 1350 (D.C. 1995) ..... 351
*In re Hager*, 812 A.2d 904 (D.C. 2004) ..... 335
*In re Hathaway Ranch Partnership,* 116 B.R. 208 (Bankr. C.D. Cal. 1990) ..... 264
*In re Himmel,* 533 N.E.2d 70 (Ill. 1989) ..... 246
*In re Jackson*, 650 A.2d 675, 677 (D.C. 1994) ..... 344
*In re James,* 452 A.2d 163 (D.C. App. 1982) ..... 248, 253, 257, 309, 317
*In re James Finkelstein*, 901 F.2d 1560 (11th Cir. 1990) ..... 331
*In re Karr*, 722 A.2d 16 (1998) ..... 332
*In re Keiler*, 380 A.2d 119, 126 (D.C. 1977) ..... 358
*In re L.H.,* 634 A.2d 1230 (1993) ..... 252
*In re Lieber,* 442 A.2d 153 (D.C. 1982) ..... 314, 370
*In re Lindsay*, 158 F.3d 1263, *cert. denied*, 525 U.S. 996 (1998) ..... 346
*In re Mance,* 980 A.2d 1196 (D.C. 2009*)* ..... 355, 375, 378
*In re Martin, 67 A.3d 1032, 1041 (D.C. 2013)* ..... 378
*In re Mason, 736 A.2d 1019, 1023 (D.C. 1999)* ..... 358
*In re McKennett,* 349, N.W.2d 29 (N.D. 1984) ..... 266
*In re Opinion No. 24*, 128 N.J. 114, 607 A.2d 962 (1992) ..... 304
*In re Overboe,* 745 N.W. 2d 852 (Minn. 2008) ..... 368
*In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001) ..... 337
*In re Ponds*, 888 A.2d 234 (D.C. 2005) ..... 364
*In re Public Defenders Service*, 831 A.2d 890 (D.C. 2003) ..... 364
*In re RMJ,* 455 U.S. 191 (1982) ..... 332
*In re Ryan*, 670 A.2d 375, 379 (D.C. 1996) ..... 374
*In re Sather,* 3 P.3d 403 (Colo. 2000*)* ..... 355, 378
*In re Schneider,* 710 N.E.2d 178 (Ind. 1999) ..... 332
*In Re Sealed Case*, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982)) ..... 346
*In re Sealed Case,* 877 F.2d 976 (D.C. Cir. 1989) ..... 256, 318
*In Re. Sears Holdings Mgmt. Corp.,* FTC No. C-4264 (Aug. 31, 2009) ..... 371
*In re Semel,* 411 F.2d 195 (3d Cir. 1969) ..... 214
*In re Shannon,* 638 P.2d 482 (Or. 1982) ..... 332
*In re Shapiro,* 656 N.Y. S.2d 80 (App. Div. 1996) ..... 332
*In re Shell Oil Ref.,* 143 F.R.D. 105 (E.D. La. 1992) ..... 242

*In re Shorter,* 570 A.2d 760 (D.C. App. 1990) ..... 256
*In re Sofaer,* 728 A.2d 625 (D.C. 1999) ..... 297, 309, 313, 343
*In re Solerwitz*, 575 A.2d 287, 292 (D.C. 1990) ..... 358
*In re Thai*, 987 A.2d 428, 430 (2009) ..... 357, 372
*In re Thelen LLP,* 20 N.E. 3d 264 (N.Y. 2014) ..... 368
*In re United Workers of America Employee Benefit Litigation,* 156 F.R.D. 507 (D.D.C. 1984) ..... 256
*In re Vincenti*, 704 A.2d 927 (N.J. 1998) ..... 358
*In re Vitamin Antitrust Litigation*, 120 F. Supp. 2d 58, 68 (D.C. 2000) ..... 358
*In re Wade,* 526 A.2d 936 (D.C. 1987) ..... 311
*In re White,* 815 P.2d 1257 (Or 1991) ..... 323
*In re Wingspread Corp.,* 152 B.R. 861 (Bankr. S.D.N.Y. 1993) ..... 272
*In the Matter of A.S. and J.S.,* 118 D.W.L.R. 2221 (Super. Ct. Oct. 11, 1990) ..... 252
*Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Corp.,* 953 F.2d 1004 (5th Cir. 1992) ..... 246
*International Electronics v. Flanzer,* 527 F.2d 1288 (2d Cir. 1975) ..... 228
*Interstate Properties v. Pyramid Co. of Utica,* 547 F. Supp. 178 (S.D.N.Y. 1982) ..... 309, 317, 367
*Iowa Supreme Court Bd. of Prof 'l Ethics & Conduct v. Ronwin*. 557 N.W.2d 515 (Iowa 1996) ..... 358
*Jacob v. Norris, McLaughlin & Marcus,* 607 A.2d 142 (N.J. 1992) ..... 368
*Jacobson v. Sassower,* 474 N.Y.S. 2d 107 (1983) ..... 264
*Jacoby v. State Bar,* 562 P.2d 1326 (Cal. 1977) ..... 332
*Jeffer v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 703 A.2d 316, 322 (N.J. Super. 1997) ..... 361
*Jesse v. Danforth,* 486 N.W. 2d 63 (Wisc. 1992) ..... 367
*Johnson v. McCullough,* 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam) ..... 371
*Jordan v. United States Dep't of Justice,* 691 F.2d 514, 516 n. 14 (D.C. Cir. 1982) ..... 351
*Jurney v. MacCracken,* 294 U.S. 125 (1935) ..... 288
*Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) ..... 363
*Kala v. Aluminum Smelting & Refining Co., Inc.,* 688 N.E.2d 258 (1998) ..... 279
*Kapco Mfg. Co. v. C & O Enter.*, 637 F. Supp. 1231 (N.D. Ill. 1985) ..... 285
*Kean v. Stone,* 966 F.2d 119 (3rd Cir. 1992) ..... 329
*Kesselhaut v. United States,* 555 F.2d 791 (Ct. Cl. 1977) ..... 279
*Kin Cheung Wong v. Kennedy,* 853 F. Supp. 73 (E.D.N.Y. 1994) ..... 264
*Koger v. Weber,* 455 N.Y.S. 2d 935 (N.Y. Sup. Ct. 1982) ..... 258
*Kolmick v. Kolmick,* 518 N.Y.S.2d 413 (App. 1987) ..... 317
*Kurtenbach v. Tekippe,* 260 N.W. 53 (Iowa 1977) ..... 316
*Laker Airways Limited v. Pan American World Airways*, 103 F.R.D. 22 (D.D.C. 1984) ..... 343
*LaSalle Nat'l Bank v. County of Lake,* 703 F.2d 252 (7th Cir. 1983) ..... 279
*Lawson v. Nevada Power Co.,* 739 F. Supp. 23 (D.D.C. 1990) ..... 258
*Lenz v. Universal Music Corp.*, No. 5:07-CV-03783 JF (PVT) (N.D. Cal. Nov. 17, 2010) ..... 371
*Lehr v. Robertson,* 463 U.S. 248 (1983) ..... 366
*Leon v. Martinez,* N.Y. Ct. App., 103 (7/7/94) ..... 252
*Lerner v. Laufer,* 819 A.2d 471 (N.J. Super. Ct. App. Div. 2003) ..... 330
*Lester v. Allied Concrete Co.*, 83 Va. Cir. 308 (2011), 285 Va. 295 (2013) ..... 371
*Lewis v. S.S. Baune,* 534 F.2d 1115 (3d Cir. 1976) ..... 258
*Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999) ..... 363
*Lipin v. Bender,* 644 N.E. 2d 1300 (N.Y. 1994) ..... 256
*Loporcaro v. City of New York,* 950 N.Y.S.2d 723 (Sup. Ct., Richmond Cty. 2012) (unpublished table decision), 2012 WL 1231021 ..... 371
*Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D. Md. 2007) (Grimm, M.J.) ..... 371
*Louisiana State Bar Ass'n v. Edwins,* 329 So. 2d 437 (La. 1976) ..... 354
*Louisiana State Bar Ass'n v. St. Romain,* 560 So.2d 820 (La. 1990) ..... 261
*Lustig v. Horn,* 732 N.E. 2d 613 (Ill. App. 2000) ..... 310
*MacArthur v. Bank of New York,* 524 F. Supp. 1205 (S.D.N.Y. 1981) ..... 228
*Maddox v. Burlingame,* 517 N.W.2d 816 (Mich. App. 1994) ..... 317
*Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012) ..... 371
*Manoir-Electroalloys Corp. v. Amalloy Corp.,* 711 F. Supp. 188 (D.N.J. 1989) ..... 272
*Marketti v. Fitzsimmons,* 373 F. Supp. 637 (W.D. Wis. 1974) ..... 309
*Marre v. United States*, 117 F.3d 297, 304 (5th Cir. 1997) ..... 351
*Matter of Nelson,* 327 N.W.2d 576 (Minn. 1982) ..... 236

*Matter of Rosales,* Bd. of Immigration App. Interim Decision 3064 (Apr. 21, 1988) ..... 266
*Matter of Wiggins,* 359 A.2d 579 (D.C. 1976) ..... 263
*Mayer v. Oil Field Systems Corp.,* 803 F.2d 749 (2d Cir. 1986) ..... 256
*McGuire v. Wilson,* 735 F. Supp. 83 (S.D.N.Y. 1990) ..... 317
*McMillen v. Hummingbird Speedway, Inc.*, No. 113-2010 CD (P.C., Jefferson Cty. Sept. 9, 2010) ..... 371
*Mendenhall v. Barber-Greene Co.,* 531 F. Supp. 951 (N.D. Ill. 1982) ..... 256
*Middlesex County Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423 (1982) ..... 311
*Minebea Co. v. Papst*, 228 F.R.D. 13, 15 (D.D.C. 2005) ..... 349
*Minnesota Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP,* 2010 U.S. Dist. LEXIS 122836, *28 (E.D. Va. Nov. 18, 2010) (Civil No. 1:08-CV-1020) ..... 361
*Mississippi Bar v. Shaw*, 919 So.2d 51 (Miss. 2005) ..... 354
*Mississippi Bar v. Attorney HH,* 671 So. 2d 1293 (Miss. 1996) ..... 354
*Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985) ..... 211
*MMR/Wallace Power & Industrial v. Thames Association*, 764 F. Supp. 712 (D. Conn. 1991) ..... 285
*Monaghan v. S2S 33 Associates, L.P.,* 1994 WL 623185 (S.D.N.Y. Nov. 9, 1994) ..... 272
*Moyer v. 1330 Nineteenth Street Corp.,* 597 F. Supp. 14 (D.D.C. 1984) ..... 228
*Munk v. Goldane National Corp.,* 697 F. Supp. 784 (S.D.N.Y. 1988) ..... 228
*NLRB v. Harvey,* 349 F.2d 900 (4th Cir. 1965) ..... 214
*Nakasian v. Incontrade Inc.,* 409 F. Supp. 1220 (S.D.N.Y. 1976) ..... 236
*National Clients Council v. Legal Services Corp.,* 617 F. Supp. 480 (D.D.C. 1985) ..... 223
*National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996) ..... 349
*National Senior Citizens Law Center v. Legal Services Corp.,* 751 F.2d 1391 (D.C. Cir. 1985) ..... 223
*National Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848, 853-54 (D.C. Cir. 1981) ..... 351
*Nelson v. Green Builders, Inc.,* 823 F. Supp. 1439 (E.D. Wis. 1993) ..... 279
*Nelson v. Nationwide Mortgage Corp.,* 659 F. Supp. 611 (D.D.C 1987) ..... 319
*Nercessian v. Homasian Carpet Enterprises, Inc.,* 458 N.E. 2d 822 (1983) ..... 277
*Newman v. Akman,* 715 A.2d 127 (D.C. 1998) ..... 291, 325, 335, 368
*Nix v. Whiteside,* 475 U.S. 157 (1986) ..... 320
*Norell, Inc. v. Federated Department Stores, Inc.,* 450 F. Supp. 127 (S.D.N.Y. 1978) ..... 228
*North Star Hotels Corp. v. Mid-City Hotel Assocs.,* 118 F.R.D. 109 (D. Minn. 1987) ..... 305
*O'Brien v. Stolt-Nielson Transp. Group, Ltd.*, 838 A.2d 1076 (Conn. Super. 2003) ..... 363
*O'Hara v. Ahlgren, Blumenfeld and Kempster,* 537 N.E.2d 730 (Ill. 1989) ..... 294
*O'Neil v. Bergan,* 452 A.2d 337 (D.C. 1982) ..... 258
*Oklahoma Bar Ass'n v. Leigh*, 914 P.2d 661 (Okla. 1996) ..... 332
*Oliver v. Board of Governors,* 779 S.W.2d 212 (Ky. 1989) ..... 284
*Pace v. State,* 368 So.2d 340 (Fla. 1979) ..... 261
*Papanicolaou v. Chase Manhattan Bank, N.A.,* 720 F. Supp. 1080 (S.D.N.Y. 1989) ..... 258
*Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011) ..... 371
*Pearson v. Singing River Medical Center Inc.,* 757 F. Supp. 768 (S.D. Mass. 1991) ..... 272
*Peel v. Attorney Registration and Disciplinary Comm'n,* 110 S. Ct. 2281 (1990) ..... 249
*Peel v. Attorney Registration and Disciplinary Comm'n,* 496 U.S. 91 (1990) ..... 332
*Penn Mutual Life Ins. Co. v. Cleveland Mall Associates,* 841 F. Supp. 815 (E.D. Tenn. 1993) ..... 272
*Penwalt Corp. v. Plough, Inc.,* 85 F.R.D. 264 (D. Del. 1980) ..... 272
*People v. Bennett,* 810 P.2d 661 (Colo. 1991) ..... 260
*People v. Lowery,* 366 N.E.2d 155 (Ill. App. 1977) ..... 234
*People v. Moffitt,* 801 P.2d 1197 (Colo. 1990) ..... 260
*People v. Williams,* 25 Cal. 4th 441 P.3d 1209 (2001) ..... 320
*People ex. Rel. Gallagher v. Hertz*, 608 P.2d 335 (Colo. 1979) ..... 339
*Peterson v. Kennedy,* 771 F.2d 1244 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986) ..... 314
*Picker Intl., Inc. v. Varian Assoc., Inc.,* 869 F.2d 578 (Ohio 1989) ..... 272
*Poe v. Noble,* 525 A.2d 190 (D.C. 1987) ..... 259
*Polycast Technology Corp. v. Uniroyal, Inc.,* 129 F.R.D. 621 (S.D.N.Y. 1990) ..... 258
*Rad Services v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 275-77 (3d Cir. 1986) ..... 358
*Rand v. CF Indus., Inc.*, 797 F. Supp. 643 (N.D. Ill. 1992) ..... 363
*Raphael v. Shapiro,* 587 N.Y.S.2d 68 (N.Y. Sup. Ct. 1992) ..... 294
*Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *cert. granted*, 174 L. Ed. 2d 631, 2009 U.S. LEXIS 5148, 78 U.S.L.W. 3169 (No. 08-1322) (Sept. 30, 2009) ..... 351

*Ready v. United States*, 620 A.2d. 233 (D.C. 1993) ..... 364
*Reale v. U.S.,* 573 A.2d 13 (D.C. 1990) ..... 320
*Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008) ..... 351
*Renouf v. Multicultural Broadcasting,* 1994 WL 499060 (D.D.C. 1994) ..... 310
*Resolution Trust Corp. v. First American Bank,* 4: 94-CV–83 (W.D. Mich. 1994) ..... 256
*Richers v. Marsh & McLennan Group Associates,* 459 N.W.2d 478 (Iowa 1990) ..... 255
*Robinson v. Nussbaum,* 11 F. Supp. 2d 1 (D.D.C. 1997) ..... 368
*Robinson v. Jones Lang LaSalle Ams., Inc.*, No. 3:12-cv-00127-PK (D. Or. Aug. 29, 2012) ..... 371
*Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977) ..... 351
*Rodriguez de Quijas v. Shearson American Express, Inc.,* 109 S. Ct. 1917 (1989) ..... 211
*Rosman v. Shapiro, 653 F. Supp. 1441 (S.D.N.Y. 1987)* ..... 216
*Ross v. Creighton Univ., 740 F. Supp. 1319 (N.D. Ill. 1990)* ..... 311
*Rutkoski v. Hollis, 600 N.E.2d 1284 (Ill. App. Ct. 1992)* ..... 259
*Sage Realty Corp. v. Prokauer Rose Goetz & Mendelsohn LLP,* 91 N.Y. 2d 30, 689 N.E. 2d 879, 666 N.Y.S. 2d 985 (N.Y. 1997) ..... 333
*Saltzberg v. Fishman,* 462 N.E. 2d 901 (Ill. App. 1984) ..... 277
*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.,* 208 Cal. Rptr. 494 (1984) ..... 253
*San Fratello v. United States*, 340 F.2d 560, 564 (4th Cir. 1965) ..... 358
*Schiessle v. Stephens,* 717 F.2d 417 (7th Cir. 1983) ..... 279
*Scott v. Illinois*, 440 U.S. 367 (1979) ..... 373
*Sealed Party v. Sealed Party* 2006 U.S. Dist. LEXIS 28393 (S.D. Tex 2006) ..... 335
*Shainis v. Baraff, Koerner, Olender & Hochberg,* P.C., 1994 U.S. Dist. Lexis 21971 (Civil Action No. 93-2253 (NHJ)) (July 18, 1994) ..... 368
*Shea v. Virginia State Bar,* 236 Va. 442, 374 S.E.2d 63 (Va. 1988) ..... 354
*Shearson American Express, Inc. v. McMahon,* 482 U.S. 200 (1987) ..... 211
*Sherrod v. Furniture Ctr.,* 769 F. Supp. 1021 (W.D. Tenn. 1991) ..... 258
*Shockley v. State,* 565 A.2d 1373 (Del. 1989) ..... 234
*Sobol v. Dist. Ct. Arapahoe Cty.,* 619 P.2d 765 (Colo. 1980) ..... 317
*Somers v. Statewide Grievance Comm.*, 245 Conn. 277 (1998) ..... 339
*Sparf v. U.S.,* 156 U.S. 51 (1895) ..... 320
*Speedway v. NASCAR, Inc.*, 2006 U.S. Dist. LEXIS 92028(E.D. Ky. Dec 18, 2006) ..... 341
*Spencer v. Steinman,* 179 F.R.D. 484 (E.D. Pa. 1998) ..... 287
*Spratley v. State Farm Mut. Automobile Ins. Co.*, 78 P.3d 603 (Utah 2003) ..... 363
*S.S v. D.M.,* 597 A.2d 870 (D.C. 1991) ..... 252, 295, 366
*State v. Bennefield,* 567 A.2d 863 (Det. 1989) ..... 320
*State v. Doe, 101 Ohio St. 3d 170,* 803 N.E. 2d 777 (2004) ..... 324
*State Bar of Texas v. Faubion,* 821 S.W. 2d 203 (Tex. 1991) ..... 322
*Steinway v. Bolden,* 460 N.W.2d 306 (Mich. Ct. App. 1990) ..... 259
*Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009) ..... 351
*Stevens v. Rooks, Pitts and Poust,* 682. N.E. 2d 1125 (Ill. App. 1997) ..... 368
*Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994) ..... 363
*Street v. Hedgepath*, 607 A.2d 1238, 1246 (D.C. 1992) ..... 360
*Strickland v. Washington*, 466, U.S. 688 (1984) ..... 364
*Swidler & Berlin v. United States*, 118 S. Ct. 2081, 524 U.S. 399 (1998) ..... 299, 324
*T.C. Theatre Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953) ..... 343
*T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.,* 216 F.2d 920 (2d Cir. 1954) ..... 237, 312
*Tompkins v. Detroit Metro.* Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ..... 371
*Tillotson v. Boughner,* 350 F.2d 663 (7th Cir. 1965) ..... 214
*Tinney v. Duckett,* 141 A.2d 193 (D.C. 1958) ..... 317
*Togstad v. Vesely, Otto, Millerd, Keefe,* 291 N.W.2d 686 (Minn. 1980) ..... 316, 370
*Tompkins v. Detroit Metro.* Airport, 278 F.R.D. 387, 388 (E.D. Mich. 2012) ..... 371
*Torres v. Lexington Ins.*, 237 F.R.D. 533 (D.P.R. 2006) ..... 371
Trotter v. Nelson, 684 N.E. 2d 1150 (Ind. 1997) ..... 322
*Turner v. Secretary of the Air Force*, 944 F.2d 804, 808 (11th Cir. 1991) ..... 351
*Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334 (D.C. 2000) ..... 363
*Unified Sewerage Agency v. Jelco, Inc.,* 646 F.2d 1339 (9th Cir. 1981) ..... 272, 309, 317
*United Paper Workers v. Misco, Inc.,* 108 S. Ct. 364 (1987) ..... 211

*United States v. Andrews,* 21 CMA 165 (1972) ..... 313
*United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977) ..... 288
*United States v. BDO Seidman*, LLP, 492 F.3d 806, 815 (7th Cir. 2007) ..... 349
*United States v. Balistriere,* 606 F.2d 216 (7th Cir. 1979) ..... 262
*United States v. Batchelor,* 484 F. Supp. 812 (E.D. Pa. 1980) ..... 258
*United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015) ..... 371
*United States v. Braxton*, 926 F.2d 1180 (D.C. Cir. 1990) ..... 320
*United States v. Calvin,* 29 F.3d 1299 (5th Cir. 1994) ..... 320
*United States v. Citron,* 783 F.2d 307 (2d Cir. 1986) ..... 214
*United States v. Cooper,* 876 F.2d 1192 (5th Cir. 1989) ..... 262
*United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) ..... 358
*United States v. Craig, 907 F.2d 653 (7th Cir. 1990)* ..... 262
*United States v. Fenlag, 434 F.2d 596 (6th Cir. 1970)* ..... 214
*United States v. Galanis, 685 F. Supp. 901 (S.D.N.Y. 1988)* ..... 258
*United States v. Hsia, 81 F.Supp. 2d 7, 16 (D.D.C. 2000)* ..... 349
*United States v. Judge, 625 F. Supp. 901 (D. Hawaii 1986)* ..... 237
*United States v. Keogh, 391 F.2d 138 (2d Cir. 1968)* ..... 262
*United States v. Keystone Sanitation Company, 903 F. Supp. 803 (M.D. Pa. 1995)* ..... 281
*United States v. Maxwell,* 43 Fed. R. Serv. 24 (U.S.A.F. Ct. Crim. App. 1995) ..... 281
*United States v. Mills,* 430 F.2d 526 (8th Cir. 1970) ..... 262
*United States v. Morgan,* 364 U.S. 502 (1954) ..... 262
*United States v. Morris,* 26 F. Cas. 1323 (C.C.D. Mass 1851) ..... 320
*United States v. Nguyen,* 56 MJ 252 (C.A.A.F. 2001) ..... 313
*United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27 (D.D.C. 2004) ..... 343
*United States v. Pierre,* 974 F.2d 1355 (D.C. Cir. 1992) ..... 320
*United States v. Sams,* 104 F.3d 1407 (D.C. Cir. 1996) ..... 320
*United States v. Stepney*, 246 F.Supp. 2d 1069, 1085 (N.D. Cal. 2003) ..... 349
*United States v. Tucker*, 267 F.2d 212, 215 (3d Cir. 1959) ..... 358
*United States v. Washington,* 705 F.2d 489 (D.C. Cir. 1983) ..... 320
*United States v. Western Electric Co.,* 1990 WL 39129 ..... 287
*United States v. Young,* 470 U.S. 1 (1984) ..... 320
*United States ex rel. Wilcox v. Johnson,* 555 F.2d 115 (3d Cir. 1977) ..... 234
*U.S. Football League v. National Football League,* 605 F. Supp. 1448 (S.D.N.Y. 1985) ..... 212
*United States Industries, Inc. v. Goldman,* 421 F. Supp. 7 (S.D.N.Y. 1976) ..... 216, 259
*University Patents, Inc. v. Kligman,* 737 F. Supp. 325 (E.D. Pa. 1990) ..... 258
*Upjohn Co. v. United States,* 449 U.S. 383 (1981) ..... 269
*Vaca v. Sipes,* 386 U.S. 171 (1967) ..... 314
*Valassis v. Samelson,* 143 F.R.D. 118 (E.D. Mich. 1992) ..... 258
*Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009) ..... 363
*Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) ..... 351
*W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757 (1983) ..... 211
*Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873 (D.C. 1998) ..... 363
*Watson v. Ameredes,* C.A. 03-A-01-9704-CV-00129, 1997 Tenn. App. Lexis 884 (Ct. App. Dec. 10, 1997) ..... 279
*Watts v. United States,* 362 A.2d 706 (D.C. 1976) ..... 320
*Wayland v. Shore Lobster & Shrimp Corp.,* 537 F. Supp. 1220 (S.D.N.Y. 1982) ..... 216, 259
*Westinghouse Electric Corp. v. Gulf Oil Corp.,* 588 F.2d 221 (7th Cir. 1978) ..... 237, 343
*Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978) ..... 269, 272, 305, 328
*Wichita Land & Cattle Co. v. American Fed. Bank,* 148 F.R.D. 456 (D.D.C. 1992) ..... 256, 318
*Williams v. Sprint/United Mgt.*, 230 F.R.D. 640 (D. Kan 2005) ..... 341
*Williams v. TWA,* 588 F. Supp. 1037 (W.D. Mo. 1984) ..... 285
*Williamson v. Council of North Carolina Bar,* 266 S.E.2d 391 (N.C. 1980) ..... 238, 239, 246
*Willy v. Administrative Review Bd., U.S. Dep't of Labor*, 423 F.3d 483 (5th Cir. 2005) ..... 363
*Woods v. Covington Bank,* 537 F.2d 804 (5th Cir. 1976) ..... 313
*Worldspan, L.P. v. Sabre Group Holdings, Inc.,* 5 F. Supp. 2d 1356 (N.D. Ga. 1998) ..... 309
*Wright v. Group Health Hospital,* 691 P.2d 564 (Wash. 1984) ..... 258, 287
*Wunschel Law Firm v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980) ..... 347
*Yasui v. United States,* 772 F.2d 1496 (9th Cir. 1985) ..... 262

*Yellin v. United States,* 374 U.S. 109 (1963) ..... 288
*Youkers v. State*, 400 S.W.3d 200, 206 (Tex. App. 2013) ..... 371
Younis v. Farooqi, 597 F. Supp. 2d 552 (D.Md. 2009) ..... 354
*Zachair, Ltd. v. Driggs,* 141 F.3d 1162 (4th Cir. 1998) ..... 287
*Zador Corp. N.V. v. Kwan,* 31 Cal. Rptr. 2d 754 (Cal. App. 1995) ..... 309, 317
*Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) ..... 335

# CROSS REFERENCE INDEX FROM THE AMENDED D.C. RULES OF PROFESSIONAL CONDUCT TO THE FORMER D.C. RULES OF PROFESSIONAL CONDUCT

| *Amended Rules Provision* | *Former Rules Provision(s)* |
|---|---|
| **Rule** 1.0 | *See* Terminology[1] |
| **Rule** 1.1 | Rule 1.1 |
| **Rule** 1.2 | Rule 1.2 |
| **Rule** 1.3 | Rule 1.3 |
| **Rule** 1.4 | No change[2] |
| **Rule** 1.5 | Rule 1.5 |
| **Rule** 1.6(a)–(c) | No change |
| 1.6(d) | No counterpart[3] |
| 1.6(e)(1)–(5) | Rule 1.6(d)(1)–(5) |
| 1.6(e)(6) | No counterpart |
| 1.6(f) | Rule 1.6(e) |
| 1.6(g) | Rule 1.6(f) |
| 1.6(h) | Rule 1.6(g) |
| 1.6(i) | Rule 1.6(h) |
| 1.6(j) | Rule 1.6(i) |
| 1.6(k) | Rule 1.6(j) |
| **Rule** 1.7(a)–(b) | No change |
| 1.7(c)(1) | *See* 1.7(c) |
| 1.7(c)(2) | No counterpart |
| 1.7(d) | No change |
| 1.7, comments 14 through 18 | Rule 2.2 |
| **Rule** 1.8(a)–(i) | Rule 1.8(a)–(i) |
| 1.8(j) | No counterpart |
| **Rule** 1.9 | Rule 1.9 |
| **Rule** 1.10(a) | *See* Rule 1.10(a) |
| 1.10(a)(1) | No counterpart |
| 1.10(a)(2) | No counterpart |
| 1.10(b) | Rule 1.10(b) |
| 1.10(c) | Rule 1.10(c) |
| 1.10(c)(1) | *See* Rule 1.10(c) |
| 1.10(c)(2) | No counterpart |
| 1.10(d) | No change |
| 1.10(e) | Rule 1.10(e) |
| **Rule** 1.11 | Rule 1.11 |
| **Rule** 1.12(a) | Rule 1.12(a) |
| 1.12(b)–(d) | No counterpart |
| 1.12(e) | Rule 1.12(b) |
| **Rule** 1.13(a) | No change |
| 1.13(b) | No counterpart |
| 1.13(c) | Rule 1.13(b) |
| 1.13(d) | Rule 1.13(c) |
| **Rule** 1.14(a) | Rule 1.14(a) |
| 1.14(b) | *See* Rule 1.14(b) |
| 1.14(c) | No counterpart |
| **Rule** 1.15(a) | No change |

[1] "See" denotes that there was either a significant Rule addition or subtraction of text *or* a significant Rule formatting change from the original version *but* that the substance of the current text comes generally from the cited section.

[2] "No change" denotes that there were no *substantive* alterations in the rule or its comment(s).

[3] "No counterpart" denotes that there is no comparable provision within the former rules.

| | | |
|---|---|---|
| | 1.15(b) | No change |
| | 1.15(c) | No change |
| | 1.15(d) | *See* Rule 1.15(d) |
| | 1.15(e) | *See* Rule 1.15(e) |
| | 1.15(f) | No change |
| **Rule** | 1.16(a)–(b) | No change |
| | 1.16(c) | *See* Rule 1.16(c) |
| | 1.16(d) | Rule 1.16(d) |
| **Rule** | 1.17 | No counterpart |
| **Rule** | 1.18 | No counterpart; see Rule 1.10(a) and comments [7]–[9] |
| **Rule** | 1.19 | Rule 1.17 |
| **Rule** | 2.1 | Rule 2.1 |
| **Rule** | 2.3(a) | Rule 2.3(a) |
| | 2.3(b) | *See* 2.3(a)(2) |
| | 2.3(c) | Rule 2.3(b) |
| **Rule** | 2.4 | No counterpart; see Rule 1.12 |
| **Rule** | 3.1 | Rule 3.1 |
| **Rule** | 3.2 | No change |
| **Rule** | 3.3(a)(1) | *See* Rule 3.3(a)(1) |
| | 3.3(a)(2)–(3) | No change |
| | 3.3(a)(4) | *See* Rule 3.3(a)(4) |
| | 3.3(b)–(c) | No change |
| | 3.3(d) | *See* Rule 3.3(d) |
| **Rule** | 3.4(a)–(f) | No change |
| | 3.4(g) | No counterpart; see Rule 3.8(h) |
| **Rule** | 3.5(a) | No change |
| | 3.5(b) | Rule 3.5(b) |
| | 3.5(c) | No counterpart |
| | 3.5(d) | *See* Rule 3.5(c) |
| **Rule** | 3.6 | Rule 3.6 |
| **Rule** | 3.7 | No change |
| **Rule** | 3.8 | Rule 3.8 |
| **Rule** | 3.9 | No change |
| **Rule** | 4.1 | Rule 4.1 |
| **Rule** | 4.2 | Rule 4.2 |
| **Rule** | 4.3(a).. | See Rule 4.3(a)(1) |
| | 4.3(a)(1) | Rule 4.3(a) |
| | 4.3(a)(2) | *See* Rule 4.3(b) |
| | 4.3(b) | *See* Rule 4.3(b) |
| **Rule** | 4.4(a) | Rule 4.4 |
| | 4.4(b) | No counterpart |
| **Rule** | 5.1 | *See* Rule 5.1 |
| **Rule** | 5.2 | No change |
| **Rule** | 5.3 | Rule 5.3 |
| **Rule** | 5.4(a)(1)–(4) | Rule 5.4(a)(1)–(4) |
| | 5.4(a)(5) | No counterpart |
| | 5.4(b)–(c) | No change |
| **Rule** | 5.5 | Rule 5.5 |
| **Rule** | 5.6 | Rule 5.6 |
| **Rule** | 5.7 | No counterpart; see Rule 1.7, comment [25] |
| **Rule** | 6.1 | Rule 6.1 |
| **Rule** | 6.2 | No change |

| | | |
|---|---|---|
| **Rule** | 6.3 | No change |
| **Rule** | 6.4 | No change |
| **Rule** | 6.5 | No counterpart |
| **Rule** | 7.1(a) | No change |
| | 7.1(b) | *See* 7.1(b) |
| | 7.1(c)–(d) | No change |
| | 7.1(e) | No counterpart |
| **Rule** | 7.5 | Rule 7.5 |
| **Rule** | 8.1 | Rule 8.1 |
| **Rule** | 8.3 | *See* Rule 8.3 |
| **Rule** | 8.4 | *See* Rule 8.4 |
| **Rule** | 8.5 | Rule 8.5 |
| **Rule** | 9.1 | Rule 9.1 |

# INDEX OF RULES CITED IN OPINIONS

(Opinions 210–378)


| *Rules**** | *Cited in Opinion* |
|---|---|
| Scope | 334, 342 |
| 1.0 | 347, 355, 366 |
| 1.0(c) | 338 |
| 1.0(e) | 348, 355, 361, 376 |
| 1.0(f) | 341, 350, 362 |
| 1.0(h) | 344 |
| 1.0(j) | 364 |
| 1.0(n) | 358 |
| 1.0(o) | 341, 355 |
| 1.1 | 256, 290, 316, 330, 343, 370, 371, 372, 377, 378 |
| 1.1(a) | 238, 318, 373 |
| 1.2 | 268, 284, 289, 314, 330, 335, 336, |
| 343 | 353, 371, 373, 375 |
| 1.2(a) | 256, 284, 289, 335, 353 |
| 1.2(b) | 231, 265 |
| 1.2(c) | 248, 289, 316, 337, 343 |
| 1.2(e) | 219, 242, 350 |
| 1.3 | 225, 248, 252, 253, 256, 265, 272, 276, 316, 320, 321, 326, 327, 330, 334, 337, 341, 371, 372, 375, 377 |
| 1.3(a) | 318, 373 |
| 1.3(b) | 217, 231, 246 |
| 1.4 | 221, 252, 263, 265, 270, 273, 284, 296, 316, 326, 327, 330, 366, 371, 372, 375, 376, 377 |
| 1.4(a) | 238, 263, 337, 357 |
| 1.4(b) | 228, 235, 254, 256, 282, 290, 343, 373 |
| 1.4(c) | 289 |
| 1.5 | 218, 264, 267, 284, 298, 310, 345, 347, 348, 355, 375, 376, 378 |
| 1.5(a) | 264, 284, 294, 300, 347, 348, 351 |
| 1.5(b) | 211, 238, 240, 264, 267, 345, 348, 355, 373 |
| 1.5(d) | 262, 347 |
| 1.5(e) | 255, 284, 286, 347, 361 |
| 1.5(e)(2) | 284 |
| 1.6 | 213, 214, 217, 223, 225, 230, 237, 239, 242, 246, 248, 251, 256, 269, 273, 275, 276, 281, 282, 283, 285, 288, 289, 290, 294, 296, 297, 298, 299, 302, 303, 305, 306, 308, 309, 312, 318, 324, 326, 327, 330, 334, 335, 336, 337, 338, 341, 343, 344, 346, 348, 349, 352, 356, 359, 363, 364, 366, 370, 371, 372, 374, 375, 377 |
| 1.6(a)(1) | 266, 289, 324, 348, 357 |
| 1.6(a)(5) | 218 |


***The Rules cited are the D.C. Rules that were effective at the time of the opinion's publication. *See* C1. Beginning with Opinion 337, the Rules cited are the D.C. Rules of Professional Conduct, effective February 1, 2007.

| *Rule* | *Cited in Opinion* |
|---|---|
| 1.6(b) | 266, 324, 335, 344, 363, 364, 370 |
| 1.6(c) | 259, 282, 324 |
| 1.6(c), (d) or (e) | 346 |
| 1.6(d) | 282, 350 |
| 1.6(d)(1) | 290, 316, 324 |
| 1.6(d)(2) | 282, 324 |
| 1.6(d)(2)(A) | 219, 259, 288, 324 |
| 1.6(d)(4) | 290, 324 |
| 1.6(d)(5) | 236 |
| 1.6(e) | 282, 290, 318, 359 |
| 1.6(e)(1) | 337, 348, 370 |
| 1.6(e)(2) | 359 |
| 1.6(e)(3) | 363, 364 |
| 1.6(e)(5) | 363 |
| 1.6(e)(6) | 337 |
| 1.6(f) | 270, 273, 315, 357 |
| 1.6(g) | 227, 285, 352 |
| 1.6(h) | 349 |
| 1.6(i) | 268 |
| 1.6(k) | 367 |
| 1.7 | 210, 217, 225, 237, 240, 247, 248, 252, 255, 259, 263, 265, 268, 269, 272, 273, 276, 279, 289, 290, 292, 296, 297, 301, 303, 305, 306, 308, 309, 314, 316, 326, 327, 328, 330, 334, 337, 343, 344, 349, 354, 356, 361, 365, 370, 372, 374 |
| 1.7(a) | 226, 243, 265, 268, 269, 317, 334, 344, 365, 366 |
| 1.7(b) | 226, 228, 231, 232, 245, 253, 256, 257, 259, 265, 272, 300, 317, 334, 344, 349 |
| 1.7(b)(1) | 265, 268, 272, 317, 334, 344, 356 |
| 1.7(b)(2) | 265, 268, 269, 317, 334, 344, 356, 366 |
| 1.7(b)(3) | 265, 268, 269, 317, 334, 344, 356, 366 |
| 1.7(b)(4) | 265, 268, 269, 290, 315, 317, 334, 343, 344, 349, 354, 356, 361, 365, 366, 367, 370 |
| 1.7(c) | 226, 253, 257, 268, 269, 300, 317, 334. 344, 349, 354, 356, 361, 365, 370 |
| 1.7(c)(1) | 361, 367 |
| 1.7(c)(2) | 361, 367 |
| 1.7(d) | 268, 272, 317, 356 |
| 1.8 | 218, 289, 290, 306, 314, 316, 333, 334, 354, 356, 361, 375, 376, 378 |
| 1.8(a) | 211, 300, 319, 361 |
| 1.8(b) | 232, 279 |
| 1.8(c) | 318, 334 |
| 1.8(d) | 345, 351, 354 |
| 1.8(d)(1) | 354 |
| 1.8(d)(2) | 354 |
| 1.8(e) | 225, 269, 328, 366 |
| 1.8(e)(2) | 289 |

| *Rule* | *Cited in Opinion* |
|---|---|
| 1.8(g) | 211, 235, 260, 304 |
| 1.8(i) | 230, 250, 273, 283, 333, 350, 357, 372 |
| 1.8(j) | 354 |
| 1.9 | 217, 227, 232, 237, 239, 240, 247, 259, 263, 269, 270, 272, 273, 279, 308, 309, 316, 317, 328, 330, 337, 343, 349, 352, 366, 372 |
| 1.10 | 227, 237, 240, 263, 268, 275, 276, 279, 303, 308, 309, 312, 343, 344, 349, 352 |
| 1.10(a) | 232, 247, 255, 316, 317, 325, 338, 344, 349, 352 |
| 1.10(a)(1) | 337, 338, 344, 349, 367 |
| 1.10(a)(2) | 338 |
| 1.10(b) | 273, 285, 334, 337, 349, 352 |
| 1.10(c) | 212, 273 |
| 1.10(d) | 273, 352 |
| 1.10(e) | 268 |
| 1.11 | 227, 279, 285, 297, 313, 315, 316, 344, 349 |
| 1.11(a) | 285, 313, 343, 344 |
| 1.11(c) | 285 |
| 1.11(g) | 315, 344 |
| 1.11(h) | 268 |
| 1.12 | 279, 349 |
| 1.13 | 259, 268, 276, 305, 314, 328 |
| 1.13(a) | 216, 269, 314 |
| 1.13(b) | 269 |
| 1.13(c) | 269 |
| 1.14 | 252, 323, 353, 359 |
| 1.14(a) | 353 |
| 1.14(b) | 353 |
| 1.15 | 242, 251, 256, 264, 283, 291, 293, 348, 355, 359, 372, 374, 375, 378 |
| 1.15(a) | 264, 283, 287, 355, 357 |
| 1.15(b) | 283, 318, 351, 357 |
| 1.15(c) | 359 |
| 1.15(d) | 264, 348, 355, 359 |
| 1.15(e) | 355 |
| 1.16 | 258, 266, 272, 291, 294, 296, 305, 317, 327, 336, 348, 353, 354, 357 |
| 1.16(a) | 232, 256, 374 |
| 1.16(a)(1) | 219, 279, 314, 317, 354 |
| 1.16(a)(2) | 377 |
| 1.16(a)(3) | 317 |
| 1.16(b) | 272, 317, 353, 367 |
| 1.16(b)(1) | 219 |
| 1.16(b)(2) | 219 |
| 1.16(b)(3) | 317 |
| 1.16(b)(4) | 317 |
| 1.16(b)(5) | 317 |
| 1.16(c) | 266, 317, 354, 367 |
| 1.16(d) | 230, 250, 264, 270, 273, 283, 333, 348, 350, 357, 359, 372 |
| 1.18 | 346, 349, 370, 374 |

| *Rule* | *Cited in Opinion* |
|---|---|
| 1.18(a) | 346 |
| 1.18(c) | 346 |
| 1.4(b) | 347, 348 |
| 2.1 | 348, 375 |
| 2.2 | 217, 232, 243, 247, 276, 279 |
| 3.1 | 258, 320, 371 |
| 3.2 | 258 |
| 3.3 | 213, 234, 320, 330, 336, 350, 370, 371 |
| 3.3(a) | 350 |
| 3.3(a)(1) | 336, 350 |
| 3.3(a)(2) | 219, 350 |
| 3.3(a)(4) | 350 |
| 3.3(d) | 219, 282, 336, 350 |
| 3.4 | 258, 283, 322, 358, 360, 371 |
| 3.4(a) | 242, 283, 341, 360 |
| 3.4(c) | 266, 341, 359 |
| 3.4(e) | 358 |
| 3.4(f) | 360 |
| 3.5 | 258, 295, 358, **371** |
| 3.5(d) | 358 |
| 3.6 | 371 |
| 3.7 | 279, 343 |
| 3.7(a) | 228 |
| 3.8 | 358, 371 |
| 4.1 | 270, 321, 339, 371, 375 |
| 4.1(b) | 219 |
| 4.2 | 258, 285, 287, 295, 321, 330, 331, 340, 360, 371 |
| 4.2(a) | 215, 232, 258, 263, 274, 331, 373 |
| 4.2(b) | 340 |
| 4.2(c) | 258, 331, 340 |
| 4.2(d) | 258, 280, 340 |
| 4.3 | 240, 247, 269, 287, 302, 314, 321, 323, 326, 330, 339, 360, 366, 371 |
| 4.3(b) | 269 |
| 4.4 | 285, 287, 352, 358, 371 |
| 4.4(a) | 352, 358, 360 |
| 4.4(b) | 341 |
| 5.1 | 278, 304, 344, 365, 367, 370, 371, 372, 377 |
| 5.1(b) | 256 |
| 5.2 | 270, 278, 358, 362, 365, 367, 377 |
| 5.3 | 227, 256, 278, 282, 285, 298, 304, 344, 370, 371, 377 |
| 5.3(a) | 285 |
| 5.3(b) | 285, 344 |
| 5.3(c) | 285 |
| 5.4 | 233, 253, 286, 289, 298, 302, 304, 307, 322, 342, 351, 361, 366, 375 |
| 5.4(a) | 284, 286, 314, 329, 342, 351 |
| 5.4(a)(5) | 351, 369 |
| 5.4(b) | 235, 244, 362, 372 |
| 5.4(c) | 289, 314, 366 |

| *Rule* | *Cited in Opinion* |
|---|---|
| 5.4(e) | 225 |
| 5.5 | 225, 261, 278, 362 |
| 5.5(b) | 289, 304, 362 |
| 5.6 | 335 |
| 5.6(a) | 221, 241, 291, 325, 335, 368, 372 |
| 5.6(b) | 335 |
| 5.7 | 344, 361, 362 |
| 5.7(a)(1) | 344 |
| 5.7(a)(2) | 344, 361, 362 |
| 5.7(b) | 337, 344, 361 |
| 6.1 | 316 |
| 6.4 | 231 |
| 7.1 | 221, 225, 253, 261, 271, 277, 284, 302, 303, 307, 322, 335, 342, 348, 361, 369, 370, 372 |
| 7.1(a) | 224, 235, 249, 254, 332, 338, 342, 370 |
| 7.1(a)(1) | 267, 271 |
| 7.1(a)(2) | 271 |
| 7.1(b) | 261, 342 |
| 7.1(b)(2) | 261, 316, 342 |
| 7.1(b)(3) | 261, 316 |
| 7.1(b)(5) | 286, 329 |
| 7.5 | 271, 277, 284, 303, 332 |
| 7.5(a) | 224, 244, 254, 273, 332, 338 |
| 7.5(b) | 224, 235, 254, 278 |
| 7.5(c) | 284 |
| 7.5(d) | 278, 332 |
| 8.3 | 270, 377 |
| 8.3(a) | 220, 239, 246, 260 |
| 8.4 | 276, 284, 285, 306, 320, 321, 323, 336, 337, 341, 358, 368, 370, 371, 374, 375 |
| 8.4(a) | 285, 295, 358, 362, 370, 377 |
| 8.4(b) | 339 |
| 8.4(c) | 229, 256, 260, 267, 270, 273, 285, 318, 319, 323, 336, 339, 341, 344, 370, 372 |
| 8.4(d) | 260, 285, 358 |
| 8.4(g) | 220, 263, 339 |
| 8.5 | 222, 264, 311, 342, 368, 370 |
| 9.1 | 222 |

# D.C. ETHICS OPINIONS CITATOR

(Updated through Opinion 378)

| Ethics Committee Opinion | Cited by Opinion |
|---|---|
| 2 | 24 |
| 4 | 25, 29, 103, 116, 126, 184, 208, 267 |
| 5 | 334 |
| 9 | 126, 153 |
| 10 | 93, 146 |
| 11 | 23, 60, 75, 103, 138, 184, 200, 211, 310 |
| 14 | 58, 124, 148, 180, 186, 209, 214, 288 |
| 16 | 26, 84, 92, 98, 106, 177, 313, 315 |
| 19 | 38 |
| 20 | 55, 56 |
| 21 | 103, 104 |
| 23 | 63, 75, 87, 138, 298, 348 |
| 25 | 29, 37, 103, 116, 184, 267 |
| 26 | 84, 92, 98, 106 |
| 29 | 37, 103, 116, 184, 208, 267 |
| 30 | 155, 225 |
| 31 | 231, 358 |
| 34 | 87, 189 |
| 35 | 130, 147, 175, 200, 335 |
| 37 | 85, 116, 347 |
| 38 | 123, 244 |
| 41 | 334 |
| 42 | 347 |
| 44 | 88, 125, 148 |
| 45 | 244 |
| 48 | 71, 92, 101, 103, 108, 133, 135 |
| 49 | 54, 71, 78, 92, 94, 106, 131, 136, 140 143, 154, 155, 156, 157, 163, 173, 210, 248, 253 |
| 50 | 84, 137 |
| 51 | 261 |
| 52 | 106, 146, 160 |
| 53 | 70, 121 |
| 54 | 92, 106, 131, 136, 140, 143, 154, 155, 156, 217 |
| 55 | 56 |
| 57 | 112, 204 |
| 58 | 124, 180, 214, 223 |
| 59 | 90, 95, 103, 107, 135, 168, 191, 195, 230, 250, 273 |
| 60 | 75, 126, 298 |
| 63 | 71, 78, 84, 94, 106, 171 |
| 64 | 261 |
| 65 | 77, 97, 109, 122, 145, 160, 181, 194, 221, 222, 241, 325, 368 |
| 68 | 86, 94 |
| 70 | 81, 95, 117, 178 |
| 70A | 81 |
| 71 | 78, 187 |
| 72 | 124, 128, 223 |
| 75 | 87, 138 |
| 77 | 97, 106, 122, 181, 221, 241 |
| 78 | 106, 171, 187 |
| 79 | 119, 234, 260 |
| 80 | 125, 129, 178, 199, 258, 280, 340 |
| 81 | 95, 121, 222 |
| 82 | 92, 98, 119, 178, 223 |
| 83 | 99, 124, 180, 186, 214, 256, 288 |

| Ethics Committee Opinion | Cited by Opinion |
|---|---|
| 84 | 92, 98, 106, 111, 128, 177, 187, 313, 315 |
| 85 | 108, 139 |
| 87 | 93, 110, 189 |
| 88 | 99, 106 |
| 89 | 104, 126 |
| 90 | 95, 230 |
| 91 | 105, 121, 170, 225 |
| 92 | 98, 106, 131, 133, 136, 268 |
| 93 | 135, 146, 176, 203, 233, 289 |
| 94 | 106, 131, 155, 182, 225, 226, 314 |
| 95 | 117, 141 |
| 96 | 124, 175, 180, 214 |
| 97 | 122, 181, 221, 241, 273, 291 |
| 99 | 124, 128, 180, 186, 214, 223, 288 |
| 100 | 107, 195 |
| 101 | 114, 119, 178 |
| 102 | 113 |
| 103 | 116, 135, 138, 211, 230 |
| 104 | 144, 166 |
| 105 | 134, 153, 167 |
| 106 | 128, 135, 186, 187, 297, 315 |
| 107 | 230 |
| 108 | 139 |
| 109 | 145, 167, 201 |
| 110 | 141 |
| 111 | 164, 177, 313, 315 |
| 112 | 118, 169 |
| 113 | 127, 264 |
| 114 | 178 |
| 115 | 179, 202, 347 |
| 117 | 132 |
| 118 | 169 |
| 119 | 178, 206, 250, 260, 283 |
| 120 | 199 |
| 122 | 368 |
| 124 | 128, 180, 186, 214, 223, 288 |
| 125 | 148 |
| 128 | 158, 177 |
| 129 | 148, 199, 203, 287 |
| 130 | 147, 153, 175, 184 |
| 131 | 137, 154, 163, 248 |
| 135 | 289, 314 |
| 137 | 171 |
| 138 | 245 |
| 140 | 154, 157 |
| 142 | 188 |
| 143 | 154, 156, 157, 173, 209, 217, 243 |
| 144 | 169, 177, 210, 300 |
| 146 | 182, 233 |
| 147 | 207 |
| 148 | 186 |
| 150 | 177 |
| 151 | 192, 197, 247, 248, 255 |
| 153 | 219 |
| 154 | 173 |
| 155 | 170, 201, 225, 264 |

| Ethics Committee Opinion | Cited by Opinion |
|---|---|
| 156 | 252 |
| 158 | 154, 163, 164, 174, 175, 187, 217, 227 |
| 159 | 216, 259, 269 |
| 161 | 347 |
| 162 | 177, 255 |
| 163 | 187, 210, 248, 253 |
| 164 | 174 |
| 166 | 184 |
| 167 | 311 |
| 168 | 206, 209, 250, 273, 283, 333 |
| 169 | 177, 187, 210 |
| 170 | 225 |
| 173 | 253 |
| 174 | 227, 273 |
| 175 | 180, 181, 186, 187, 214, 217, 275 |
| 176 | 182 |
| 177 | 313, 315 |
| 178 | 199, 229 |
| 179 | 195 |
| 180 | 186, 213, 214, 288 |
| 181 | 194, 200, 221, 222, 241, 273, 291, 356, 368 |
| 182 | 225, 304 |
| 184 | 198, 200 |
| 185 | 211, 267, 284 |
| 186 | 214, 216, 223 |
| 187 | 297, 315 |
| 189 | 224, 332 |
| 190 | 211, 310, 376 |
| 192 | 197, 247 |
| 194 | 221, 241, 368 |
| 201 | 369 |
| 202 | 334 |
| 204 | 231 |
| 206 | 209, 283 |
| 208 | 347 |
| 210 | 248, 253, 257, 308, 367 |
| 211 | 218, 267, 310, 376 |
| 214 | 219, 223, 288, 324 |
| 216 | 259, 305, 328 |
| 217 | 232, 327 |
| 218 | 310, 376 |
| 219 | 282 |
| 220 | 246, 263, 339, 377, |
| 221 | 241, 273, 291, 325, 368 |
| 224 | 277, 332 |
| 225 | 261, 302, 314, 329 |
| 226 | 248, 253, 306 |
| 227 | 279, 285, 312, 352 |
| 228 | 279 |
| 230 | 250, 333, 357 |
| 232 | 237, 327 |
| 233 | 322, 329, 351, 369 |
| 235 | 254, 304, 332 |
| 238 | 330 |
| 239 | 343 |
| 241 | 325, 335, 356, 368 |

| Ethics Committee Opinion | Cited by Opinion |
|---|---|
| 243 | 366 |
| 244 | 271 |
| 245 | 361 |
| 246 | 260, 270, 377 |
| 247 | 338 |
| 249 | 335, 342, 370 |
| 250 | 273, 283, 333, 350, 357, 372 |
| 251 | 293 |
| 253 | 261, 286 |
| 254 | 332 |
| 255 | 352 |
| 256 | 287, 318, 341, 371 |
| 258 | 274, 295, 358 |
| 261 | 342 |
| 263 | 295, 321, 339, 373 |
| 264 | 311 |
| 265 | 268, 301, 312, 327, 344, 356 |
| 268 | 308, 367 |
| 269 | 314, 321, 328 |
| 272 | 292, 317, 356 |
| 273 | 312, 325, 368, 372, 377 |
| 275 | 279 |
| 276 | 356 |
| 277 | 338 |
| 278 | 311 |
| 279 | 285, 308, 309, 349, 352 |
| 280 | 340 |
| 281 | 302, 316, 370, 371 |
| 283 | 308, 324, 333, 357, 359, 372 |
| 284 | 291, 304, 352 |
| 285 | 352 |
| 286 | 307, 322, 329, 342, 350, 369 |
| 287 | 321, 360, 371 |
| 290 | 296 |
| 291 | 325 |
| 292 | 317, 334 |
| 293 | 359 |
| 294 | 308 |
| 295 | 336, 366 |
| 296 | 327, 366 |
| 297 | 315, 344 |
| 300 | 365, 378 |
| 301 | 327 |
| 302 | 307, 316, 329, 342, 370 |
| 303 | 322, 332, 352 |
| 305 | 328 |
| 307 | 322, 329, 342, 369 |
| 309 | 316, 317, 327, 334, 344, 349, 356, 366 |
| 310 | 345, 348, 355 |
| 311 | 342, 370 |
| 312 | 359 |
| 316 | 330, 337, 370 |
| 317 | 327, 344 |
| 318 | 341 |
| 321 | 371 |
| 323 | 371 |

| Ethics Committee Opinion | Cited by Opinion |
|---|---|
| 325 | 335, 368 |
| 327 | 366 |
| 329 | 369 |
| 330 | 343, 373 |
| 331 | 340 |
| 332 | 338 |
| 333 | 350, 357, 372, 374 |
| 335 | 372 |
| 341 | 357 |
| 342 | 369 |
| 344 | 365 |
| 345 | 348 |
| 354 | 365 |
| 355 | 375 |
| 357 | 372 |
| 358 | 362 |
| 359 | 372 |
| 368 | 372 |
| 370 | 371 |
| 371 | 370, 375, 378 |
| 372 | 377 |

# INDEX OF OTHER ETHICS OPINIONS CITED BY D.C. BAR OPINIONS

(Opinions 210-378)


| Other Opinion | Cited by D.C. Bar Opinion |
|---|---|
| ABA Ethics Opinion No. 90-358 | 346 |
| ABA Formal Op. 34-108 (1934) | 258 |
| ABA Formal Op. 51 (1931) | 319 |
| ABA Formal Op. 61-303 (Nov. 27, 1961) | 235 |
| ABA Formal Op. 291 (1961) | 307 |
| ABA Formal Op. 300 (1961) | 291 |
| ABA Formal Op. 310 (1963) | 303 |
| ABA Formal Op. 338 (1974) | 348 |
| ABA Formal Op. 62-306 (1962) | 231 |
| ABA Formal Op. 72-328 (June 1972) | 226 |
| ABA Formal Op. 74-336 (1974) | 323, 337 |
| ABA Formal Op. 74-337 (1974) | 229 |
| ABA Formal Op. 75-342 (1975) | 237, 315 |
| ABA Formal Op. 84-135 (Oct. 20, 1984) | 255 |
| ABA Formal Op. 84-351 (1984) | 332 |
| ABA Formal Op. 87-355 (1987) | 314 |
| ABA Formal Op. 88-356 (Dec. 16, 1988) | 255, 284, 291, 304, 338 |
| ABA Formal Op. 90-357 (May 10, 1990) | 224, 247, 255, 277, 338 |
| ABA Formal Op. 91-359 (1991) | 285, 287 |
| ABA Formal Op. 91-360 (1991) | 368 |
| ABA Formal Op. 92-360 (1992) | 311 |
| ABA Formal Op. 92-363 (1992) | 339 |
| ABA Formal Op. 92-365 (1992) | 305, 328 |
| ABA Formal Op. 92-368 (Nov. 10, 1992) | 256, 318 |
| ABA Formal Op. 93-372 (1993) | 265, 289, 309 |
| ABA Formal Op. 93-373 (1993) | 347 |
| ABA Formal Op. 93-374 (1993) | 329 |
| ABA Formal Op. 93-377 (Dec. 9, 1993) | 253, 265 |
| ABA Formal Op. 93-378 (1993) | 321 |
| ABA Formal Op. 93-379 (Nov. 3, 1993) | 267 |
| ABA Formal Op. 93-396 (1993) | 263, 287 |
| ABA Formal Op. 94-380 (May 9, 1994) | 259 |
| ABA Formal Op. 94-381 (May 9, 1994) | 291 |
| ABA Formal Op. 94-382 (1994) | 318 |
| ABA Formal Op. 94-383 (1994) | 339 |
| ABA Formal Op. 94-385 (1994) | 288 |
| ABA Formal Op. 94-388 (Dec. 5, 1994) | 255, 332 |
| ABA Formal Op. 95-390 (Jan. 25, 1995) | 268, 326, 328, 337 |
| ABA Formal Op. 95-395 | 349 |
| ABA Formal Op. 95-396 (July 28, 1995) | 263, 298, 321 |
| ABA Formal Op. 96-400 (Jan. 24, 1996) | 268, 336, 367 |
| ABA Formal Op. 97-407 (1997) | 337 |
| ABA Formal Op. 97-408 (Aug. 2, 1997) | 280, 285, 287, 340 |
| ABA Formal Op. 97-409 (1997) | 313 |
| ABA Formal Op. 99-414 (1999) | 372, 377 |
| ABA Formal Op. 00-417 (2000) | 335 |
| ABA Formal Op. 00-418 (2000) | 378 |
| ABA Formal Op. 01-421 (2001) | 314 |
| ABA Formal Op. 01-423 (2001) | 311 |
| ABA Formal Op. 01-424 (2001) | 363 |
| ABA Formal Op. 02-425 (2002) | 376 |
| ABA Formal Op. 03-429 (2003) | 377 |
| ABA Formal Op. 04-432 (2004) | 365 |
| ABA Formal Op. 06-442 (2006) | 341 |

| Other Opinion | Cited by D.C. Bar Opinion |
|---|---|
| ABA Formal Op. 07-447 (2007) | 343 |
| ABA Formal Op. 10-456 (2010) | 364 |
| ABA Formal Op. 13-462 (2013) | 371 |
| ABA Formal Op. 13-463 (2013) | 375 |
| ABA Formal Op. 14-466 (2014) | 371 |
| ABA Formal Op. 14-467 (2014) | 377 |
| ABA Informal Op. 68-1020 (Feb. 9, 1968) | 245 |
| ABA Informal Op. 68-1056 (1968) | 216 |
| ABA Informal Op. 69-1076 (1968) | 307 |
| ABA Informal Op. 69-1087 (19690 | 231 |
| ABA Informal Op. 71-1182 (1971) | 231 |
| ABA Informal Op. 74-1287 (1974) | 223 |
| ABA Informal Op. 75-1314 (Mar. 25, 1975) | 234 |
| ABA Informal Op. 77-1376 (1977) | 283 |
| ABA Informal Op. 77-1384 (1977) | 283 |
| ABA Informal Op. 77-1394 (Nov. 2, 1977) | 223 |
| ABA Informal Op. 77-1397 (1977) | 317 |
| ABA Informal Op. 1417 (1978) | 291, 368 |
| ABA Informal Op. 1440 (1979) | 322 |
| ABA Informal Op. 81-1465 (1981) | 252 |
| ABA Informal Op. 88-1526 (June 22, 1988) | 227, 279, 285 |
| ABA Informal Op. 89-1527 (Feb. 22, 1989) | 244, 271 |
| ABA Informal Op. 89-1528 (June 5, 1989) | 240 |
| ABA Informal Op. 89-1529 (Oct. 20, 1989) | 228 |
| Alabama State Bar Ass'n Ethics Op. 85-95 (1985) | 246 |
| Alabama State Bar Ass'n Ethics Op. 86-106 (Nov. 6, 1986) | 247 |
| Alabama State Bar Ass'n Ethics Op. 90-17 (Feb. 21, 1990) | 223 |
| Alabama State Bar Ass'n Ethics Op. 90-97 (1990) | 246 |
| Alabama State Bar Ass'n Ethics Op. 98-02 (1998) | 290 |
| Alabama State Bar, Formal Ethics Op. RO 86-02 | 333 |
| Alabama State Bar, Formal Ethics Op. RO-07-02 | 341 |
| Alaska State Bar Ass'n Ethics Op. 87-1 (Sept. 1987) | 264 |
| Alaska State Bar Ass'n Ethics Op. 93-3 (1999) | 314 |
| Alaska State Bar Ass'n Ethics Op. 97-2 (1997) | 339 |
| Arizona State Bar Ass'n Ethics Op. 75-13 (June 11, 1975) | 229 |
| Arizona State Bar Ass'n Ethics Op. 86-13 (1986) | 252 |
| Arizona State Bar Ass'n Ethics Op. 87-26 (1987) | 246 |
| Arizona State Bar Ass'n Ethics Op. 88-06 (1988) | 293 |
| Arizona State Bar Ass'n Ethics Op. 90-02 (Mar. 16, 1990) | 229 |
| Arizona State Bar Ass'n Ethics Op. 90-13 (1990) | 246 |
| Arizona State Bar Ass'n Ethics Op. 91-23 (Nov. 25, 1991) | 260 |
| Arizona State Bar Ass'n Ethics Op. 95-396 (Nov. 25, 1991) | 260 |
| Arizona State Bar Ass'n Ethics Op. 05-01 (2005). | 361 |
| Arizona State Bar Ass'n Ethics Op. 07-02 (2007). | 357 |
| Arizona State Bar Ass'n Ethics Op. 08-01 (2008) | 348 |
| Arizona State Bar Comm. On Rules of Prof'l Conduct, Op. No. 92-1 | 333 |
| Arizona State Bar Ethics Op. 97-04 (April 4, 1997) | 281, 316 |
| Arkansas Bar Ass'n Op. 95-01 (1995) | 307, 329 |
| California State Bar Ethics Op. 1983-70 (1983) | 307 |
| California State Bar Ethics Op. 1985-86 (1985) | 372 |
| California State Bar Ethics Op. 1988-101 (1988) | 293 |
| California State Bar Ethics Op. 1994-136 (1994) | 289 |
| Calif. State Bar Formal Ethics Op. 1995-140 (1995) | 361 |
| California State Bar Ethics Op. 2007-172 (2007) | 348 |
| Chicago Bar Ass'n Prof. Resp. Comm., Op. 87-1 (1987) | 307 |
| Chicago Bar Ass'n Prof. Resp. Comm., Op. 93-5 (1993) | 285 |
| Cleveland Bar Ass'n Ethics Op. 87-3 (1988) | 293 |

**Other Opinion** **Cited by D.C. Bar Opinion**


Colo. Bar Ethics Comm., Formal Op. 92 (1993) ..... 335
Colorado Ethics Op. 90 (Nov. 14, 1992) ..... 281
Colorado Ethics Op. 94 (Nov. 20, 1993) ..... 293
Colorado Ethics Op. 99 (1997) ..... 348
Colorado Ethics Op. 127 (2015) ..... 371
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 89-14 (1989) ..... 246
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 91-1 (1993) ..... 322
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 94-25 (1994) ..... 361
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 95-20 (May 1, 1995) ..... 293
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 96-4 (1996) ..... 285, 287
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 97-31 (Nov. 3, 1997) ..... 289
Connecticut State Bar Ass'n Comm. on Prof. Ethics, Informal Op. 99-35 (1999) ..... 359
Connecticut State Bar Ass'n Comm. on Prof. Ethics Op. 99-50(1999) ..... 339
Connecticut State Bar Ass'n Comm. on Prof. Ethics Op. 00-24(2000) ..... 339
District of Columbia Committee on Unauthorized Practice of Law Op. 6-99 (June 30, 1999) ..... 362
District of Columbia Committee on Unauthorized Practice of Law Op. 21-12 (Jan. 12, 2012) ..... 362
Florida State Bar Ass'n Ethics Op. 70-13 (1970) ..... 245
Florida State Bar Ass'n Ethics Op. 81-3 (Apr. 15, 1981) ..... 298
Florida State Bar Ass'n Ethics Op. 85-3(1985) ..... 339
Florida State Bar Ass'n Ethics Op. 89-3(1989) ..... 339
Florida State Bar Ass'n Ethics Op. 89-4 (1989) ..... 286
Florida State Bar Ass'n Ethics Op. 02-1 (2002) ..... 322
Florida State Bar Ass'n Ethics Op. 92-5 (1992) ..... 296
Florida State Bar Ass'n Ethics Op. 06-2(2006) ..... 341
Florida State Bar Staff Op. 20591 (Dec. 31, 1997) ..... 290
Georgia Bar Ass'n Op. 26 (1980) ..... 339
Georgia Bar Ass'n Op. 45 (1985) ..... 310
Idaho State Bar Ethics Op. 130 (May 10, 1989) ..... 229
Illinois State Bar Assn., Op. No. 94-13 ..... 333
Illinois State Bar Ass'n Advisory Op. on Prof. Conduct 92-97 (Jan. 22, 1993) ..... 284
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 84-13 (1985) ..... 273
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 86-15 (May 13, 1987) ..... 247
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 86-16 (1986) ..... 221
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 87-7 (Jan. 29, 1988) ..... 220
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 90-3 (Nov. 6, 1990) ..... 247
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 90-36 (1990) ..... 246
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 90-93 (1991) ..... 304
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 94-19 (1995) ..... 283
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 96-10 (May 16, 1997) ..... 281, 316
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 97-1 (1997) ..... 359
Illinois State Bar Ass'n Comm. on Prof. Resp., Op. 97-04 (1997) ..... 361
Indiana State Bar Ass'n Legal Ethics Comm. Op. 85-10 (1985) ..... 220
Indiana State Bar Ass'n Legal Ethics Comm. Op. 98-4 (1998) ..... 290
Iowa Supreme Court Bd. of Prof. Ethics Op. 96-1 (Aug. 29, 1996) ..... 281
Iowa Supreme Court Bd. of Prof. Ethics Op. 98-03 (1998) ..... 347
Kansas State Bar Ass'n Ethics Op. 95-9 (1995) ..... 322
Kansas State Bar Ass'n Ethics Op. 01-1 (2001) ..... 324
Kentucky State Bar Ass'n Ethics Op. E-279 (1984) ..... 229
Kentucky State Bar Ass'n Ethics Op. E-290 (1984) ..... 243
Kentucky State Bar Ass'n Ethics Op. E-300 (1985) ..... 283
Kentucky State Bar Ass'n Ethics Op. E-359 (1993) ..... 347
Kentucky State Bar Ass'n Ethics Op. E-390 (1996) ..... 361
Kentucky State Bar Ass'n Ethics Op. E-404 (undated) ..... 290
Kentucky State Bar Ass'n Ethics Op. E-426 (2007) ..... 348
Los Angeles County Bar Ass'n Ethics Op. 452 (Nov. 21, 1988) ..... 236
Los Angeles County Bar Ass'n Ethics Op. 471 (1994) ..... 309
Los Angeles County Bar Ass'n Ethics Op. 502 (1999) ..... 330

**Other Opinion** **Cited by D.C. Bar Opinion**


Maine Professional Ethics Commission, Op. 68 (1986) ..... 260
Maine Professional Ethics Commission, Op. 100 (Oct. 4, 1989) ..... 220
Maine Prof. Ethics Comm'n., Op. 183 (2004) ..... 357
Maryland State Bar Ass'n Comm. on Ethics, Op. 83-19 (Sept. 27, 1982) ..... 236
Maryland State Bar Ass'n Comm. on Ethics, Op. 86-14 (1986) ..... 220
Maryland State Bar Ass'n Comm. on Ethics, Op. 86-28 (1986) ..... 311, 368
Maryland State Bar Ass'n Comm. on Ethics, Op. 86-51 (Feb. 18, 1986) ..... 223
Maryland State Bar Ass'n Comm. on Ethics, Op. 88-45 (1988) ..... 338
Maryland State Bar Ass'n Comm. on Ethics, Op. 89-36 (Feb. 14, 1989) ..... 246
Maryland State Bar Ass'n Comm. on Ethics, Op. 89-46 (1989) ..... 246
Maryland State Bar Ass'n Comm. on Ethics, Op. 89-53 (1989) ..... 318
Maryland State Bar Ass'n Comm. on Ethics, Op. 93-39 (1994) ..... 283
Maryland State Bar Ass'n Comm. on Ethics, Op. 99-7 (1999) ..... 290
Maryland State Bar Ass'n Comm. on Ethics, Op. 07-09 (2007) ..... 341
Maryland State Bar Ass'n Comm. on Ethics, Op. 14-05 (2014) ..... 370
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 78-11 (1978) ..... 348
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 81-5 (April 14, 1981) ..... 277
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 83-1 (1983) ..... 310
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 83-2 (1983) ..... 220
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 1990-3 (1990) ..... 247
Massachusetts State Bar Ass'n Comm. on Prof. Ethics, Op. 2014-5 (2014) ..... 371
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. CI-695 (Oct. 18, 1981) ..... 220
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. CI-929 (1984) ..... 368
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. CI-970 (1983) ..... 318
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op CI-1001 (April 30, 1984) ..... 277
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-2 (undated) ..... 211
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-75 (1991) ..... 307, 328
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-143 (1992) ..... 322
Michigan State Bar Comm. on Prof. and Judicial Ethics Op. RI 168 (1963) ..... 348
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-213 (1994) ..... 252
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-225 (1995) ..... 368
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-249 (1996) ..... 303
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-276 (1997) ..... 316
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-310 (1998) ..... 304
Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-317 (2000) ..... 361
Michigan State Bar Comm. on Prof. and Judicial Ethics Op. RI 344 (2008) ..... 348
Michigan State Bar Comm. on Prof. Ethics, Op. R-12 (1991) ..... 283
Michigan State Bar Comm. on Prof. Ethics, Op. R-112 (1992) ..... 285
Michigan State Bar Comm. on Prof Ethics, Op. RI- 78 (1991) ..... 339
Michigan State Bar Comm. on Prof. Ethics, Op. R-284 (1996) ..... 285
Mississippi State Bar Ethics Op. 101 (Jan. 29, 1985) ..... 223
Missouri Sup. Ct Advisory Comm. Op. 127 (May 19, 2009) ..... 357
Missouri Bar Office of Chief Disciplinary Counsel, Informal Adv. Op. 960124 (1996) ..... 361
Nassau County Comm. Ethics Op. 03-4 (2003) ..... 324
Nebraska State Bar Ass'n Advisory Comm., Op. 95-1 (1995) ..... 289
Nebraska State Bar Ass'n Ethics Op. 89-4 (1989) ..... 246
Nevada Ethics Op. 14 (Oct. 8, 1993) ..... 271
New Hampshire State Bar Ass'n Ethics Op. 1088-0/15 (1989) ..... 252
New Hampshire State Bar Ass'n Ethics Op. 1988-9/13 (Feb. 16, 1989) ..... 223
New Hampshire State Bar Ass'n Ethics Op. 1988-9/14 (2000) ..... 306
New Hampshire State Bar Ass'n Ethics Op. 1989-90/1 (June 21, 1990) ..... 247
New Hampshire State Bar Ass'n Ethics Op. 2012-13/05 (2013)..... 371
New Jersey State Bar Ass'n Ethics Op. 416 (1979) ..... 245
New Jersey State Bar Ass'n Ethics Op. 631 (1989) ..... 304
New Jersey State Bar Ass'n Ethics Op. 644 (1990) ..... 264
New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 688 (2000) ..... 361
New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 701 (2006) ..... 357

| Other Opinion | Cited by D.C. Bar Opinion |
|---|---|
| New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 632 (Oct. 12, 1984) | 284 |
| New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 638 (1990) | 338 |
| New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 665 (1992) | 285 |
| New Jersey Sup. Ct. Advisory Comm. on Prof. Ethics, Op. 680 (1995) | 285, 287 |
| N.M. Bar Ethics Adv. Op. Comm., Adv. Op. 1985-5 (1985) | 335 |
| New Mexico State Bar Ass'n Ethics Op. 1988-8 (1988) | 246 |
| New York City Bar Ass'n Op. 80-95 (undated) | 229 |
| New York City Ethics Op. 1988-3 (Mar. 31, 1988) | 284 |
| New York City Ethics Op. 1990-1 (1990) | 247 |
| New York City Ethics Op. 1991-2 (1991) | 367 |
| New York City Ethics Op. 1990-3 (1990) | 239, 246 |
| New York City Ethics Op. 1993-1 (Nov. 5, 1993) | 298 |
| New York City Ethics Op. 1994-10 (1994) | 296 |
| New York City Ethics Op. 1996-3 (1996) | 268 |
| New York City Ethics Op. 1998-2 (1998) | 316 |
| New York City Ethics Op. 1999-03 (1999) | 368 |
| New York City Ethics Op. 1999-7 (1999) | 296 |
| New York City Ethics Op. 2000-1 (2000) | 302 |
| New York City Ethics Op. 2000-3 (2000) | 310, 378 |
| New York City Ethics Op. 2001-3 (2001) | 343 |
| New York City Ethics Op. 2010-2 (2010) | 371 |
| New York City Ethics Op. 2012-2 (2012) | 370, 371 |
| New York City Ethics Op. 2019-5 (2019) | 378 |
| New York County Lawyers Ass'n Comm. on Prof. Ethics, Op. 669 (Mar. 10, 1994) | 289 |
| New York County Lawyers Ass'n Comm. on Prof. Ethics, Op. 724 (1998) | 309 |
| New York County Lawyers Ass'n Comm. on Prof. Ethics, Op. 743 (2011) | 371 |
| New York County Lawyers Ass'n Comm. on Prof. Ethics, Op. 745 (2013) | 371 |
| New York County Lawyers Ass'n Comm. on Prof. Ethics, Op. 748 (2015) | 370 |
| New York State Bar Ethics Op. 555 | 296, 327 |
| New York State Bar Ethics Op. 576 (June 5, 1986) | 247 |
| New York State Bar Ethics Op. 611 (June 20, 1990) | 247 |
| New York State Bar Ethics Op. 619 (1991) | 306 |
| New York State Bar Ethics Op. 623 (1991) | 283 |
| New York State Bar Ethics Op. 635 (1992) | 246 |
| New York State Bar Ethics Op. 643 (1993) | 326 |
| New York State Bar Ethics Op. 648 (1993) | 252 |
| New York State Bar Ethics Op. 656 (1993) | 295 |
| New York State Bar Ethics Op. 658 (Feb. 14, 1994) | 278 |
| NY State Bar Ass'n. Comm. on Prof. Ethics, Op. 682 (1996) | 361 |
| New York State Bar Ethics Op. 687 (1997) | 306 |
| New York State Bar Ethics Op. 717 (April 15, 1999) | 293 |
| New York State Bar Ethics Op. 730 (2000) | 335 |
| New York State Bar Ethics Op. 733 (2000) | 322 |
| New York State Bar Ethics Op. 749 (2001) | 341 |
| New York State Bar Ethics Op. 782 (2004) | 341 |
| New York State Bar Ethics Op. 843 (2010) | 371 |
| New York State Bar Ethics Op. 911 (March 2012) | 362 |
| New York State Bar Ethics Op. 1027 (2014) | 368 |
| New York State Bar Ethics Op. 1032 (2014) | 370 |
| New York State Bar Ethics Op. 1062 (2015) | 375 |
| North Carolina Bar Formal Ethics Op. 11 | 336 |
| North Carolina Ethics Op. 83 (1989) | 260 |
| North Carolina Ethics Op. 106 (Apr. 11, 1991) | 264 |
| North Carolina Ethics Op. 200 (1995) | 273 |
| North Carolina Ethics Op. 215 (July 1995) | 281 |
| North Carolina Formal Ethics Op. 97-9 (1998) | 348 |
| North Carolina State Bar Ethics Comm., RPC 178 (1994) | 333 |

**Other Opinion** **Cited by D.C. Bar Opinion**


North Carolina State Bar Ethics Op. RPC 104 (1991) ..... 304
North Carolina State Bar Ethics Op. RPC 145 (Jan. 15, 1993) ..... 289
North Carolina State Bar Ethics Op. RPC 147 (1995) ..... 322
North Carolina State Bar Ethics Op. RPC 176 (1994) ..... 285
North Carolina State Bar Ethics Op. RPC 205 (1995) ..... 324
North Carolina State Bar Ethics Op. RPC 209 (1995) ..... 283
North Carolina State Bar Ethics Op. RPC 249 (April 3, 1997) ..... 295
North Carolina State Bar Proposed Ethics Op. 98-3 (1998) ..... 310
North Carolina State Bar Proposed Ethics Op. 98-10 (1998) ..... 290
North Carolina State Bar Ethics Op. 2014-5 (2014) ..... 371
North Carolina State Bar Ethics Op. 2014-8 (2014) ..... 371
North Dakota State Bar Ass'n Ethics Comm. Op. 93-09 (June 28, 1993) ..... 289
North Dakota State Bar Ass'n. Ethics Comm. Op. 97-09 (Sept. 4, 1997) ..... 281
Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2000-1 (2000) ..... 361
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 90-23 (Dec. 14, 1990) ..... 284
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 91-16 (1991) ..... 298
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 93-11 (Dec. 3, 1993) ..... 256
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 94-13 (1994) ..... 316
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 99-7 (1999) ..... 338
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 99-9 (1999) ..... 316
Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 04-11 (2004) ..... 338
Oregon State Bar Ass'n Ethics Op. 515 (1988) ..... 243
Oregon State Bar Ass'n Ethics Op. 1991-70 (1991) ..... 273
Oregon State Bar Ass'n Ethics Op. 2005-172 (2005) ..... 348
Oregon State Bar Ass'n Ethics Op. 2013-189 (2013) ..... 371
Oregon Formal Op. 2003-173 (2003) ..... 323
Pennsylvania State Bar Ass'n Ethics Op. 88-95 (1988) ..... 247
Pennsylvania State Bar Ass'n Ethics Op. 88-176 (1988) ..... 338
Pennsylvania State Bar Ass'n Ethics Op. 88-225 (1988) ..... 246
Pennsylvania State Bar Ass'n Ethics Op. 92-76 (1992) ..... 347
Pennsylvania State Bar Ass'n Ethics Op. 93-135 (1993) ..... 285, 287
Pennsylvania State Bar Ass'n Ethics Op. 93-162 (1993) ..... 307, 329
Pennsylvania State Bar Ass'n Ethics Op. 96-147 (1997) ..... 311
Pennsylvania State Bar Ass'n Ethics Op. 2014-300 (2014) ..... 371
Philadelphia Bar Ass'n Ethics Op. 86-46 (Apr. 10, 1986) ..... 247
Philadelphia Bar Ass'n Ethics Op. 88-2 (1988) ..... 211
Philadelphia Bar Ass'n Ethics Op. 88-34 (1988) ..... 338
Philadelphia Bar Ass'n Ethics Op. 89-16 (June 16, 1989) ..... 247
Philadelphia Bar Ass'n Ethics Op. 91-28 (1991) ..... 245
Philadelphia Bar Ass'n Ethics Op. 94-9 (June 1994) ..... 293
Philadelphia Bar Ass'n Ethics Op. 94-24 (1994) ..... 293
Phila. Bar Ass'n Joint Ethics Op. 2000-1 (2000) ..... 361
Philadelphia Bar Ass'n Ethics Op. 2000-12 (2000) ..... 377
Philadelphia Bar Ass'n Ethics Op. 2001-5 (2001) ..... 338
Philadelphia Bar Ass'n Ethics Op. 2001-7 (2001) ..... 322
Philadelphia Bar Ass'n Ethics Op. 2003-11 (2003) ..... 324
Philadelphia Bar Ass'n Ethics Op. 2009-02 (2009) ..... 371
Philadelphia Bar Ass'n Ethics Op. 2012-8 (2012) ..... 370
Philadelphia Bar Ass'n Ethics Op. 2014-5 (2014) ..... 371
Philadelphia Bar Ass'n Ethics Op. 2016-6 (2015) ..... 375
Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 83-23 (1988) ..... 246
Rhode Island State Bar Ass'n Ethics Op. 93-99 (1994) ..... 303
Rhode Island State Bar Ass'n Ethics Op. 95-29 (July 13, 1995) ..... 293
Rhode Island State Bar Ass'n Ethics Op. 98-3 (1998) ..... 310
Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993) ..... 333
San Diego Cty. Bar Ass'n Legal Ethics Comm. Op. 2011-2 (2011) ..... 371
San Diego Cty. Bar Ass'n Legal Ethics Comm. Op. 2011-12 (2011) ..... 371

**Other Opinion** **Cited by D.C. Bar Opinion**

South Carolina State Bar Ethics Advisory Op. 86-9 (1986) ..... 247
South Carolina State Bar Ethics Advisory Op. 89-13 (1989) ..... 293
South Carolina State Bar Ethics Advisory Op. 93-29 (1993) ..... 285
South Carolina State Bar Ethics Advisory Op. 94-27 (Jan. 1995) ..... 281
South Carolina State Bar Ethics Advisory Op. 97-02 (1997) ..... 322
South Carolina State Bar Ethics Advisory Op. 97-08 (June 1997) ..... 281
South Carolina State Bar Ethics Advisory Op. 97-22 (1997) ..... 290
South Carolina State Bar Ethics Advisory Op. 09-10 (2009) ..... 370
Suffolk County, New York Ethics Op. 88-6 (1988) ..... 247
State Bar of S.D., Ethics Comm. Op. 91-22 (1992) ..... 337
Tenn. Bd. of Prof'l Resp., Formal Op. 98-F-141 (1998) ..... 335
Tennessee State Bar Ethics Op. 86-F-14 (July 18, 1986) ..... 229
Texas State Bar Ass'n Ethics Op. 431 (June 1986) ..... 264
Texas State Bar Ass'n Ethics Op. 448 (Sept. 11, 1987) ..... 247, 362
Utah State Bar Ass'n Ethics Op. 71(1979) ..... 339
Utah State Bar Ass'n Ethics Op. 90 (undated) ..... 229
Utah State Bar Ass'n Ethics Op. 97-06 (1997) ..... 348
Utah State Bar Ass'n Ethics Op. 132 (1993) ..... 273
Utah State Bar Ass'n Ethics Op. 96-12 (1997) ..... 316
Utah State Bar Ass'n Ethics Op. 96-14 (Jan. 24, 1997) ..... 278
Utah State Bar Ass'n Ethics Op. 97-10 (1997) ..... 316
Utah State Bar Ass'n Ethics Op. 98-03 (1998) ..... 290
Utah State Bar Ass'n Ethics Op. 98-05 (Apr. 17, 1998) ..... 289
Utah State Bar Ethics Adv. Op. Comm., Op. 99-07 (1999) ..... 361
Utah State Bar Ass'n Ethics Op. 02-07 (2002) ..... 322
Utah State Bar Ass'n Ethics Op. 03-04(2003) ..... 339
Vermont Advisory Ethics Op. 87-12 (1987) ..... 307
Vermont Advisory Ethics Op. 97-5 ..... 281
Vermont Advisory Ethics Op. 1998-08 ..... 361
Virginia Commw. Bar Cmte. on Ethics & Prof. Op. 874 (1987) ..... 303
Virginia Commw. Bar Cmte. on Ethics & Prof. Op. 1712 (1998) ..... 304
Virginia State Bar Ethics Op. 824 (Oct. 9, 1986) ..... 247
Virginia State Bar Ethics Op. 962 (1987) ..... 246
Virginia State Bar Ethics Op. 1000 (Nov. 12, 1987) ..... 247
Virginia State Bar Ethics Op. 1076 (1988) ..... 318
Virginia State Bar Ethics Op. 1089 (June 8, 1988) ..... 247
Virginia State Bar Ethics Op. 1149 (Dec. 19, 1988) ..... 247
Virginia State Bar Ethics Op. 1232 (undated) ..... 221
Virginia State Bar Ethics Op. 1564 (1995) ..... 361
Virginia State Bar Ethics Op. 1584 (1994) ..... 322
Virginia State Bar Ethics Op. 1723 (undated) ..... 290
Virginia State Bar Ethics Op. 1744 (2001) ..... 329
Virginia State Bar Ethics Op. 1765 (2003) ..... 323
Virginia State Bar Ethics Op. 1783 (2003) ..... 351
Virginia State Bar Ethics Op. 1818 (2005) ..... 357
Virginia State Bar Ethics Op. 1884 (1989) ..... 337
Washington State Bar Ethics Op. 183 (1990) ..... 223
West Virginia Ethics Op. 89-1 (1989) ..... 247
West Virginia Ethics Op. 93-02 (1993) ..... 310
Wisconsin Ethics Opinion E-82-7 (1998) ..... 333
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-89-12 (1989) ..... 246
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-89-13 (1989) ..... 252
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-89-16 (Sept. 8, 1989) ..... 220
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-98-1 (1998) ..... 283
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-00-03 (2003) ..... 357
Wisconsin State Bar Comm. on Prof. Ethics, Op. E-00-04 (2000) ..... 361

**To Members of the District of Columbia Bar:**

Effective February 1, 2007, the D.C. Court of Appeals amended the D.C. Rules of Professional Conduct in the most comprehensive revision to the Rules since they first became effective on January 1, 1991. Although the vast majority of opinions issued by the D.C. Bar Legal Ethics Committee ("Committee") prior to the effective date of the amended Rules are substantively unaffected by the amendments, there are some that simply no longer provide complete guidance in light of the recent changes. *It is critical, therefore, that anyone who seeks guidance from a Committee opinion pay particular attention to the possibility that the Rules or Comments have changed in relevant ways since the opinion was published.* Some of the changes are "non-substantive," such as the renumbering of a Rule section or a Comment. In these circumstances, the Committee opinion remains valid, even though a particular citation to a Rule or a Comment may no longer be consistent with the current version. The Committee urges anyone consulting an opinion to read it in light of the revised Rules and Comments. In the table below, the Committee has identified those opinions that, in its judgment, are *substantively* affected by the amended Rules:

**Opinions Substantively Affected by the Amended Rules (Effective 2/1/07)**

| *Opinion* | *Relevant Changes* |
|---|---|
| **Opinion 211:** Fee Agreements; Mandatory Arbitration Clauses | D.C. Rule 1.8(g)(2) has been revised to clarify the conditions under which a lawyer may settle a claim or potential claim for malpractice. Comment [13] now explains that the Rule does not prohibit lawyers from entering into an agreement with the client for mandatory arbitration of legal malpractice claims, and there is no requirement that the client have separate counsel before such an agreement is permissible. |
| **Opinion 212:** Representation by Law Firm Adverse to Former Client in a Substantially Related Matter After Lawyers Who Represented Former Client Have Left the Law Firm | D.C. Rule 1.10(c) now permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm, so long as none of the remaining lawyers has any information protected by D.C. Rule 1.6 that is material to the matter. |
| **Opinion 217:** Multiple Representation; Intermediation | D.C. Rule 2.2 has been eliminated, and the discussion of intermediation and common representation has been moved to Comments [14] through [18] of D.C. Rule 1.7. |
| **Opinion 218:** Retainer Agreement Providing for Mandatory Arbitration of Fee Disputes Is Not Unethical | Comment [1] to D.C. Rule 1.8 now explains that the requirements of paragraph (a) do not apply to ordinary fee arrangements between client and lawyer, which are governed by D.C. Rule 1.5. Moreover, Comment [13] to D.C. Rule 1.8 now explains that D.C. Rule 1.8 generally permits lawyers to enter into agreements to arbitrate any legal malpractice claim. |
| **Opinion 219:** Conflict of Ethical Obligations | D.C. Rule 1.6(d) now permits a lawyer whose services were used to further a crime or fraud to reveal client confidences and secrets under certain circumstances to prevent the crime or fraud or to mitigate the harm caused by a client's crime or fraud. Because a lawyer is now permitted to make certain disclosures under D.C. Rule 1.6, the disclosure obligations under D.C. Rules 4.1(b) and 3.3(d)—both of which are expressly made subject to the obligations under D.C. Rule 1.6—may now be broader. |
| **Opinion 232:** Multiple Clients/Criminal Matter | D.C. Rule 1.7(c) has been revised to require that each potentially affected client provide informed consent to a representation otherwise prohibited under paragraph (b) and that the lawyer reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. |

| *Opinion* | *Relevant Changes* |
|---|---|
| **Opinion 238:** Written Fee Agreements | D.C. Rule 1.5(b) has been revised to require that a written fee agreement describe not only the basis or rate of the fee but also the scope of the lawyer's representation and the expenses for which the client will be responsible. |
| **Opinion 243:** Joint Representation in Divorce Cases | D.C. Rule 2.2 has been eliminated, and the discussion of intermediation and common representation has been moved to Comments [14] through [18] of D.C. Rule 1.7. |
| **Opinion 253:** Referral Fee Arrangement Between Law Firms and Insurance Companies | D.C. Rule 7.1(b)(5) has been eliminated. As a result, a portion of the opinion is no longer applicable—specifically, the discussion about the relationship between the prohibition on sharing fees with nonlawyers in D.C. Rule 5.4 and the provision in D.C. Rule 7.1(b)(5) that had permitted lawyers to pay referral fees to intermediaries under certain conditions. |
| **Opinion 264:** Refunds of Special Retainers; Commingling of Such Funds with the General Funds of the Law Firm Upon Receipt | D.C. Rule 1.15(d) has been revised significantly since this opinion was issued. Most particularly, D.C. Rule 1.15(d) now provides that advances of unearned fees and unincurred costs shall be treated as property *of the client*. The opinion's contrary determination was based on a prior version of D.C. Rule 1.15(d).* |
| **Opinion 273:** Ethical Considerations of Lawyers Moving From One Private Law Firm to Another | D.C. Rule 1.10(c) now permits a firm to represent persons with interests materially adverse to those of a former client in matters which are the same as or substantially related to those in which a formerly associated lawyer represented the client while at the firm where none of the remaining lawyers has any information protected by D.C. Rule 1.6 that is material to the matter. The opinion's contrary conclusion was based on the prior version of D.C. Rule 1.10(c). |
| **Opinion 275:** Receipt of Confidential Information Bars Subsequent Representation of Another Client in the Same or a Substantially Related Matter Unless Screen Can Be Erected | D.C. Rule 1.10(a) no longer contains the potential-client exception to the imputed disqualification of a law firm. That exception is now contained in a new rule, D.C. Rule 1.18(d). |
| **Opinion 279:** Availability of Screening as Cure for Imputed Disqualification | D.C. Rule 1.10(a) no longer contains the potential client exception to the imputed disqualification of a law firm. That exception is now contained in a new rule, D.C. Rule 1.18(d). |
| **Opinion 286:** Contingent Referral Fees | D.C. Rule 7.1(b)(5) has been eliminated. The opinion's discussion of how the Rule marked a departure from prior ethics law and authorized certain payments to others for the referral of legal business is no longer applicable. |
| **Opinion 294:** Sale of Law Practice by Retiring Lawyer | D.C. Rule 1.17 is new and governs the sale of a law practice. This rule (together with Comment [10]) authorizes the sale of a law practice so long as the sale is not financed by increases in fees charged to the transferred clients and existing arrangements between the transferring lawyer and the client as to fees and the scope of the work are honored by the purchasing lawyer. |

* When Opinion 264 was published in 1996, D.C. Rule 1.15(d) provided that "[a]dvances of legal fees and costs become the property of the lawyer upon receipt. Any unearned amount of prepaid fees must be returned to the client at the termination of the lawyer's services in accordance with Rule 1.16(d)." The D.C. Court of Appeals amended D.C. Rule 1.15(d), effective January 1, 2000, to clarify that, "[a]dvances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client consents to a different arrangement." Although the D.C. Court of Appeals also made some minor modifications to D.C. Rule 1.15(d) in the most recent amendments that became effective on February 1, 2007, the earlier amendments to the rule are the ones directly relevant to Opinion 264.

| *Opinion* | *Relevant Changes* |
|---|---|
| **Opinion 296:** Joint Representation: Confidentiality of Information | D.C. Rule 2.2 has been eliminated, and Comments [14]–[18] to D.C. Rule 1.7 have been added to address special considerations in common representation. Moreover, D.C. Rule 1.6(d) now permits a lawyer whose services were used to further a crime or fraud to reveal client confidences and secrets under certain circumstances to prevent the crime or fraud or to mitigate the harm caused by a client's crime or fraud. |
| **Opinion 299:** Duty of Confidentiality to the Corporate Client That Has Ceased Operations | D.C. Rule 1.6(d) now permits a lawyer whose services were used to further a crime or fraud to reveal client confidences and secrets under certain circumstances to prevent the crime or fraud or to mitigate the harm caused by a client's crime or fraud. |
| **Opinion 302:** Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web Pages | D.C. Rule 7.1(b)(5) has been eliminated. As a result, a portion of the opinion is no longer applicable—specifically, the discussion about the steps that a lawyer must take when paying fees to participate in a web-based bidding service to satisfy the conditions of D.C. Rule 7.1(b)(5). |
| **Opinion 306:** Practicing Law While Simultaneously Selling Insurance | D.C. Rule 5.7 is new. It provides that a lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of services that might reasonably be performed in conjunction with and which are related to the provision of law services. This opinion remains consistent with D.C. Rule 5.7, but it relied only on Comment [25] (now renumbered [36]) to D.C. Rule 1.7 for the conclusion that a lawyer may sell insurance products to clients so long as she makes full disclosure, obtains consent, and concludes that her professional judgment on behalf of the client will not be adversely affected. |
| **Opinion 307:** Participation in Government Program Requiring Payment of Percentage of Fee | D.C. Rule 7.1(b)(5) has been eliminated. As a result, a portion of the opinion is no longer applicable—specifically, the discussion about the steps that a lawyer must take when paying to participate in a government-run schedule program for legal services to satisfy the conditions of D.C. Rule 7.1(b)(5). |
| **Opinion 311:** Choice-of-Law Rules for Professional Conduct in Non-Judicial Proceedings | D.C. Rule 8.5(b)(1) now applies more broadly to conduct in connection with a "matter pending before a tribunal" rather than only in connection with a "proceeding in a court before which a lawyer has been admitted to practice." |
| **Opinion 329:** Non-Profit Organization Fee Arrangement with an Attorney to Whom It Refers Matters | D.C. Rule 5.4(a)(5) now provides that a lawyer may share legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies as tax exempt under section 501(c)(3) of the Internal Revenue Code. The opinion's requirement that reimbursements be permitted only to recoup the non-profit's out-of pocket expenses and not to provide some portion of the fees collected is no longer necessary given that D.C. Rule 5.4(a)(5) now expressly authorizes the sharing of legal fees under these circumstances. |

ETHICS OPINIONS TITLES/HEADINGS


210- Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney. Rule 1.7. (1990)

211- Fee Agreements; Mandatory Arbitration Clauses. Rule 1.5(b), Rule 1.8(a), Rule 1.8(g). (1990)

212- Representation by Law Firm Adverse to Former Client in a Substantially Related Matter After Lawyers Who Represented Former Client Have Left the Law Firm. Rule 1.10(c). (1990)

213- Defense Counsel's Obligation to Inform Court of Adverse Evidence. Rule 1.6, Rule 3.3. (1990)

214- Disclosure to Internal Revenue Service of Name of Client Paying Fee in Cash. Rule 1.6(a), Rule 1.6(d). (1990)

215- Communication With Potential Client Currently Represented by Other Counsel. Rule 4.2(a). (1990)

216- Representation of Closely Held Corporation in Action Against Corporate Shareholder. Rule 1.13(a). (1991)

217- Multiple Representation; Intermediation. Rule 1.7, Rule 2.2. (1991)

218- Retainer Agreement Providing for Mandatory Arbitration of Fee Disputes Is Not Unethical. Rule 1.5, Rule 1.6(a)(5), Rule 1.8. (1991)

219- Conflict of Ethical Obligations. Rule 1.6(d)(2)(A), Rule 3.3(d), Rule 4.1(b). (1991)

220- Threats to File Disciplinary Charges. Rule 8.4(g). (1991)

221- Law Firm Employment Agreement. Rule 1.4, Rule 5.6(a), Rule 7.1. (1991)

222- Attorney's Obligation Under Rule 9.1 Does Not Apply to Lawful Acts Outside the District of Columbia. Rule 8.5, Rule 9.1. (1991)

223- Nondisclosure of Protected Information to Funding Agency. Rule 1.6. (1991)

224- Misleading Firm Name. Rule 7.1(a), Rule 7.5(a), Rule 7.5(b). (1991)

225- Prepaid Legal Services. Rule 1.3, Rule 1.6, Rule 1.7, Rule 1.8(e), Rule 5.4(e), Rule 5.5, Rule 7.1. (1992)

226- Service by Lawyer in Private Practice as In-House Counsel and Real Estate Broker. Rule 1.7(b), Rule 1.7(c)(2), Rule 7.1(a). (1992)

227- Imputed Disqualification and Screening of Paralegals. Rule 1.9, Rule 1.10, Rule 5.3. (1992)

228- Lawyer-Witness Participation in Pretrial Proceedings. Rule 1.4(b), Rule 1.7(b), Rule 3.7(a). (1992)

229- Surreptitious Tape Recording by Attorney. Rule 8.4(c). (1992)

230- Assertion of Retaining Liens; Preservation of Confidences and Secrets of Trust Client in Dispute Between Former Co-trustee and Successor Trust. Rule 1.16(d), Rule 1.8(i), Rule 1.6. (1992)

231- Lawyer as Legislator. Rule 1.2(b), Rule 1.3(b)(3), Rule 1.7(b)(4), Rule 6.4. (1992)

232- Multiple Clients/Criminal Matter. Rule 1.7(b), Rule 1.10(a), Rule 1.16(a), Rule 4.2(a). (1992)

233- Payment of "Success Fees" to Nonlawyer Consultants. Rule 5.4. (1993)

234- Defense Counsel's Duties When Client Insists on Testifying Falsely. Rule 3.3. (1993)

235- Registered Limited Liability Partnership/Limited Liability Company. Rule 1.4(b), Rule 1.8(g), Rule 5.4(b), Rule 7.1(a), Rule 7.5(b). (1993)

236- Divulging Client Confidences and Secrets in a Bankruptcy Proceeding in Order to Collect Fees Is Permitted in Limited Circumstances. Rule 1.6(d)(5). (1993)

237- Conflict of Interests: Previous Representation of Witness in Unrelated Matter. Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10. (1992)

238- Written Fee Agreements. Rule 1.1, Rule 1.4(a), Rule 1.5(b). (1993)

239- Attorney–Client Relationship Between a Lawyer and Her Firm; Reporting of Professional Misconduct. Rule 1.6, Rule 1.9, Rule 8.3(a). (1993)

240- Ethical Obligations of D.C. Corporation Counsel Attorneys Representing Custodial Parents in Social Security Act Title IV-D Cases. Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10, Rule 4.3. (1993)

241- Financial Penalty Imposed on Departing Lawyer Who Engages in Legal Practice in D.C. Area. Rule 5.6(a). (1993)

242- Ethical Obligations of Attorney Holding Documents Provided by Client That May Be Property of Third Party. Rule 1.2(e), Rule 1.6, Rule 1.15, Rule 3.4(a). (1993)

243- Joint Representation in Divorce Cases. Rule 1.7(a), Rule 2.2. (1993)

244- Inclusion of Name of Nonlawyer Partner in Firm Name. Rule 5.4(b), Rule 7.5. (1993)

245- Payment of Referral Fee to a Lawyer for Recommendation of Registered Agent. Rule 1.7(b)(4). (1993)

246- A Lawyer's Obligation to Report Another Lawyer's Misconduct. Rule 1.3(b)(2), Rule 1.6, Rule 8.3. (1994)

247- Whether Settlement Lawyer Selected by Real Estate Purchaser Has a Sufficient Lawyer–Client Relationship With Seller to Warrant Disqualification; Conflict of Interest if Adverse Party Formerly Was Represented by a Firm to Whom Lawyer Is "Of Counsel." Rule 1.7, Rule 1.9(a), Rule 1.10, Rule 2.2, Rule 4.3. (1994)

248- Whether Lawyer May Represent Multiple Plaintiffs Claiming Employment Discrimination in Selection of Other Person for Position They Sought. Rule 1.2, Rule 1.3, Rule 1.7. (1994)

249- Lawyer Advertising. Rule 7.1(a). (1994)

250- Duty to Turn Over Files of Former Client to New Lawyer When Unpaid Fees Are Outstanding. Rule 1.8(i), Rule 1.16(d). (1994)

251- Safekeeping of Settlement Proceeds Claimed Both by the Client and a Third Person. Rule 1.15, Rule 1.6. (1994)

252- Obligations of a Lawyer Appointed Guardian Ad Litem in a Child Abuse and Neglect Proceeding With Respect to Potential Tort Claims of the Child. Rule 1.2, Rule 1.3, Rule 1.4, Rule 1.7, Rule 1.14. (1994)

253- Referral Fee Arrangement Between Law Firms and Insurance Companies. Rule 1.3(a)-(b), Rule 1.7(b)-(c), Rule 5.4, Rule 7.1. (1994)

254- Use of Abbreviations by Limited Liability Companies, Limited Liability Partnerships, and Professional Limited Liability Companies. Rule 7.1(a), Rule 7.5(a)-(b). (1995)

255- Use of Former Firm Lawyer on a Contract Basis. Rule 1.5(e), Rule 1.7(b)(4), Rule 1.10(a), Rule 7.1(a). (1995)

256- Inadvertent Disclosure of Privileged Material to Opposing Counsel. Rule 1.1, Rule 1.6, Rule 1.15, Rule 8.4(c). (1995)

257- Disclosure Obligations of Criminal Defense Lawyer Charged With a Crime by the Prosecutor. Rule 1.3, Rule 1.7. (1995)

258- Application of Rule 4.2(a) to Lawyers as Parties Proceeding Pro Se. Rule 4.2. (1995)

259- Conflict Issues in Representations Involving Estates. Rule 1.7, Rule 1.9. (1995)

260- Agreements Limiting the Professional Liability of Lawyers to Former Clients. Rule 1.8(g), Rule 8.3(a), Rule 8.4. (1995)

261- Emergency Room Referrals by a Law School Clinical Program. Rule 7.1. (1995)

262- Application of Rule 1.5(d) to Receipt of a Contingent Fee in a Writ of Error Coram Nobis Proceeding. Rule 1.5(d). (1995)

263- Contacts With Persons Represented by Counsel; Application of Rule 8.4(g) to Criminal Contempt Proceedings. Rule 1.4(a), Rule 4.2(a), Rule 8.4(g). (1996)

264- Refunds of Special Retainers; Commingling of Such Funds With the General Funds of the Law Firm Upon Receipt. Rule 1.15, Rule 1.16. (1996)

265- Positional Conflicts of Interest in Simultaneous Representation of Clients Whose Positions on Matters of Law Conflict With Other Clients' Positions on Those Issues in Unrelated Matters. Rule 1.7. (1996)

266- Withdrawal From Representation Requiring Court Approval; Withdrawal Conditioned on Disclosure of Client's Whereabouts. Rule 1.6, Rule 1.16, Rule 3.4(c). (1996)

267- Disclosure of Billing Practices: Billings Based on Time and "Attorney Charge." Rule 1.5, Rule 7.1(a)(1), Rule 8.4(c). (1996)

268- Conflict of Interest Issues Where Private Lawyers Provide Volunteer Legal Assistance to the D.C. Corporation Counsel: Reconsideration of Opinion 92. Rule 1.2, Rule 1.7. (1996)

269- Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation. Rule 1.7, Rule 1.8(e), Rule 1.13, Rule 4.3. (1997)

270- Whether Subordinate Lawyer Must Alert Client and Report Superior's Misconduct After Lawyer Has Left Practice. Rule 1.4, Rule 1.16, Rule 5.2, Rule 8.3, Rule 8.4. (1997)

271- Inactive Members: Business Cards and Letterhead. Rule 7.1, Rule 7.5. (1997)

272- Conflict of Interests: "Hot Potato." Rule 1.7, Rule 1.9, Rule 1.16. (1997)

273- Ethical Considerations of Lawyers Moving From One Private Law Firm to Another. Rule 1.4, Rule 1.7, Rule 1.8(i), Rule 1.10(b), Rule 1.16(d), Rule 7.5(a), Rule 8.4(c). (1997)

274- Government Agency Attorneys May Participate in a Public Meeting at Which Claimants Who Are Represented by Counsel Are Present. Rule 4.2(a). (1997)

275- Receipt of Confidential Information Bars Subsequent Representation of Another Client in the Same or a Substantially Related Matter Unless Screen Can be Erected. Rule 1.6, Rule 1.10. (1997)

276- Lawyer–Mediator Must Conduct Conflicts Check. Rule 1.7, Rule 2.2, Rule 8.4. (1997)

277- Retention by Former Law Firm of Withdrawing Partner's Name. Rule 7.1, Rule 7.5. (1997)

278- Partnership With Foreign Lawyer. Rule 5.1, Rule 5.5, Rule 7.5(b), Rule 7.5(d). (1998)

279- Availability of Screening as Cure for Imputed Disqualification. Rule 1.7, Rule 1.8(b), Rule 1.9, Rule 1.10, Rule 1.11, Rule 2.2. (1998)

280- Direct Communications Between a Lawyer Representing a Client and Members of a Local Government Board. Rule 4.2(d). (1998)

281- Transmission of Confidential Information by Electronic Mail. Rule 1.6. (1998)

282- Duties of Lawyer Employing a Social Worker Who Is Obligated to Report Child Abuse. Rule 1.6, Rule 5.3. (1998)

283- Disposition of Closed Client Files. Rule 1.8(i), Rule 1.15, Rule 1.16(d), Rule 3.4(a). (1998)

284- Advising and Billing Clients for Temporary Lawyers. Rule 1.2, Rule 1.4, Rule 1.5, Rule 7.1, Rule 7.5. (1998)

285- Nonlawyer Former Government Employee Working for a Lawyer. Rule 1.11, Rule 4.4, Rule 5.3, Rule 8.4. (1998)

286- Contingent Referral Fees. Rule 1.5(e), Rule 5.4(a), Rule 7.1(b)(5). (1998)

287- Ex Parte Contact With Former Employees of Party Opponents. Rule 4.2, Rule 4.3, Rule 4.4. (1998)

288- Compliance With Subpoena from Congressional Subcommittee to Produce Lawyer's Files Containing Client Confidences or Secrets. Rule 1.6(d)(2)(A). (1999)

289- "Cause" Litigation by a Nonprofit Foundation Run by Nonlawyers; Prospectively Restricting Clients' Right to Waive Attorney's Fees or Agree to a Confidential Settlement. Rule 1.2, Rule 1.6, Rule 1.7, Rule 1.8, Rule 5.4. (1999)

290- Disclosure of Protected Information of Insured to Insurers and Outside Auditing Agencies. Rule 1.6, Rule 1.8(e). (1999)

291- Contracts With Temporary Lawyers: Restrictions on Subsequent Employment. Rule 5.6(a). (1999)

292- Conflict of Interest: "Thrust Upon" Conflict. Rule 1.7, Rule 1.16. (1999)

293- Disposition of Property of Clients and Others Where Ownership Is in Dispute. Rule 1.15. (2000)

294- Sale of Law Practice by Retiring Lawyer. Rule 1.5(a), Rule 1.5(e), Rule 1.6, Rule 1.7, Rule 1.16. (1999)

295- Restriction on Communications With a Represented Parent by a Lawyer Acting as Guardian Ad Litem in a Child Abuse and Neglect Proceeding. Rule 3.5, Rule 4.2, Rule 8.4(a). (2000)

296- Joint Representation: Confidentiality of Information. Rule 1.4, Rule 1.6, Rule 1.7, Rule 1.16. (2000)

297- Representation of Client in Negotiated Rulemaking Proceeding for Which Lawyer Was Responsible While in Government. Rule 1.6, Rule 1.7, Rule 1.11. (2000)

298- Sale or Assignment of Accounts Receivable to a Collection Agency. Rule 1.5, Rule 1.6, Rule 5.3, Rule 5.4. (2000)

299- Duty of Confidentiality to Corporate Client That Has Ceased Operations. Rule 1.6. (2000)

300- Acceptance of Ownership Interest in Lieu of Legal Fees. Rule 1.5(a), Rule 1.7(b), (c), Rule 1.8(a). (2000)

301- Conflict of Interest: Simultaneous Representation of Two Plaintiffs Against a Common Defendant in Separate but Related Lawsuits. Rule 1.7(b). (2000)

302- Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-Based Web Pages. Rule 1.6, Rule 3.6, Rule, 4.3, Rule 5.4, Rule 7.1. (2000)

303- Sharing Office Space and Services by Unaffiliated Lawyers. Rule 1.6, Rule 1.7, Rule 1.10, Rule 7.1, Rule 7.5. (2001)

304- Management of a Law Firm's Human Resources Functions by an Employee Management Company. Rule 1.8(g)(1), Rule 5.1, Rule 5.3, Rule 5.4, Rule 5.5(b). (2001)

305- Ethical Considerations Arising From Representation of Trade Association. Rule 1.6, Rule 1.7, Rule 1.13, Rule 1.16. (2001)

306- Practicing Law While Simultaneously Selling Insurance. Rule 1.6, Rule 1.7, Rule 1.8, Rule 8.4. (2001)

307- Participation in Government Program Requiring Payment of Percentage of Fee. Rule 5.4, Rule 7.1. (2001)

308- Ethical Constraints on Lawyers Who Leave Private Employment for Government Service. Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10. (2001)

309- Advance Waivers of Conflicts of Interest. Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10, Rule 2.2. (2001)

310- Propriety of Lawyer Charging Interest When the Client Fails to Pay Fees. Rule 1.5. (2001)

311- Choice-of-Law Rules for Professional Conduct in Non-Judicial Proceedings. Rule 8.4(a), Rule 8.5(b). (2002)

312- Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm. Rule 1.6, Rule 1.10. (2002)

313- Whether a Lawyer May Continue to Represent a Client When That Lawyer Represented the Same Client in the Same Matter While Serving as a Public Officer or Employee. Rule 1.6, Rule 1.11. (2002)

314- Whether a Nonlawyer Union Employee May Supervise a Union Attorney. Rule 1.2, Rule 1.7, Rule 1.8, Rule 1.13, Rule 4.3, Rule 5.4. (2002)

315- Personal and Substantial Participation in Prior Litigation. Rule 1.11. (2002)

316- Lawyers' Participation in Chat Room Communications With Internet Users Seeking Legal Information. Rule 1.1, Rule 1.2, Rule 1.3, Rule 1.4, Rule 1.6, Rule 1.7, Rule 1.9, Rule 7.1. (2002)

317- Repudiation of Conflict of Interest Waivers. Rule 1.7, Rule 1.9, Rule 1.16. (2002)

318- Disclosure of Privileged Material by Third Party. Rule 1.1(a) and (b), Rule 1.3(a), Rule 1.6(a) and (e), Rule 1.15(b), Rule 8.4(c). (2002)

319- Purchase by a Lawyer of a Legal Claim From a Nonlawyer. Rule 1.8(a), Rule 8.4(c). (2003)

320- Jury Nullification Arguments by Criminal Defense Counsel. Rule 1.3, Rule 3.1, Rule 3.3, Rule 8.4. (2003)

321- Communications Between Domestic Violence Petitioner and Counsel for Respondent in a Privately Litigated Proceeding for Criminal Contempt. Rule 1.3, Rule 4.1, Rule 4.2, Rule 4.3, Rule 5.3, Rule 8.4. (2003)

322- Whether a Nonlawyer Employed by a Law Firm May Be Partly Compensated by a Percentage of the Profits of the Cases on Which He Worked. Rule 5.4. (2004)

323- Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties. Rule 8.4. (2004)

324- Disclosure of Deceased Client's Files. Rule 1.6. (2004)

325- Agreement to Distribute Former Firm Profits to Partners From Former Firm Only as Long as They Continue to Practice in New Merged Firm. Rule 5.6(a). (2004)

326- Referral of Person Adverse to a Client to Another Lawyer. Rule 1.3, Rule 1.4, Rule 1.6, Rule 1.7, Rule 4.3. (2004)

327- Joint Representation: Confidentiality of Information Revisited. Rule 1.3, Rule 1.4, Rule 1.6, Rule 1.7, Rule 1.16. (2005)

328- Personal Representation of Constituents of an Organization, Including Individuals Who Participate in an Organization's Governance. Rule 1.7, Rule 1.8(e), Rule 1.9, Rule 1.13. (2005)

329- Nonprofit Organization Fee Arrangement With an Attorney to Whom it Refers Matters. Rule 5.4(a), Rule 7.1(b)(5). (2005)

330- Unbundling Legal Services. Rule 1.1, Rule 1.2, Rule 1.3, Rule 1.4, Rule 1.6, Rule 1.7, Rule 1.9, Rule 3.3, Rule 4.2, Rule 4.3. (2005)

331- Contact With In-House Counsel of a Represented Entity. Rule 4.2. (2005)

332- Firm Names for Solo Practitioners. Rule 7.5, Rule 7.1. (2005)

333- Surrendering Entire Client File Upon Termination of Representation. Rule 1.8(i), Rule 1.16(d). (2005)

334- Agreement Between Lawyer and Media Representatives. Rule 1.8(c), Rule 1.7(b)(4), Rule 1.7(c). (2006)

335- Whether a Lawyer May, as Part of a Settlement Agreement, Prohibit the Other Party's Lawyer From Disclosing Publicly Available Information About the Case. Rule 1.2, Rule 1.6, Rule 5.6, Rule 7.1. (2006)

336- A Lawyer's Fiduciary Role as a Court-Appointed Guardian of an Incapacitated Individual. Rule 3.3, Rule 8.4. (2006)

337- Lawyer as Expert Witness. Rule 1.4, Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10, Rule 8.4. (2007)

338- Whether A Law Firm May Retain the Name of a Partner Who Becomes Both "Of Counsel" to that Law Firm and a Partner in a Different Law Firm Also Bearing His Name. Rule 1.10, Rule 7.1, Rule 7.5. (2007)

339- Threat of Criminal Referral in Civil Debt Collection Matter. Rule 4.1, Rule 4.3, Rule 8.4. (2007)

340- Contacts With Government Officials in Litigated Matters. Rule 4.2(d). (2007)

341- Review and Use of Metadata in Electronic Documents. Rule 1.6, Rule 3.4, Rule 4.4, Rule 8.4. (2007)

342- Participation in Internet-Based Lawyer Referral Services Requiring Payment of Fees. Rule 5.4, Rule 7.1. (2007)

343- Application of the "Substantial Relationship" Test When Attorneys Participate in Only Discrete Aspects of a New Matter. Rule 1.2, Rule 1.9, Rule 1.10. (2008)

344- Conflicts of Interest for Lawyers Engaged in Lobbying Activities That Are Not Deemed to Involve the Practice of Law. Rule 1.0(h), Rule 1.6, Rule 1.7, Rule 1.10, Rule 1.11, Rule 5.3, Rule 5.4, Rule 5.7. (2008)

345- Reimbursement of Interest Charges Incurred When a Lawyer Uses The Firm's Line of Credit to Advance the Costs of the Representation. Rule 1.5, Rule 1.8(d). (2008)

346- The Required Elements for Triggering a Duty of Confidentiality to a Prospective Client. Rule 1.6, Rule 1.18 (2009)

347- Reverse Contingent Fees. Rule 1.5 (2009)

348- Accepting Credit Cards for Payment of Legal Fees. Rule 1.5, Rule 1.4(b), Rule 1.6, Rule 1.15, Rule 1.16, Rule 7.1 (2009)

349- Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group. Rule 1.6, Rule 1.7, Rule 1.9, Rule 1.10 (2009)

350- Whether A Lawyer Is Obliged To Surrender To A Former Client Work-Product Procured Through The Former Client's Factual Misrepresentations. Rule 10(f), Rule 1.2(e), Rule 1.6(d), Rule 1.16(d), Rule 3.3(a). (2009)

351- Sharing Legal Fees with Clients. Rule 1.5(a), Rule 1.8(d), Rule 1.15(b), Rule 5.4(a). (2009)

352- Professional Responsibility Duties for Temporary Contract Lawyers and the Firms that Hire Them. Rule 1.6, Rule 1.9, Rule 1.10, Rule 4.4. (2010)

353- Whether a lawyer representing a client with diminished capacity can seek the appointment of a substitute surrogate decision-maker when the current surrogate decision-maker is making decisions for the client against the advice of a lawyer. Rule 1.2, Rule 1.14, Rule 1.16 (2010)

354- Providing Financial Assistance to Immigration Clients Through Lawyer's Execution of Affidavit of Support on Form I-864 as a Joint Sponsor. Rule 1.7, Rule 1.8(d), Rule 1.16. (2010)

355- Flat Fees and Trust Accounts: (a) must a lawyer deposit flat fees paid in advance of the conclusion of a representation in a trust account?; and (b) when are such funds earned so that a lawyer can transfer them to an operating account? Rule 1.0(e) & (o), Rule 1.5(b), 1.15(a) & (e). (2010)

356- Absence of Conflict of Interest When Lawyer Cannot Identify Affected Clients and Nature of Conflict; Applicability of "Thrust Upon" Exception Where Lawyer Cannot Seek Informed Consent. Rule 1.6, Rule 1.7. (2010)

357- Former Client Records Maintained in Electronic Form (2010)

358- Subpoenaing Witness When Lawyer for Congressional Committee Has Been Advised that Witness Will Decline to Answer Any Questions on Claim of Privilege; Legal Ethics Opinion 31 Revisited (2011)

359- Disposition of Missing Client's Trust Account Monies in the District of Columbia (2011)

360- Contact With Non-Party Treating Physician Witness (2011)

361- Lawyer's Acceptance of Compensation From Non-Lawyer Entity for Referring Client to Such Entity; Opinion 245 Overruled in Part (2011)

362- Non-lawyer Ownership of Discovery Service Vendors (2012)

363- In-House Lawyer's Disclosure or Use of Employer/Client's Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge (2012)

364- Confidentiality Obligations When Former Client Makes Ineffective Assistance of Counsel Claim (2013)

365- Conflict of Interest Analysis for Government Agency Lawyer Defending Agency from Furlough-Related Employment Complaints While Pursuing Her Own Furlough-Related Employment Complaint (2013)

366- Ethical Issues that Commonly Arise in Private Adoption Matters (2014)

367- Representation of Client by Lawyer Seeking Employment with Entity or Person Adverse to Client, or Adversary's Lawyer; Clarification of Opinion 210 (2014)

368- Lawyer Employment Agreements—Restrictions on Departing Lawyer Who Competes with Former Firm (2015)

369- Sharing of Legal Fees Wtih a Lawyer Referral Service (2015)

370- Social Media I: Marketing and Personal Use (2016)

371- Social Media II: Use of Social Media in Providing Legal Services (2016)

372- Ethical Considerations in Law Firm Dissolutions (2017)

373- Court-Ordered Representation of Clients in Criminal Domestic Violence Matters Who Are Party to Parallel Civil Protection Order Proceedings (2017)

374- Ethical Obligations Regarding Prospective Client Information (2018)

375- Ethical Considerations of Crowdfunding (2018)

376- Mandatory Arbitration Provisions in Fee Agreements (2019)

377- Duties When A Lawyer is Impaired (2019)

378- Acceptance of Cryptocurrency as Payment for Legal Fees (2020)

379- Attorneys' Charging Liens and Client Confidentiality (2020)

380- Conflict of Interest Issues Related to Witnesses (2021)

381- Responding to Third-Party Subpoena (2021)

382- Lawyer-Directors Representing Entity-Clients (2021)

383- Disclosure of Client Confidences or Secrets in Compliance With the Outside Counsel Guidelines of Another Client; Advance Agreement to Withdraw from Representation in the Event of a "Midstream" Conflict (2022)

384- Restrictions on Accepting a Legal Fee For Benefit of Certain Incarcerated Persons Before Notifying Prior Counsel of Record (2022)

385- Advising Clients About Communications with Represented Opponents (2023)

386- Aggregate Settlements (2023)

387- Serving as Local Counsel for a Matter Being Litigated in a District of Columbia Court (2024)

388- Attorneys' Use of Generative Artificial Intelligence in Client Matters (2024)

389- Flat Fees, Subscription Fees and Disbarment (2025)

390- Representation and Privilege Issues in Context of Prior Work (2025)

The opinions in this publication begin at No. 210 because they were adopted after the March 1, 1990 adoption date but before the Jan. 1, 1991 effective date of the *D.C. Rules of Professional Conduct.* Opinion Nos. 1-215 are published in the *D.C. Code of Professional Responsibility*, with Opinions Nos. 210-215 being common to both documents.

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*Opinion No. 210*

**Representation Of Criminal Defendants By Attorney Seeking Position As Assistant U.S. Attorney**

• A lawyer who is primarily engaged in criminal defense work may continue to represent criminal defense clients while seeking a position with the United States Attorney's office provided that each of his/her criminal defense clients gives consent to the representation after full disclosure of the possible disadvantages that may result if the lawyer must withdraw to start employment with the United States Attorney. Disclosure must be made and consent obtained when the lawyer takes the first active step in seeking such employment. With disclosure and consent, a lawyer may accept new criminal defense clients after deciding to apply to the United States Attorney's office, before commencement of employment

**Applicable Code Provisions**

• **DR 7-101** (Representing a Client Zealously).

• **DR 5-101** (Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment).

**Applicable Rules Provision**

• **Rule 1.7** (Conflict of Interest: General Rule)

*Inquiry*

An attorney practicing in the District of Columbia primarily represents criminal defendants under the Criminal Justice Act in the Superior Court of the District of Columbia. The attorney determines to seek a position with the United States Attorney's Office for the District of Columbia and submits a resume for review. It will be several weeks before the United States Attorney's offices decides whether or not to grant the applicant an interview. Thereafter, if she is offered a position as an Assistant in the U.S. Attorney's Office, actual employment may not commence for a number of months, perhaps as long as a year, pending an FBI investigation and because of federal hiring freezes.

The attorney asks whether she must disclose to her clients her decision to seek employment with the prosecutor's office, and whether she is required to withdraw from representation of criminal defendants prosecuted by the United States Attorney's office:

1) As soon as she determines to seek a position with the United States Attorney's office;
2) When she submits a resume;
3) When she is granted an interview;
4) When she is offered a position;
5) When an employment date is set.

The attorney also inquires whether she must disclose the potential conflict to the trial court even if after disclosure to the client, the client agrees to let the attorney continue as counsel. Finally, the attorney inquires whether she may continue to represent criminal defendants who are prosecuted by the District of Columbia Corporation Counsel's Office, after employment is offered but before it commences with the United States Attorney's office; and if so whether she must disclose her pending employment to her clients in such cases.

*Discussion*

This inquiry raises the issue whether a lawyer who is actively seeking a position as a prosecutor in the office of the United States Attorney for the District of Columbia is thereby disqualified during the pendency of her job application, and before she has a firm employment date, from continuing to represent clients involved in criminal investigations or proceedings being conducted by that office and by the District of Columbia Corporation Counsel's office. The questions to be resolved are first, whether the lawyer's interest in pursuing this ambition will or reasonably may be expected to affect the exercise of her professional judgment in behalf of her clients; if so, whether and under what circumstances the lawyer may continue to represent existing clients in criminal cases being prosecuted by the United States Attorney's office after deciding to seek a position with that office; and, second, whether the lawyer after determining to seek a position with the United States Attorney's office, may continue to seek and accept new employment to represent clients being prosecuted by that office or by the District of Columbia Corporation Counsel's office.

In defining the obligation of the bar to represent clients zealously within the bounds of law, DR 7-101 (A) provides that "A lawyer shall not intentionally: (1) fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules,...." This grave responsibility, which is also set forth in Rule 1.3 of the Rules of Professional Conduct and Related Comments (adopted March 1, 1990 by the D.C. Court of Appeals and effective January 1, 1991), is of special importance in criminal proceedings where the client's liberty is in jeopardy.

To insure the lawyer's independence and freedom to act at all times in the best interests of his or her client, DR 5-101 enjoins the lawyer to refuse employment when some personal interest may impair the lawyer's independent professional judgment. Thus, DR 5-101(A) provides: "Except with the consent of this client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests." *Cf.* Rule 1.7(B)(4) of the Rules of Professional Conduct effective January 1, 1991.

This rule governs the lawyer's initial decision whether or not to undertake the representation of a client in a new matter when some existing interest of the lawyer might reasonably be expected to affect the zealousness with which the lawyer acts in behalf of the client. The rule has also been interpreted to impose a continuing ethical obligation on a lawyer not to place his or her personal interests above the client's interests. Opinion Nos. 144, 169.

Rule 1.7 of the new Rules effective January 1, 1991, contains prescriptions similar to those of DR 5-101.

DR 5-101(A), read literally, addresses the question of whether and when a lawyer may accept new employment that might be in conflict with the lawyer's own business or personal interests; or which might adversely affect the lawyer's ability to exercise independent professional judgment in behalf of an ex-

isting client, or otherwise involve the lawyer in representing conflicting interests. In considering the present inquiry the Committee interprets this rule as applying as well to the question of whether and when a lawyer may affirmatively seek new employment which, if accepted, would create the same sort of conflicts.

*1. Lawyer's Duty to Existing Clients When He or She Applies for a Position in the Prosecutor's Office*

The overriding consideration in addressing the questions raised by this inquiry, is not the personal interest or ambition of the lawyer, but the lawyer's responsibility to represent his or her client zealously within the bounds of law, especially those who may be charged with a crime. Clearly, the lawyer cannot allow personal interests to interfere with that duty. The lawyer may perceive the particular prosecutor handling a case or matter she has been retained to defend as having some influence over her employment prospects. She may also believe that her advocacy skills as demonstrated in that case or matter will provide a principal basis upon which she will be evaluated. If so, she likely will seek to make a favorable impression. It is difficult to know whether or not these subjective feelings will compromise her zealous representation of her client. They may or they may not. In some circumstances the lawyer may work even harder in her client's behalf in order to demonstrate her competence and ability.

Thus, the lawyer may redouble the effort and time she previously gave to the client's cause, working more vigorously to master the applicable law and facts of the case. Obscure tactics and defenses may receive greater attention than otherwise, and the lawyer, in an effort to perform well, may conduct a more thorough discovery to better anticipate the prosecution's attack. At trial, the attorney may put forth her defense and counter the prosecution more energetically than otherwise. All of this activity, though driven by the lawyer's personal interest in performing well and enhancing her employment prospects, would benefit the client also. The interests of the lawyer and the client in this situation, therefore, could very well be consistent.

On the other hand, when representing clients in criminal proceedings, the lawyer is often required to make judgments as to courses of action and to assert rights that heavily burden the prosecution and create difficult obstacles to conviction of the lawyers's clients. The prosecutor may view some of defense counsel's tactics as unwarranted, technical, unreasonable or even personally offensive.

Moreover, criminal investigations and trials are the most adversarial of all litigation. It is to be expected that the prosecutor will vigorously contest, in his effort to obtain a conviction, virtually all of defense counsel's requests for discovery, pre-trial motions, and trial tactics. In the context of such hotly contested and adversarial proceedings, relationships between opposing counsel may become strained. Nevertheless, defense counsel is obligated to take whatever lawful and ethical measures are required to vindicate a client's cause without regard to opposition, obstruction, or personal interests, such as a desire not to offend or irritate members of the prosecutor's office from which she is seeking or may have recently received favorable job consideration. Where concern for jeopardizing her employment opportunities interferes with a lawyer's representation of her client, an impermissible conflict of interest exists.

The difficulty, therefore, is that, while the lawyer may react in this situation in a manner entirely consistent with her client's best interests, she could also perceive her own interests to be in conflict with those of her client. Moreover, the lawyer may not be able to foresee whether or when this conflict will arise during the course of her representation.

The Committee finds that DR 5-101 applies here, as will Rule 1.7 when it becomes effective on January 1, 1991. These rules provide that, where, as here, the lawyer's judgment on behalf of her client reasonably may be affected by her own personal interests, she may not proceed without obtaining the client's consent after full disclosure. (DR 5-101(A)).

The Committee has previously recognized "that the obvious ability to provide adequate representation, which pursuant to DR 7-101 must be zealous, is an independent requirement which must be met even though consent is provided." Opinion 163, referring to Opinion 49. A criminal defendant, moreover, may feel compelled to give consent rather than incur the delay and inconvenience which would otherwise result.

While it is ultimately the lawyer's own subjective perception of the relationship between her interests and the client's which determines the existence of a conflict,[1] the evaluation of the potential for conflict necessarily must rest with the client. Thus, even if the lawyer determines that her own interests in obtaining a position in the prosecutor's office will not impair the zealousness of her representation of her client's interests, this possibility must be fully disclosed to the client. The client must also be made aware of the possibility of added expense, delay, inconvenience and other disadvantages to the client that may occur, if the lawyer must subsequently withdraw from the case, perhaps at a most inconvenient time, to commence employment with the United States Attorney's office. Only if the client consents after full and complete disclosure of all of these possibilities may the lawyer continue to represent the client. See Comment [12] to Rule 1.7 effective January 1, 1991.

The Committee believes that this duty to disclose and seek consent arises when the attorney has determined to pursue employment with the United States Attorney's Office for the District of Columbia. Thus, disclosure should be made not later than when the lawyer takes the first active step in seeking such employment. This may be when the lawyer calls to discuss or inquire about procedures for making application; and the duty certainly arises when the lawyer submits a resume.

Further, the lawyer must apprise her client of any significant change in her employment prospects with the prosecutor's office, particularly any developments tending to indicate that the lawyer might need to withdraw from the representation. This duty derives from the lawyer's obligation to mitigate the

1 If in the lawyer's own mind the conflict of interests is insurmountable, and she cannot at the same time pursue her personal interest in becoming a prosecutor while continuing to represent criminal defendants, she must of course withdraw (no not submit) her application to the U.S. Attorney's office until all of her pending criminal matters have been completed.

burden which withdrawal imposes on the client.[2]

*2. During Pendency of Application For a Position In Prosecutor's Office, Lawyer May Accept New Criminal Defense Clients With Their Consent After Full Disclosure*

The resolution of the question whether or not the inquirer may seek and accept new criminal defense clients after she has determined to apply for a position with the United States Attorney's office, while her application is pending and before employment is scheduled to commence, is governed by DR 5-101(A). This rule permits a lawyer, with the consent of the client, to accept new employment even though the exercise of the lawyer's independent judgment might be affected by some business or personal interest.

In these circumstances, assuming full disclosure, the client is in a position to evaluate the possibility that the vigor of the lawyer's representation may be tempered by a desire not to take any action that could lessen the chances of her becoming a member of the prosecutor's staff. A decision can be reached freely without concern about possible significant disadvantages if consent is refused. Other counsel not so infected with adverse personal interests are presumably available, and there is no apparent reason why the client would suffer any significant delay, expense or inconvenience by refusing consent.

Accordingly, the Committee concludes that under DR 5-101(A), the lawyer may accept new criminal matters with the consent of the clients after full disclosure.

There remains the question whether a lawyer may continue to seek and accept new employment to represent clients being prosecuted by the District of Columbia Corporation Counsel's office during the pendency of her application with the United States Attorney's office. This question does not present a situation in which there is or may be a conflict between the lawyer's interests and her client's interests. Unlike the scenario which the above analysis contemplates, the lawyer cannot reasonably be concerned about jeopardizing her employment prospects in an unrelated agency by her actions in zealously defending a criminal client prosecuted by a different agency. Therefore, neither DR 5-101 nor DR 5-105 applies. Although a client in a criminal matter may prefer that his lawyer be completely "defense oriented" and not even consider becoming a prosecutor while defending him, this preference does not mean that a potential or actual conflict of interest exists, absent the circumstances described above. Consequently, the Committee finds that the lawyer is not obligated to disclose to any of her clients who are being prosecuted by the District of Columbia Corporation Counsel's office that she is seeking employment with the United States Attorney's office.

*Concurring Opinion of Four Members*

We agree with the Committee's conclusion but wish to emphasize the narrow reach of the Opinion.

The Inquiry presents a situation in which the lawyer has an extensive on-going criminal practice and the employment process in the U.S. Attorney's Office takes many months to complete. Since the lawyer cannot be expected to cease her practice entirely, it is not feasible for her to time her decision to seek employment with the U.S. Attorney's Office until the possible conflict with existing clients is eliminated. In other circumstances, however, it may be feasible for a lawyer to avoid any conflict by delaying the decision, in which case, we believe the lawyer may have an ethical duty to withhold the application until the conflict is removed. *See,* EC 5-2 ("After accepting employment, a lawyer carefully should refrain from assuming a position that would tend to make his judgment less protective of the interests of his client.")

Inquiry No. 88-2-5
Adopted April 17, 1990

*Opinion No. 211*

**Fee Agreements; Mandatory Arbitration Clauses.**

• A lawyer may not insist that a client enter into a fee agreement containing a clause mandating arbitration of fee and malpractice disputes unless the client is represented by other counsel.

**Applicable Code Provisions**

• **DR 2-106 (A)** A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

• **EC 2-19** Desirability of written fee agreements.

• **EC 2-23** A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject.

• **DR 6-102(A)** A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

**Applicable Rules Provisions**

• **1.5(b)** Requirement of written fee disclosures.

• **1.8(a)** In transactions with clients, a lawyer shall make full written disclosure of relevant information and shall give the c1lient a reasonable opportunity to seek independent legal advice.

• **1.8 (g)** A lawyer shall not attempt to limit his liability to his client for his personal malpractice.

*Inquiry*

A law firm proposes to use a form retainer agreement which describes the legal representation to be provided and states that the law firm will use "its best efforts on behalf of the client's interest." The agreement requires the firm and its client to resort to arbitration for "[a]ll claims, disputes and other matters in question arising out of, or relating to, payment under this Contract for Legal Services, or the breach thereof ...." By its terms, the agreement requires arbitration of claims by the firm against its clients for unpaid fees and claims by the client against the firm for malpractice.

Fee disputes are to be arbitrated before the Fee Arbitration Board of the District of Columbia Bar, or if that is not available, before an arbitration panel mutually chosen by the parties. All other disputes are to be arbitrated in the District of Columbia under the rules of the American Arbitration Association. The agreement states that the client consents to the jurisdiction of the Superior Court of the District of Columbia for "all purposes in connection with arbitration" and agrees "to pay reasonable attorney's fees in the amount of fifteen percent (15%) of the balance owed to the law firm..., plus

2 While there may be situations where it would be appropriate to do so, this opinion does not address the question of whether a lawyer should inform the judge handling a client's case that he or she has applied for a position in the prosecutor's office.

all costs of said suit." Finally, the contract erects a two-year statute of limitations within which arbitration must be started.

The law firm asks whether the mandatory arbitration provisions are proper under the District of Columbia Code of Professional Responsibility.

*Discussion*

In our Opinion 103, we decided that written retainer agreements are highly desirable, and to that end we approved the use of a form agreement for legal services.[1] However, we warned that form agreements "may not be adequate to set forth fully and fairly the terms of representation for all legal matters or for all attorney-client relationships," and that great care must be taken to insure that form agreements comport with all relevant ethics requirements.

In our Opinion 190, we held that a lawyer was not prohibited from incorporating in a fee agreement a clause which mandated arbitration of all disputes between lawyer and client under the procedures of the American Arbitration Association or the District of Columbia Bar Fee Arbitration Board.[2] However, we cautioned that a mandatory arbitration provision was not proper unless the lawyer made full disclosure to his client concerning any rights the client might waive by agreeing to arbitration and that the lawyer must not create arbitration procedures that violate DR 6-102(A).

Opinion 190 was issued prior to the promulgation of Rule 1.8 of the District of Columbia Rules of Professional Conduct, which is similar to rules in other jurisdictions that have been construed to bar mandatory arbitration provisions in retainer agreements unless the lawyer at least advises his client to seek independent legal counsel before entering into such an agreement. In addition, we note that Rule 1.5(b) of the new Rules of Professional Conduct will soon require lawyers to provide many clients with written statements concerning fee practices. Accordingly, we believe it appropriate to visit again the issues raised by mandatory arbitration clauses in written retainer agreements

The State Bar of Michigan, in Opinion RI-2, which applies Rule 1.8(h)(1) of the Michigan Rules by analogy,[3] has disapproved mandatory arbitration provisions in fee agreements unless the client has actually received independent counsel on the advisability of entering into the agreement. Opinion RI-2 notes that the lawyer and the client may have conflicting interests with respect to whether arbitration is appropriate and that, at the least, the client may not have the knowledge needed to make an informed decision about arbitration. The Philadelphia Bar Association's Opinion 88-2, relying on Rule 1.8(a)[4] of the Pennsylvania Rules of Professional Conduct, requires that a lawyer advise his client "in writing, in simple direct language, that by agreeing to arbitration the client is waiving the right to trial by jury...," and to seek independent legal counsel before executing the arbitration agreement.

Our Opinion 190 similarly cautioned that lawyers must "make a full disclosure to the client of all the ramifications of an agreement to arbitrate," and we suggested that any agreement limiting the availability of punitive damages would be unethical under DR 6-102(A). However, over a dissent, this Committee rejected the need for independent counsel as required by Michigan and Philadelphia.

Our Court of Appeals has now promulgated Rule 1.8(a),[5] which states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) The client consents in writing thereto.

While a mandatory arbitration pro-vision does not precisely fit the language of the Rule 1.8(a), comment one to the Rule suggests that the Rule should be broadly construed to cover transactions in which the lawyer may have a conflicting interest with his client and has any advantage in dealing with the client.

> As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Paragraph (a) does not, however, apply to standard commercial transactions[.] ... In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable. (Emphasis added).

Our previous opinions concerning the lawyer-client fee relationship have similarly stressed the need for complete fair dealing by the lawyer with his client in the fee agreement. When a lawyer seeks to impose an atypical requirement in a fee agreement, for example, the lawyer must explicitly bring that provision to the attention of the client at the time the agreement is presented so that the client can intelligently consider the provision. *See, e.g.*, Opinion 11 (interest on unpaid fees). Second, the lawyer owes the utmost duty of candor and fair dealing to the client with respect

1 The District of Columbia Rules of Professional Conduct also permit the use of form agreements:

> "...[A]n individual writing specific to the particular client and representation is generally not required. Unless there are unique aspects of the fee arrangement, the lawyer may utilize a standardize letter, memorandum or pamphlet explaining the lawyer's fee practices, and indicating those practices applicable to the specific representation.

Comment 2 to Rule 1.5.

2 The value of fee arbitration is recognized in the District of Columbia Rules of Professional Conduct, which counsel attorneys to submit fee disputes to arbitration or mediation procedures established by the Bar *when those procedures are invoked by a client. See* Comment 15 to Rule 1.5.

3Michigan Rule 1.8(h)(1) provides:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice *unless permitted by law and the client is independently represented in making the agreement.*

The equivalent District of Columbia Rule of Professional Conduct, Rule 1.8(g)(1), does not contain the italicized last clause, which was intentionally deleted by the Bar in proposing Rule 1.8(g)(1) to the Court of Appeals. Were our Rule 1.8(g)(1) applicable to arbitration provisions, which we hold it is not, then no agreement to arbitrate malpractice claims would be permissible in the District of Columbia.

4 Pennsylvania Rule 1.8(a) is identical to the District of Columbia Rule.

5 Rule 1.8(a) is a refocusing of the provisions of DR 5-104(A). DR 5-104(A) requires full disclosure by the lawyer to the client of possible conflicts arising from business transactions with the client and consent by the client after full disclosure.

to fee matters. *See, e.g.*, Opinion 185 (billing for disbursements). Our Opinion 190 also stressed the "obligation to make a full disclosure to the client of all the ramifications of an agreement to arbitrate."

Our consideration of the arbitration provisions in instant agreement has lead us to the conclusion that Opinion 190 was incorrect in its belief that the complex nature of arbitration could be adequately disclosed to a lay client. The virtue of arbitration is its flexibility; arbitration procedures will typically be "atypical". The salient characteristics of an arbitration which must be disclosed are therefore very difficult to catalog.

For example, is the arbitrator to be paid and, if so, must these fees be disclosed to the client? The instant agreement provides for both D.C. Bar and American Arbitration Association ("AAA") arbitration, but does not disclose that the arbitrators must be paid. Since the fee for D.C. Bar arbitration is $25.00, perhaps it does not need to be disclosed. On the other hand, AAA fees can be substantial and surely would have to be disclosed. Similarly, what of matters of procedure? Neither the D.C. Bar nor the AAA Commercial Arbitration rules provide for discovery.[6] Must this be disclosed? If so, how are the tactical considerations to be explained to a lay client? Arbitrations are typically not open to the public, while trials are. Must the client be told of this distinction; does it raise a tactical issue? In our Opinion 190, we stated that punitive damages are not available in arbitrations, but now we are told that there is a line of cases permitting arbitrators to award any type of damage a jury could award. If that is so, must the attorney advise the prospective client on the advantages and disadvantages of jury trial versus an arbitrator's award for malpractice damages?

A second level of complexity arises with respect to the enforcement of the arbitral award. The instant agreement requires the client to consent in advance to the jurisdiction of the Superior Court of the District of Columbia. Is this fair to a client who resides in California and retains a District of Columbia attorney with a special federal expertise to handle a complex federal matter in, for example, (a) California, (b) Texas, or (c) North Carolina? Why should such a client be forced to bear the expense of travel to the District of Columbia to arbitrate even a simple fee dispute? On the other hand, can an uncounseled client realistically be expected to appreciate the issues raised by forum selection and is it practical for a lawyer in an initial meeting with the client to attempt to explain such a thing?

In summary, this Committee has come to the conclusion that it is unrealistic to expect lawyers to provide enough information about arbitration to a prospective client, particularly on a first visit, so that the client can make an informed consent to a mandatory arbitration provision. It is equally unrealistic to conclude that limited disclosure coupled with the advice to seek independent legal counsel will cure the problem. How many clients either will see or can afford to see a second lawyer as a condition of entering into an agreement with the first? Therefore, we now conclude that Opinion 190 was incorrect in supposing that adequate disclosures concerning mandatory arbitration could be made to lay clients.

Accordingly, mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counselled by another attorney.[7] We see no problem, on the other hand, with proposing mandatory arbitration where a client has actual counsel from another lawyer, who has no conflict of interest, upon whom the client can rely to assess the complexities posed by arbitration.

Even when mandatory arbitration is permitted, however, it is important to observe other restrictions on lawyer-client agreements in framing the procedures to be used. Where an arbitration agreement covers claims by the client for malpractice, the restrictions contained in DR 6-102(A) and Rule 1.8(g) of the District of Columbia Rules of Professional Conduct must be observed. In the instant case, for example, DR 6-102(A) makes unethical the lawyer's attempt to reduce the limitations period for malpractice below that otherwise provided by law.[8]

Finally, we turn to that portion of the agreement which imposes on the client additional legal fees equal to 15 percent of fees owed in the event that the firm goes to arbitration and prevails. This provision must be considered under DR 2-106(A), which provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." Given the speed, efficiency and reduced costs or arbitration, the 15% charge may well be unrelated to any actual costs incurred by the firm and quite likely excessive. As we have stated in other opinions, "the firm must make certain that the percentage bears a reasonable relationship to the costs incurred." Opinion 155.

Nothing in this Opinion should be read to discourage firms from seeking to avail themselves of the benefit of alternative dispute resolution techniques for resolving claims made by or against a firm. In the context of an actual dispute, rather than at the outset of the lawyer-client relationship, it may well be possible to recommend arbitration and to make all required disclosures in a fashion that permits intelligent consideration even by the lay client.

*Dissent Of Two Members From Opinion No. 211*

In a series of recent decisions the United States Supreme Court has broadly endorsed arbitration as an alternative to traditional litigation as a means of resolving disputes in a wide range of circumstances.[9] The Court's decisions have applied not only to labor arbitration but to the broad range of commercial arbitrations subject to the United States Arbitra-

6 The instant agreement made reference to AAA procedures without giving even a general description of those procedures. We doubt that even most lawyers know what those procedures are.

7 We note that we do not have before us the case of an agreement limited to resolving fee disputes by arbitration before the D.C. Bar Fee Arbitration Board. The Board Rules have been designed to be inexpensive, quick, and fair to clients, and are publically available. These are important characteristics that could lead to a different outcome.

8 The limitations period for malpractice in the District of Columbia is three years, D.C. Code §12-301(8), *see, e.g., Duggan v. Keto*, 554 A.2d 1126 (D.C. App. 1989), whereas the proposed form agreement erects a two-year limitations period.

9 *E.g., Rodriquez de Quijas v. Shearson/Am. Exp., Inc.*, 109 S. Ct. 1917, 1920 (1989); *Shearson/Am. Exp., Inc., v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). *See also United Paper Workers v. Misco, Inc.*, 108 S. Ct. 364 (1987); *AT&T Technologies, Inc. v. Communication Workers*, 475 U.S. 643 (1986); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983).

tion Act., 9 U.S.C.§§ *et seq.* The District of Columbia Court of Appeals has given similarly broad reading to the District of Columbia's enactment of the Uniform Arbitration Act.[10]

The majority, however, treats disputes between lawyers and their "lay clients" as inherently different from all other disputes, without ever explaining why and without any solid foundation in the applicable provisions of the Code or Rules. In other contexts arbitration agreements have been held enforceable without regard to whether each party fully understood its impact or the potential differences between arbitration and litigation. The AAA has a useful brochure describing the arbitration process. *A Commercial Arbitration Guide For Business People.* While it may well be difficult for a lawyer to effectively summarize all to the potential differences, it is quite possible to convey objectively the basic nature of arbitration. For example, a spokesperson for the AAA recently gave the following succinct summary:

> Arbitration is hailed as a prompt and economical contractual method of resolving disputes without resort to the courts. Thus, when parties choose arbitration in preference to litigation, they must be conscious of the trade-offs found in arbitration but not found in litigation, such as (1) the privacy of the process, (2) the parties' selection of their own decision maker, (3) the absence of a jury trial, (4) the absence of a judicial appeal on the law since arbitrators are not bound by principles of substantive law absent a contractual or statutory provision to the contrary, (5) the absence of broad discovery, (6) the relaxed application of the rules of evidence,(7) the payment of arbitration administration costs by the parties themselves instead of by taxpayers and (8) the absence of a written opinion with the award unless otherwise required [Page, *Waiver of Right to Explanations,* N.Y.L.J. April, 26, 1990].[11]

The majority relies principally on DR 5-104(A) of the Code and on Rule 1.8(a), but they were intended (in our view) to address transactions between a lawyer and client other than the agreement that creates the lawyer-client relationship upon which the application of those provisions is premised.

Consent-to-jurisdiction provisions are found in a variety of commercial contracts and are ordinarily enforceable unless shown to be unreasonable upon the facts and circumstances of the particular case. A provision that would presumptively be enforceable except in extreme circumstances ought not to be unethical just because the parties are lawyer and client.

Finally, the majority concludes that the provision for a cost of collection charge of 15% is subject to DR 2-106(A), prohibiting a lawyer from collecting a "clearly excessive fee." That provision is aimed at the fee charged by a lawyer for legal services rendered to a client; it does not address the attorney's cost of collecting a debt owed by the client. Such cost-of-collection provisions are common as to other parties, and are generally enforceable unless resulting in a disproportionate award, in which case the arbitrator, like a court, can limit the award to a reasonable fee. *E.g., Central Fidelity Bank v. McLellan,* 563 A.2d 358 (D.C. Ct. App. 1989) (agreed 25% fee for collection may be awarded if reasonable); *F.W. Bolgiano & Co. v. Brown,* 333 A.2d 674, 675 (D.C. Ct. App. 1975); (court should not impose 10% maximum on fee award in collection case). It is not self-evident that a charge of 15% of the balance owing will likely be unrelated to actual costs or will otherwise likely be excessive.[12]

Inquiry No. 88-4-10
Adopted May 15, 1990

*Opinion No. 212*

**Representation By Law Firm Adverse To Former Client In A Substantially Related Matter After Lawyers Who Represented Former Client Have Left The Law Firm**

• A law firm may undertake representation adverse to a former client in a matter substantially related to the matter for the former client, provided that (i) all firm lawyers who represented the former client in the first matter have left the firm, and (ii) no lawyer remaining in the firm has, or has access to, confidences or secrets of the former client that are material to the related matter for the second client. New District of Columbia Rule 1.10(c) would compel a contrary result on and after its effective date of January 1, 1991. However, on the facts presented, and assuming the representation would otherwise continue after January 1, 1991, new Rule 1.10(c) should not be applied in this case to require the law firm to resign as counsel for the second client; the representation approved herein may continue after January 1, 1991.

**Applicable Code Provisions**

• **DR 4-101** (Preservation of Confidences and Secrets of a Client)

• **DR 5-105** (Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

**Applicable Rules Provision[1]**

• **Rule 1.10(c),** (Imputed Disqualification)

*Inquiry*

The inquirer is a law firm ("the Law Firm"). Beginning in late 1983 and continuing through November 1987 the Law Firm represented a client ("First Client") in connection with First Client's negotiation of a billion dollar construction contract with the United States Government for a large military facility in a foreign country.

First Client as the overall construction manager-engineer is in substance the general contractor for the project. The project is ongoing and is not expected to be completed until sometime in the mid-1990's.

In March 1987, one of the two partners of the Law Firm who had been principally involved in the representation of First Client resigned from the Law Firm and joined another law firm ("Second Law Firm"). The other partner remaining in the Law Firm who had been involved in the representation of First Client continued to handle all matters for First Client, with the occasional help of other partners and associates. The Law Firm's

10 *E.g., Carter v. Cathedral Ave. Coop, Inc.,* 566 A.2d 716 (D.C. App. 1989).

11 The majority asserts that the arbitrators must be paid, but in AAA arbitration the arbitrators normally work without a fee.

12 For example, with a debt of $10,000 a 15% charge would be $1,500, or 15 hours at $100/hour, which scarcely seems excessive.

1 Rules of Professional Conduct and Related Comments (effective January 1, 1991), promulgated by Order of the District of Columbia Court of appeals dated March 1, 1990.

representation of First Client included several matters in addition to and unrelated to the military construction project.

In October 1987, as the Law Firm was nearing the end of the lengthy contract negotiation process and related matters on behalf of First Client with the U.S. Government, a long-time client of the Law Firm ("Second Client") became a major subcontractor on the project, and asked the Law Firm to represent it vis-a-vis the project generally. At that time there were no disputes or anticipated disputes between First Client (the general contractor) and Second Client (the subcontractor).

In October 1987 the Law Firm obtained written consent of First Client to its representation of a Second Client, the consent containing this condition:

> "However, in the event of a dispute or conflict of any interest between [Second Client] and [First Client]...we would expect [the Law Firm] to remove itself from any contact or distribution of any information to any of the parties."

The Law Firm then undertook the representation of Second Client in connection with the project. The representation of Second Client was undertaken by lawyers in the Law Firm other than the lawyers who had been involved in the representation of First Client. A month later (in November 1987), apparently by coincidence, the other partner of the Law Firm who had been in charge of all matters for First Client resigned from the Law Firm and joined the same Second Law Firm that the first departing partner had joined eight months earlier. That second departing partner took all files of First Client with him to Second Law Firm.

Thus, in early November 1987, the Law Firm completely ceased to represent First Client, which thereupon and thereafter was represented by Second Law Firm on all continuing aspects of the construction project, including recurring disputes between First Client and the U.S. Government, and recurring disputes between First Client and various subcontractors.

In late 1988 disputes began to occur between First Client represented by Second Law Firm, and Second Client relating to the construction project. The Law Firm represented Second Client in connection with those disputes.

As the disputes between First Client and Second Client became more numerous and more serious, First Client in late 1989 asserted that the Law Firm must withdraw as counsel for Second Client on all disputes between First Client and Second client.

The Law Firm in its inquiry represents that, when the partner who was in charge of First Client's matters left the Law Firm in November 1987 and took all of First Client's files with him, as of that time and at all relevant times thereafter,

(a) nobody remaining at the Law Firm had any "confidences" or "secrets" of First Client within the meaning of DR 4-104(A),

(b) nobody remaining at the Law Firm had any "information [pertaining to First Client] protected by Rule 1.6" within the meaning of Rule 1.10(c), and

(c) there were no files or other records of First Client remaining within the premises of the Law Firm containing any information described in the preceding clauses (a) and (b), material to the Law Firm's ongoing representation of Second Client's contractual disputes with First Client.

*Discussion*

It is clear that the lawyer-client relationship between the Law Firm and Second Client that is being challenged by First Client will continue well beyond January 1, 1991 in the ordinary course of events. Therefore, among other things, this inquiry presents a novel issue as to the applicability of Rule 1.10(c) to this case when that Rule becomes effective in the District of Columbia on January 1, 1991.

In responding to this inquiry we turn first to the "current" law; we then analyze the "new" law, namely, rule 1.10(c). Before considering "the law," it is necessary to announced a caveat, and to discuss the issue presented by First Client's conditional consent (referred to above) to the Law Firm's representation of Second Client.

First, the caveat: the Law Firm's representation that it has no relevant confidences or secrets of First Client appears to be consistent with the facts available to the Committee. We therefore assume the accuracy of that representation, and it is a fundamental premise in responding to this inquiry. It is not the function of this Committee to make its own determination on such fact-intensive issues.[2]

Second, it is the Committee's view that *as a matter of legal ethics* the conditions imposed on the Law Firm by First Client in October 1987 when it consented to the Law Firm's representation of Second Client are no longer binding on the Law Firm. The reason is that those conditions were based on the assumption by all concerned that somebody at the Law Firm would continue to be in possession of, or have access to, relevant confidences or secrets of First Client, and the Law Firm's acceptance of those conditions was based on that assumption. Because that assumption is no longer correct, in our opinion those conditions no longer raise ethical concerns. Therefore, and from the viewpoint strictly of legal ethics, this inquiry is analyzed without further reference to First Client's conditional consent to the Law Firm's representation of Second Client[3]. We now turn to the applicable law.

*Current Law*

The Committee concludes that the Law Firm's representation of Second Client is materially adverse to First Client, and that the matter on which the Law Firm is representing Second Client is substantially related to the matter on which the Law Firm previously represented First Client. *See, e.g.*, Comment [2] under new District of Columbia Rule 1.9, which makes it clear that the substantial relationship criterion is to be analyzed by reference to existing federal case law. An illustrative case is *United States Football League v. National Football League*, 605 F. Supp. 1448

2 It appears from the material submitted to the committee by the Law Firm and First Client that the only matter relating to this construction project that any current partner or employee of the Law Firm was involved in prior to the transfer by First Client of its business and its fields to Second Law Firm in November 1987 was this: in late 1985 and early 1986, an associate (who is now a partner) of the Law firm logged eight hours of time researching the quesiton of what remedies might be available to first Client if the U.S. Government purported to terminate the then-existing letter argreement with First Client. The Law Firm has advised the Committee that the person involved has no present recollection of that research (which he turned over to one of the partners who left the Law Firm in 1987), and that in any event he did not obtain in connection with that research any "confidences" or "secrets" of First Client material to the later contractual disputes between first Client and Second Client.

3 The Committee expresses no opinion on the question whether, as a matter of contract law, or on some other basis, First Client may enforce the October 1987 conditions against the Law Firm.

(S.D.N.Y. 1985).

In this case, however, the combination of adverse representation and a substantial relationship is not the end of the analysis. There are no District of Columbia cases or opinions of this Committee precisely on point, but a consensus has emerged in the Code of Professional Responsibility states generally that, under DR 4-101 and DR 5-105, the Law Firm's representation of Second Client in these circumstances is permissible, because nobody at the Law Firm has, or has access to, relevant confidences or secrets of First Client. Since 1983, that principle has been codified in what is now ABA Model Rule 1.10(b):

> "(b)When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> "(1)the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> "(2)any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter."[4]

Thus, "current" law, as evidenced by and codified in ABA Model Rule 1.10(b), predicates disqualification on (i) a substantial relationship *and* (ii) possession of relevant confidences or secrets of the former client. In this case, predicate (ii) is absent, so the Law Firm's representation of Second Client is proper under current law.

*New Law*

District of Columbia Rule 1.10(c), the counterpart of ABA Model Rule 1.10(b), would disqualify the Law Firm (effective January 1, 1991) because the D.C. Rule is drafted in the disjunctive: it predicates disqualification on (i) a substantial relationship *or* (ii) possession of relevant confidences or secrets of the former client:

> "(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer during the association unless:
>
> "(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client during such former association; or
>
> "(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter."

The District of Columbia deviation from ABA Model Rule 1.10(b), resulting in the more restrictive District of Columbia Rule 1.10(c) quoted above, is both explicit and deliberate. The original version of the District of Columbia rules was drafted by the District of Columbia Bar Model Rules of Professional Conduct Committee (commonly referred to as the "Jordan Committee" after the name of its Chair, Robert E. Jordan, III, Esquire). The Jordan Committee in its September 1985 Report to the District of Columbia Bar Board of Governors proposed the deviation from the ABA version. The Jordan Committee's proposal was adopted by the Bar Board of Governors in its November 19, 1986 Petition to the District of Columbia Court of Appeals, and by the Court of Appeals in its September 1, 1988 Proposed Rules, and in its March 1, 1990 Order promulgating the new Rules.

The Jordan Committee, acknowledging that the question was a close one, explained its stricter version of Rule 1.10(c) as follows:

> "The ABA [Rule 1.10(b)] would disqualify the firm only if the matter were the same matter or substantially related to a matter in which the departing lawyer represented the client while with the firm *and* a lawyer still with the firm possessed client confidences or secrets material to the matter. [Emphasis in original.] The Committee thought it wrong that adverse representation should be allowed, in any kind of matter, where client confidences or secrets material to the matter remain in the firm. It therefore proposes changing the ABA's 'and' to 'or' in paragraph (c). It is a closer question whether the possession by a remaining lawyer of confidences or secrets should not be the sole test for firm disqualification. The committee believed, however, that it is appropriate to provide for disqualification in the same or related matter to avoid the unseemly spectacle of all the lawyers responsible for a particular piece of litigation leaving a firm and the firm turning up the next day as counsel for the opposing party. Apart from the general unseemliness of such a situation, the firm might well have in its files, or in the knowledge paralegals or other nonlegal personnel, significant confidences or secrets of the former client. **Rather than requiring an inquiry into the knowledge of confidences or secrets, paragraph (c) simply forbids representation by the former firm in such circumstances.**" [Bold type in original.]

Consistent with the foregoing, the official Comment under District of Columbia Rule 1.10 contains the following explanation of Rule 1.10(c):

> "[17] Conversely, when a lawyer terminates as association with a firm, paragraph (c) provides that the old firm may not thereafter represent clients whose interests are materially adverse to those of the formerly associated lawyer's client in respect to a matter which is the same or substantially related to a matter with respect to which the formerly associated lawyer represented the client during the former association. For example, if a lawyer who represented a client in a litigation while with Firm A departs the firm, taking to the lawyer's new firm the litigation, Firm A may not, despite the departure of the lawyer, who takes the matter and the client to the new firm, undertake a representation adverse to the former client in that same litigation."

The Jordan Committee, the Board of Governors, and the Court all were concerned about what the Jordan Committee described as the "unseemly spectacle" (not present in this case) of a law firm switching sides in a pending case immediately following the departure from the firm of all of the lawyers who had previously been involved on the other side of that case. In addition, the Jordan Committee expressed its concern about a key issue identified above: the difficulty of determining as a matter of fact exactly what information the lawyers remaining in a firm have in their heads or in their files following the departure of a lawyer or group of lawyers who had represented a former client.

The "effective date" or "retroactivity" issue presented by this inquiry appears to have been anticipated at least to some extent by the Court of Appeals in its March 1, 1990 Order, which contains the following paragraph:

> "FURTHER ORDERED, that with respect to conduct occurring before January 1, 1991, the provisions of the Code of Professional Responsibility in

4 This ABA Model Rule was lettered 1.10(c) when it was originally promulgated in 1983; it was relettered 1.10(b) without substantive change as part of the ABA's February 1989 revisions of the Model Rules.

effect on the date of the conduct in question are the governing rules of decision for this court, the Board on Professional Responsibility, its hearing committees, and the Bar Counsel."

The foregoing effective date provision appears to us to encourage restraint in applying new Rule 1.10(c) in the circumstances presented by this inquiry. We therefore conclude that in this case the Law Firm's representation of Second Client should be permitted to continue on and after January 1, 1991.

The issue presented by this inquiry may not be unique, and it is therefore appropriate to provide clarity and guidance for others similarly situated. We observe that our conclusion could have been, but is not, based on the fact that the representation at issue here commenced prior to March 1, 1990, the date of the Court of Appeals' final Order promulgating the new Rules. It is self-evident that, because of the Court's well-publicized January 1, 1991 effective date, many members of the Bar (including many of the most conscientious and best-informed members) will not read and analyze the new Rules until toward the end of the year. The Court in its Preface to the new Rules explicitly acknowledged that the new Rules are "complex and comprehensive," and urged Bar members to attend "educational workshops" to be sponsored by the Bar "[o]ver the course of the next year." Those workshops, which are now being planned, will not commence until October of this year and are not expected to be completed until mid-November at the earliest.

It is therefore unrealistic and unreasonable to assume that members of the Bar have actual knowledge or to charge them with constructive knowledge of the content of the new Rules as of March 1, 1990 or as of any other date prior to January 1, 1991. Accordingly, we hold that, if a lawyer-client relationship formed prior to January 1, 1991 was proper when commenced and continued to be proper under ethics principles applicable prior to January 1, 1991, the new Rules of Professional Conduct should not be applied on and after January 1, 1991 to require the abrupt termination of any such previously proper relationship.

Inquiry No. 89-12-43
Approved: May 15, 1990

*Opinion No. 213*

## Defense Counsel's Obligation to Inform Court of Adverse Evidence

### Applicable Code Provisions

- **DR 4-101(B)(1)** (Nondisclosure of confidence or secret)
- **DR 7-102(A)(4)** (Knowing use of false evidence)
- **DR 7-102(A)(5)** (Knowing false statement of fact)
- **DR 7-102(B)(2)** (Revealing fraud upon tribunal by non-client)

### Applicable Rules Provisions

- **Rule 1.6** (Confidentiality of Information)
- **Rule 3.3** (Candor Toward The Tribunal)

*Inquiry*

This inquiry arises out of a post-trial ineffective assistance of counsel proceeding in the Superior Court. The inquirer argued in that proceeding that his predecessor's representation of a criminal defendant was ineffective because predecessor counsel failed to secure enforceable process upon a witness ("Witness B") whose testimony allegedly would have exculpated the defendant. Predecessor counsel had located another witness ("Witness A") who advised him that she had heard Witness B confess to the crime in question. Predecessor counsel spoke to Witness B, who promised to be present for trial. Witness B was mailed a subpoena. However, it is not clear whether Witness B was properly served with the subpoena, and he did not appear for trial.

In supporting the ineffective assistance of counsel petition, the inquirer submitted an affidavit from Witness A that recounted the inculpatory statement Witness B allegedly made in her presence.[1] The petition argued, inter alia, that the failure to secure enforceable service of a subpoena upon Witness B was prejudicial to the client and rendered predecessor counsel's assistance ineffective.

Some months after the court took the matter under advisement, the inquirer located Witness B, who denied making any statements of any kind to Witness A. The inquirer asks whether he has an ethical obligation to inform the court that Witness B denies making the inculpatory statement.

*Discussion*

Consideration of this inquiry must start with DR 4-101, "Preservation of confidences and secrets of a client." The information that the inquirer learned from his interview of Witness B -- that Witness B denies making inculpatory statements to Witness A -- comes within the definition of a "secret." DR 4-101(A) (a secret is information, other than confidence, that is "gained in the professional relationship...the disclosure of which...would be likely to be detrimental to the client."[2] Thus, unless the disclosure of the secret is "permitted under DR 4-101(C)," the inquirer may not reveal the information he learned from Witness B. DR 4-101(B)(1).

The only provision of DR 4-101(C) that would appear relevant to this inquiry is subparagraph (2), which allows disclosure of confidences and secrets "when permitted under Disciplinary Rules or required by law or court order." Under this standard, the Committee concludes that the inquirer may not reveal his client's secret.[3]

*1. DR 7-102(A)(4) (Knowing use of false evidence).*

It is true that the inquirer now possesses information that conflicts with the sworn statement of Witness A, a statement that the inquirer has presented to the court. However, inquirer states that he submitted Witness A's statement to the court before he located and interviewed Witness B. Thus, on the facts presented, there appears to be no violation of DR 7-102(A)(4), because the element of counsel's prior knowledge of any falsity is absent.

1 Although Witness A testified at the criminal trial, the inquirer advises that testimony regarding Witness B's statement was not elicited, because Witness A had not been "asked the proper questions." The Committee offers no opinion regarding this assertion.

2 *See also* Comment 6 to Rule 1.6 of the D.C. Rules of Professional Conduct, which provides that the prohibition against disclosure of secrets "exists without regard to the nature or source of the information or the fact that others share the knowledge."

3 This opinion is limited to consideration of disclosures "permitted under Disciplinary Rules." The inquiry makes no reference to a court order mandating disclosure of the secret, so the Committee presumes no such order exists. *See* Opinion 180. Whether the inquirer was or is "required by law" to disclose the information in question is a legal issue that is beyond the authority of the Committee to decides. *Id.* at n. 1.

The simple existence of conflicting witness statements does not by itself rise to the level of "knowledge" that one such statement is false. *See Butler v. United States,* 414 A.2d 844 at 850 (D.C. App. 1979) and the cases cited therein. In any event, when the inquirer presented Witness A's affidavit to the court, he had no knowledge that Witness B would make a contrary statement. The Committee therefore cannot conclude that, in submitting Witness A's affidavit, the inquirer knowingly submitted a false statement.

*2. DR 7-102(A)(5) (Knowing false statement of fact).*

Similarly, under the facts presented, the inquirer did not *knowingly* make false statements of fact in his petition, to the extent that he argued that Witness B would have exculpated the defendant had the witness been required to appear at trial. DR 7-102(A)(5). The element of *knowledge* of any falsity at the time the statement may have been made to the court is lacking.[4]

*3. DR 7-102(B)(2) (Revealing fraud upon a tribunal by a non-client).*

Finally, there is the question whether DR 7-102(B)(2) requires counsel to reveal to the court the conflict between the statements of Witness A and Witness B, on the grounds that Witness A's statement amounts to a "fraud upon a tribunal" by a non-client. The Committee concludes that DR 7-102(B)(2) does not mandate disclosure under these facts.

The obligation to disclose non-client fraud is predicated upon a lawyer's having received "information clearly establishing" the fraud. *See In re Grievance Committee of U.S. District Court,* 847 F.2d 57, 62-63 (2d Cir. 1988) (interpreting DR 7-102(B) as requiring "actual knowledge of a fraud.") The Committee believes that, standing alone, the conflicting statements described in the inquiry do not clearly establish that Witness A's statement is false.

*Conclusion*

Under the facts presented, the inquirer must preserve the confidences and secrets of his client. The inquirer therefore is not ethically obligated to disclose to the Court the information he learned from his interview of Witness B. Indeed, such disclosure at present would be prohibited.[5]

However, the inquirer must exercise care in any *future* dealings with the court in this matter. Given his present knowledge that Witness B denies making inculpatory statements to Witness A, the inquirer should insure that any future representations to the court regarding what Witness B's testimony would have been do not run afoul of the inquirer's ethical obligations. *See In re Austern,* 524 A.2d 680 (D.C. App. 1987).

Inquiry No. 89-11-41
Adopted: June 19, 1990

*Opinion No. 214*

**Disclosure to Internal Revenue Service of Name of Client Paying Fee in Cash**

**Applicable Code Provisions**

- **DR 4-101(B), Rule 1.6(a)**(A Lawyer Shall Not Knowingly Reveal A Confidence or Secret of the Lawyer's Client Nor Use a Confidence or Secret of the Client to the Client's Disadvantage.)
- **DR 4-101(C)(3); Rule 1.6(d)**A Lawyer May Reveal Confidences or Secrets When Permitted Under Disciplinary Rules or Required by Law or Court Order.)

This Inquiry raises an important issue concerning the confidentiality of client names requested to be disclosed under government reporting requirements.

*Facts*

The Inquirer, a law firm, represented a client in connection with drug related criminal charges to which the client has pleaded guilty, been sentenced and served his term of incarceration. In partial payment of the firm's outstanding bill for services, the client remitted in excess of $12,000 in cash. In accepting the cash payment, the firm explained to the client that the firm would be required to submit Form 8300, Report of Cash Payments Over $10,000 Received In a Trade or Business, to the Internal Revenue Service. At the client's insistence, the firm agreed to withhold the client's name from Form 8300. The firm advised the client, however, that the Internal Revenue Service might seek to compel disclosure of the client's name, and he agreed to accept financial responsibility for the firm's efforts in resisting disclosure. The client, however, still owes a substantial amount to the firm from its prior representation of him.

More than a year after submitting the redacted Form 8300, the firm was served with an administrative summons, directing the firm's managing partner to appear before an IRS Revenue Agent to give testimony and to produce for examination the following information relating to the Form 8300:

> The unredacted, unaltered, originals of all records related to or associated with the attached Form(s) 8300 filed by you, including but not limited to accounting records, cash receipts journals, bank records, escrow account records, payment records, contracts, which contain the following information *necessary to complete the attached Form(s) 8300:*
>
> 1. The complete name(s), address(es), business or occupation(s) and social security or taxpayer identification numbers(s) of any and all clients (whether individual(s) and/or organization(s)) for whom the transaction(s) reported were completed.
> 2. The complete name(s), address(es) and taxpayer identification number(s) of any and all individuals conducting the reported transaction(s), if different from the information in item number 1.
> 3. The passport number(s) and country(ies) of origin and/or alien registration number(s) and coun-try(ies) of origin for all foreign individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were completed.
> 4. Any other identifying data for the individual(s) or organization(s) who conducted the transaction(s) or for whom the transaction(s) was/were conducted.

The firm has refused to comply with the summons pending the Committee's resolution of this Inquiry, which raises three questions:

1. Whether the firm is obligated pursuant to its ethical responsibilities to withhold from the IRS the client's identity notwithstanding the pending summons from the IRS?
2. If so, what is the extent of that obligation? Does it include an obligation to file an action seeking to quash the summons, to be held in contempt, or to appeal any adverse

4 Nonetheless, as noted below, the inquirer must take care to avoid knowlingly making false statements in the future.

5 The Committee concludes that the result reached in this opinion would be the same under the Rules of Professional Conduct that will go into effect in the District of Columbia on January 1, 1991. *See* Rules 1.6 (Confidentiality of Information) and 3.3 (Candor toward The Tribunal).

decision by an IRS administrative tribunal or by a district court?

3. In what way, if any, does the client's failure to meet his financial obligations affect the firm's obligation to litigate these issues on his behalf?

*Discussion*

DR 4-101(B) of the Code of Professional Responsibility provides that a lawyer shall not knowingly "reveal a confidence or secret of his client." DR 4-101(C)(2) allows disclosure of "[c]onfidences and secrets when permitted under Disciplinary Rules or required by law or court order." Similar rules apply under Rule 1.6 of the District of Columbia Rules of Professional Conduct (effective January 1, 1991).

In Opinion No. 180 (March 17, 1987), the Committee summarized its prior opinions relating to the disclosure of client information to governmental authorities, stating "[t]he consistent rule we have followed is that, in the absence of on-going criminal activity, a lawyer may not voluntarily compromise the client's position." In Opinion No. 99 (January 28, 1981), the Committee stated that where there is a "colorable basis" for asserting that statements made to an attorney are confidences or secrets protected from disclosure by DR-4-101, "the lawyer must resolve the question...in favor of preserving the confidentiality of the disclosures." *Accord*: Opinion No. 186 (October 20, 1987).

Opinion No. 124 (March 22, 1983) involved facts similar to those presented here. In the course of a routine audit of a law firm's federal tax returns, the IRS auditor was provided a record of the firm's receipts with the clients' names deleted. The auditor then requested the firm to provide the clients' names. The firm had represented members of Congress under circumstances the disclosure of which, the firm believed, could be damaging to the Members' careers. It requested guidance as to whether under these circumstances it could accede to the auditor's request.

The Committee held in Opinion No. 124 that "whenever a client requests nondisclosure of the fact of representation, or circumstances suggest that such disclosure would embarrass or detrimentally affect any client, the fact of the firm's representation of that client is a client 'confidence' or 'secret' subject to the protections accorded by the other provisions of Canon 4." The firm could not therefore voluntarily accede to the auditor's request. Furthermore, the Committee held, "...if the IRS does issue a summons, the inquirer's firm may not automatically comply with it. Rather, the firm remains under an ethical obligation to resist disclosure until either the consent of the client is obtained or the firm has exhausted available avenues of appeal with respect to the summons." Only after the firm is ordered by a court to disclose the names of its clients may it do so.

The client in this case has requested that the firm withhold his name from the Internal Revenue Service; moreover, as in Opinion No. 124, disclosure of the client's name to the Internal Revenue Service could "embarrass or detrimentally affect" the client.[1] An important difference between this case and Opinion No. 124, however, is that the name of the firm's client is not sought under the IRS' general authority to examine "relevant and material" books and records. *See*, 26 U.S.C. §7602(a)(1). Section 6050I of the Internal Revenue Code, the statutory authority for Form 8300, is narrowly and specifically drawn to require disclosure of the names and other identifying information of persons making cash payments in excess of $10,000 received in the course of a trade or business. Civil and criminal penalties are available to enforce its provisions. *See,* 26 U.S.C. §§6721, 6724(d) and 7203. Section 06050I is, therefore, a "law" which may justify disclosure of client confidences or secrets under DR 4-101(C)(2) in an appropriate case.

It does not necessarily follow that disclosure of the client's name is "required by" section 6050I in this case or other similar cases. Under the present state of the law, substantial good faith arguments exist as to whether law firms are a "trade or business" within the meaning of section 6050I[2] and whether Congress intended the statute to override traditional lawyer-client confidentiality.[3] Until these and any other questions regarding the coverage of section 6050I in a particular case are resolved definitively by the courts, our prior Opinions are clear that a firm may not ethically disclose the name of its client on Form 8300 without the client's consent.[4] Furthermore, since the IRS' administrative summons is intended to obtain the information withheld from Form 8300, the firm may not voluntarily disclose the client's name in response to the summons.

Our prior Opinions also address the firm's second question regarding the extent of the duty to resist compelled disclosure of client confidences and secrets. In Opinion No. 14 (January 26, 1976) we were asked to define the extent of an attorney's duty to protect the confidentiality of a former client's records subpoenaed by a grand jury. We stated that "it is the lawyer's ethical duty to a former client to assert on the former client's behalf every objection or claim of privilege available to him when to do so might be prejudicial to the client." In Opinion No. 124, involving IRS, we stated that "the attorney must assert in the pending proceeding the client's interests in nondisclosure." *See also,* Opinion No. 99 (January 28, 1981) ("inquirer's obligation is to assert before the grand jury the confidentiality of those statements"); Opinion No. 180 (absent the client's consent to disclosure, the attorney "must assert the confidentiality of the documents and information....") Thus, if the IRS files an action to enforce its summons,

1 The government, for example, may prosecute a taxpayer for failing to report income by demonstrating that the defendant's net worth is so substantial that it may be inferred that he or she received income that was not reported to the IRS. *E.g., Holland v. U.S.*, 348 U.S. 121 (1954); *United States v. Citron*, 783 F.2d 307 (2d Cir. 1986).

2 The American Bar Association and other lawyers' organizations urged the IRS to include an exception for attorney's fees in the regulations issued under Section 6050I. The IRS refused. *See*, 51 F.R. 31610 (September 4, 1986).

3 The identity of an attorney's client and information regarding the payment of attorneys' fees generally are not protected from forced disclosure by the attorney-client privilege. *See, e.g., In re Semel*, 411 F. 2d 195 (3rd Cir. 1969); U.S. v. Fenlag, 434 f. 2d 596 (6th Cir. 1970); *In re Grand Jury Proceedings*, (*Rabin v. U.S.*), 896 F.2d 1297 (11th Cir. 1990). Exceptions to this rule have been recognized, however, hwere the values promoted by the privilege outweigh the need for disclosrue of the client's identity. *See, e.g., Baird v. Koepher*, 279 F.2d 623 (9th Cir. 1960); *Tillotson v. Boughner*, 350 F.2d 663 7th Cir. 1965); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *In re Gand Jury Proceedings* (*U.S. v. Jones*), 517 F.2d 666 (5th Cir. 1975); *In re grand Jury Investigation No. 83-2-35*, 723 F.2d. 447 (6th Cir. 1983).

4 The Professional Responsibility Committee of the Chicago Bar Association has similarly concluded that an attorney should not reveal the name of a client to the IRS in Form 8300 because the application of the statute to attorneys is unclear. Docket No. 86-2 (5-11-88).

the firm must assert the client's objections to disclosure.[5]

Our prior Opinions are not entirely clear as to whether a lawyer who is ordered by a court to disclose client confidences or secrets may comply immediately with this order or must seek review of a higher court. In Opinion No. 124, we said with respect to an IRS subpoena that the firm could not comply until it had obtained its clients' consent or "exhausted available avenues of appeal with respect to the summons." It is not clear, however, whether the Committee intended the word "appeal" to mean a court's initial review of the agency's decision or a higher court's review of an initial judicial order. Our other opinions in this area suggest that the lawyer need not appeal an initial judicial order to a higher court, although he or she must allow the client an opportunity to do so. In Opinion No. 14, for example, we stated that "the attorney is...free to comply with whatever directive the *trial court* gives." (Emphasis added.) In Opinion No. 83 we stated that an attorney "is not obliged to run the risk of being held in contempt of court because of the client's desire that confidences and secrets not be disclosed." And, in Opinion No. 180 we stated that "if attorney is ordered by a court to disclose the client information, he must not make disclosure until he has given *the client* an opportunity to appeal the order to a higher tribunal." (Emphasis added.)

The trend of our prior decisions is supported by the new Rules of Professional Conduct. Comment 26 to Rule 1.6 states:

> If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (d)(2) requires the lawyer to invoke the privilege when it is applicable. The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it.

In light of our prior decisions and Comment 26, we conclude that the law firm here may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the court's order and a reasonable opportunity to seek review independently of the firm.[6]

Finally, in response to the firm's third question, the fact that the client is in arrears in his payments to the firm does not relieve the firm of its basic ethical obligation to resist disclosure in response to the IRS summons. The Committee has consistently held that DR 4-101(c) prohibits disclosure of confidences and secrets of a former client. *See*, e.g., Opinion Nos. 14, 58, 96, 99, 124, 175, 180, 186. In none of these opinions was there any suggestion that the Committee envisioned that the lawyer would be compensated by the former client for his or her efforts in protecting against disclosure. Indeed, in two of our previous decisions, the client was currently represented by other counsel at the time that the information was demanded and we nevertheless found an obligation on the part of the former attorney to resist disclosure. *See*, Opinion Nos. 14, 83. The ethical obligation of lawyers to protect the confidences and secrets of their clients is not a matter of contract between the lawyer and client; the obligation arises because "confidentiality is essential to the role of the lawyer in the administration of justice," Opinion No. 180, and because, under Canon 1, every lawyer has a duty "to assist in maintaining the integrity and competence of the legal profession."[7]

Inquiry 90-4-18
Adopted September 18, 1990

5 In appearing and asserting the client's objections to disclosure, the firm is serving, in effect, as a witness in the proceeding. Whether the firm must go further and act as an advocate for the client's position will depend upon a number of circumstances including whether the client or former client has been notified of the proceeding and whether the client or former client has been able to retain separate counsel to advocate his or her interests in teh proceeding. Where the client or former client is unable to participate because he or she is incarcerated, incapacitated or unable to afford separate counsel, the firm may have an obligation to act as an advocate for the clients or former client.

6 A duty to appeal the order may exist, however, where the client is unable to act. *See, supra* note 5.

7 It is possible that a lawyer may have an action against a current or former client who refuses to pay for such services although having the means to do so, especially where, as here, the representation with respect to disclosure has previously been agreed to by the client. This is a question of law which is beyond the jurisdication of this Committee.

*Opinion No. 215*

**Communication with Potential Client Currently Represented by Other Counsel**

• A lawyer is not prohibited by the Code of Professional Responsibility or the Rules of Professional Conduct from communicating with a person who is currently represented by counsel for the purpose of determining whether such person may wish to retain the lawyer and discharge the current lawyer.

**Applicable Code Provisions**

• **DR 7-104(A)(1)** (Communicating with One of Adverse Interest)
• **DR 2-104** (Suggestion of Need of Legal Services)

**Applicable Rules Provision**[1]

• **Rule 4.2(a)** (Communication Between Lawyer and Opposing Parties)

*The Inquiry*

The inquirer is an attorney who was retained to represent a client in a matter on which the client was then being represented by other counsel. The client was apparently dissatisfied with the first attorney's representation. The inquirer wrote the first attorney advising him that the inquirer had been retained and asking that he turn over the client's file. The client had met all her financial obligations to the former attorney. The former attorney wrote the inquirer accusing her of unethical conduct, apparently on the theory that the inquirer spoke with the client on the subject of the representation before the client had discharged the former attorney. The former attorney also demanded payment of $13.75 to cover photocopying the client's file and postage to mail it to the new attorney.

The inquirer asks for the Committee's views on whether it is unethical for an attorney to offer advice and legal services to a person who is already represented by counsel and who expresses dissatisfaction with his or her current attorney.

*Discussion*

There is no provision of the Code of

1 The Rules of Professional Conduct are effective on January 1, 1991. They are cited as Rule_____. The Code of Professional Responsibility is cited as DR_____.

Professional Responsibility or the Rules of Professional Conduct which prohibits an attorney from conferring with a potential client who is already represented by counsel on the matter. Nevertheless the Committee believes there is a common misconception among some members of the bar that such contact is prohibited until after the client has first discharged the prior lawyer.

DR 7-104 (Communicating With One of Adverse Interest) provides:

> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Does DR 7-104(A)(1) prohibit a lawyer from communicating with a person who is already represented by counsel for the purpose of having that person possibly retain the lawyer and discharge the prior lawyer? In our opinion DR 7-104 does not prohibit such communication. Neither the text of the rule itself nor the purpose underlying the rule admits of such an interpretation.

The title of the rule, Communication With One of Adverse Interest, indicates that the represented person with whom the lawyer may not communicate without permission is a party adverse to that lawyer's client, not a person who has sought the lawyer's advice and representation to replace an attorney previously retained for the matter.[2] The rule refers to communication "during the course of [the lawyer's] representation of a client"--a lawyer consulting with a potential client is not engaging in a communication during the course of representation, since at this point the lawyer does not yet have a client. The communication which is prohibited is with "a party [the lawyer] knows to be represented" without consent of "such *other* party['s]" lawyer--the reference to *other* party can only mean a party other than the party being represented by the lawyer seeking the communication. Rule of Professional Conduct 4.2(a)(Communication Between Lawyer and Opposing Parties) is virtually identical to DR 7-104(A)(1). Therefore, the result would be the same under the new rules.

DR 2-104 prohibits a lawyer who has given **unsolicited** advice to a layperson from accepting employment resulting from the advice under two circumstances, where the advice includes a statement that is false, fraudulent, misleading or deception, and where the advice involves coercion or other overreaching. There is nothing in DR 2-104 which prohibits a lawyer from giving advice to a person already represented by counsel when the client has sought the lawyer's advice. The analogous provision in the Rules of Professional Conduct, Rule 7.1(b) prohibits solicitation of employment by any of several inappropriate means, including false statements and undue influence.

Finally, although we were not asked to comment on the former lawyer's demand for payment to photocopy and mail the file, we note that we have previously addressed a client's right to have a former lawyer provide file materials to the current lawyer in Legal Ethics Committee Opinion 168.

Inquiry No. 90-5-22
Adopted October 16, 1990

*Opinion No. 216*

**Representation of Closely Held Corporation In Action Against Corporate Shareholder**

**Applicable Rules Provision**

- **Rule 1.13(a)**(Organization as Client)

A and B were each 50% shareholders of C, a close corporation organized under Maryland law which did business in the District of Columbia.

C had a banking relationship with U, which also extended personal loans to A and B, individually. A and B have defaulted on their loan payments to U. C has filed an action in the District of Columbia against U, alleging a wrongful termination of the banking relationship.

Following the filing of C's action against U, U obtained a judgment against A and, as the result of a Sheriff's execution sale, U became the owner of A's 50% interest in C. A, however, maintains that he is still President of C, since C's two shareholders, B and U are deadlocked and a majority vote is needed to remove him. U has filed an action in the Maryland courts to dissolve C because of shareholder deadlock. This action is still pending.

B's widow, who has succeeded to B's interest in C, wishes to maintain C's action against U. U, of course, wishes to discontinue the action. The question in this Inquiry is whether C's corporate lawyer, retained when C was controlled by A and B, may continue to represent C in its action against U, now one of its 50% shareholders, and in U's action to dissolve C.

*Discussion*

The Inquiry is governed by Rule 1.13 of the District of Columbia Rules of Professional Conduct. Under Rule 1.13(a), "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This rule embodies the well-established principle that a lawyer retained by a corporation, or by any other organization recognized as a separate legal entity, represents the entity. As stated in EC 5-18 of the former Code of Professional Responsibility, "[a] lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." *See,* Opinion 159 (1985); Opinion 186 (1987); *Egan v. McNamara*, 467 A.2d 733, 738 (D.C.Ct. of App. 1983).

The principle that a lawyer representing a corporation represents the entity and not its individual shareholders or other constituents applies even when the shareholders come into conflict with the entity. Courts have generally held, therefore, that a corporation's lawyer is not disqualified from representing the corporation in litigation against its constituents. *See, e.g., Bobbitt v. Victorian House,* Inc., 545 F. Supp. 1124 (N.D. Ill. 1982); *Dalrymple v. National Bank and Trust Co. of Traverse City*, 615 F. Supp. 979 (W.D. Mich. 1985); *U.S. Industries, Inc. v. Goldman*, 421 F. Supp. 7 (S.D. N.Y. 1976); *Wayland v. Shore Lobster & Shrimp Corp.,* 537 F. Supp. 1220 (S.D. N.Y. 1982). A different result may sometimes be required where the shareholders of a closely held corpora-

2 Of course, the lawyer may not represent the client in any event if the lawyer has a conflict of interest. DR 5-101. Our opinion presupposes that there is no other such conflict that would prevent the lawyer from taking on this particular client.

tion reasonably might have believed they had a personal lawyer-client relationship with the corporation's lawyer. *See, e.g., Rosman v. Shapiro,* 653 F. Supp. 1441 (S.D. N.Y. 1987); *In re Brownstein,* 288 Or. 83, 602 P. 2d 655 (1979); *In re Banks,* 283 Or. 459, 584 P. 2d 284 (1978). This is not such a case, however, since under the circumstances U, the bank, could not reasonably believe it has or had a personal lawyer-client relationship with C's lawyer.

Since C's lawyer is not disqualified from continuing to represent C in its litigation with one of its 50% shareholders, the question arises how the lawyer is to carry out his ethical duties in this representation. On the one hand, the corporate lawyer owes a duty of loyalty to the corporation, as distinct from its owners and managers, and he or she must act in the best interests of the corporation as an entity.

On the other hand, the lawyer must normally follow the direction of those duly appointed or elected to act on behalf of the corporation. *See, e.g., Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 764 ( D. D.C. 1981), vacated for lack of jurisdiction, 680 F. 2d 768 (D.C. Cir. 1982) ("...both practically and theoretically, the corporate attorney should consider himself as representing the entity interests articulated by those in current control of the management"); ABA Informal Opinion 1056 (1968); Comment, *Conflicts of Law in the Legal Profession*, 94 Harv. L. Rev. 1244, 1336 (1981). Rule 1.13 expressly recognizes that a lawyer represents an organization such as a corporation "through its duly authorized constituents." Comment [4] further states that "[w]hen 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."

The difficulty here is that the corporation's President, A, may continue to hold office only because of the shareholder deadlock; moreover, because of his own dispute with U, A may have reason to disregard the corporation's interest in determining the corporation's course of action in its dispute with U. These difficulties notwithstanding, the corporation's lawyer may continue to take direction from A until the dispute over control of the corporation is resolved by the courts or the parties. If, however, the lawyer should become convinced that A's decisions are clearly in violation of A's own fiduciary duties to the corporation, the lawyer may be forced to seek guidance from the courts as to who is in control of the corporation, there being no higher authority within the corporation to whom the lawyer can turn. Throughout the representation, the lawyer must continue to recognize that the interests of the corporation must be paramount and that he must take care to remain neutral with respect to the disputes between the present shareholders, B and U, and between A and U. *See,* ABA Opinion 86 (1932) ("In acting as the corporation's legal adviser [an attorney] must refrain from taking part in any controversies or factual differences which may exist among stockholders as to its control"), quoted with approval in *Financial General Bankshares, Inc. v. Metzger,* 523 F. Supp. at 765.

Inquiry 90-10-40
January 15, 1991

*Opinion No. 217*

**Multiple Representation; Intermediation.**

• After full disclosure and consent from the clients, a firm may represent multiple members of a group of claimants against other individual claimants or groups of claimants to a limited fund. The firm may not serve as an advocate for any of the clients in determining the allocation of any award among the clients. It may be appropriate, however, for the firm to serve as an intermediary in determining the allocation among its clients.

The firm's obligation to protect the secrets of its clients respecting settlements in prior cases would not preclude subsequent joint representation of those clients and a new client, with the consent of the clients after full disclosure. The extent to which any confidentiality agreement might restrict the firm's representation of clients in subsequent proceedings is independent of the Rules, and therefore is not addressed.

**Applicable Rules Provisions**

- **Rule 1.7** (Multiple Representation)
- **Rule 2.2** (Lawyer as Intermediary)[1]

1 The District of Columbia Rules of Professional Conduct became effective January 1, 1991. Accordingly, there is no reason to consider whether the proposed representation would have been appropriate under the District of Columbia Code of Professional Responsibility.

*Inquiry*

A law firm proposes to represent three clients in proceedings before the Copyright Royalty Tribunal. Each year cable television carriers that retransmit broadcast programming signals deposit copyright "royalties" with the Register of Copyrights for ultimate distribution by the Copyright Tribunal. *See* 17 U.S.C. 111(d). The tribunal is authorized to determine the allocation of the fund among the claimants, subject to federal court review. *See* 17 U.S.C. 111(d)(4); *see generally* 37 C.F.R. 301.70-301.83 (1990). The tribunal allocates the fund among prescribed "claimant groups" such as "joint sports programmers," "program suppliers," and "devotional claimants" in "Phase I" proceedings. In "Phase II" the tribunal allocates the awards to each group among the members of the group.

The firm has represented two clients before the Copyright Royalty Tribunal in previous proceedings. These clients want the firm to represent them in upcoming proceedings, and believe that it would be in their interest to have a third claimant join them in submitting their claims to the tribunal as a group.[2] The three clients would be members of the same Copyright Royalty Tribunal "claimant group." In all negotiations with other claimants or in proceedings before the tribunal, the firm would represent the three clients as a group. The allocation of any resulting award among the three clients would be determined by agreement.

In the past the claims of the firm's clients have been resolved without a hearing before the Copyright Royalty Tribunal. By contract, the terms of prior settlements are confidential.

*Discussion*

Rule 1.7. Rule 1.7 is as follows:

(a) A lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse

2 For purposes of submitting claims to the Copyright Royalty Tribunal, "claimants may agree among themselves as to the proportionate divison of compulsory licensing fees among them, may lump thier claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U.S.C. §111(d)(4)(A).

to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer.

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) A position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation; or

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibility to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(c)A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if:

(1) Each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and

(2)The lawyer is able to comply with all other applicable rules with respect to such representation."

Rule 1.7(a) thus prohibits multiple representation without regard to client consent. *Cf.* Opinion 158 (1985). Rule 1.7(b) in contrast permits multiple representation with the consent of the affected clients, but only after full disclosure. *Cf.* Opinion 54 (1978).

The prohibition of Rule 1.7(a) is absolute, and precludes representation in any "matter," whether it involves judicial or administrative proceedings, an application, drafting a contract, negotiations, estate planning, or family relations. The reach of Rule 1.7(a), however, is relatively narrow: representation is prohibited only with respect to a particular "position" in a matter in which the firm also represents a second client who actually takes or will take an adverse "position" on the same issue. Comment [4] to the Rule confirms that "[t]he absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions in the same matter."

Thus, Rule 1.7(a) precludes a firm that takes a position on behalf of Client A from representing Client B in the same proceeding only if Client B actually takes or will take an adverse position on the issue. If the benefits of joint representation are sufficiently great or the likelihood of prevailing on a position that would increase its individual recovery is sufficiently small, each of the clients might after "consultation" choose to forgo such arguments. *See generally* Rule 1.3(b) (client determines lawful objectives); Opinion 143 (1984). Accordingly, if Client B chooses to forgo taking an adverse position on the particular issue, Rule 1.7(a) would be inapplicable by its terms. Rule 1.7(b) governs in any case in which simultaneous representation of clients with potentially adverse interests would not actually require the firm to take inconsistent positions in the same proceeding.

Similarly, notwithstanding Rule 1.7(a), a firm may represent multiple clients in one phase of a case, even if the firm will be precluded from representing the clients in subsequent phases of the case. For example, a firm could represent two or more parties in the liability phase of a case, although separate counsel will be required for each of the clients in the damages phase of the case because the parties will take adverse positions. Rule 1.7, Comment [4]. In such a case, Rule 1.7(b), and not Rule 1.7(a), would be controlling. *See also* Rules 1.6 and 1.9.

Under Rule 1.7(b) clients may "consent" to the simultaneous representation of potentially adverse parties, so long as the lawyers in the firm can satisfy their professional responsibilities.[3] "'Consent' denotes a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." Terminology [2]. "'Consult' or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology [3]. Effective consent therefore requires full disclosure sufficient to allow each client to make an informed decision.

In this case, full disclosure necessarily would include a frank discussion of Rules 1.9 and 1.6 in particular. If the clients fail to agree on an appropriate allocation of any award among themselves or if any one of them concludes that its interests are irreconcilable with those of the others for another reason and terminates the joint representation, the firm may be precluded from representing any of the clients in proceedings before the Copyright Royalty Tribunal. Further, because the firm has represented two of the clients in prior proceedings, the extent to which the proposed joint representation might require the firm to use or disclose confidences or secrets previously obtained also should be discussed explicitly. Finally, as discussed below (pages 7-9), if the firm will participate in the efforts of the clients to agree on an allocation among themselves, Rule 2.2(d) should be addressed explicitly at the outset.

In the case posed by the inquirer, Rule 1.7(a) would not prohibit joint representation of the clients in any phase of the proceedings before the Copyright Royalty Tribunal or in negotiations with the other participants. Under Rule 1.7(b), the clients may "consent" to joint representation, provided the firm makes full disclosure of the costs and benefits of proceeding in that fashion. Each of the clients is entitled to consider whether the benefits of joint representation warrant putting aside its differences with the others to pursue a common negotiating or litigating strategy. *See generally* Rule 1.3; Opinion 143 (1984). In some cases, additional attorneys fees and the likelihood of increased delay may outweigh the value of any expected incremental recovery from separate representation. Opinion 143 (1984).

Rule 2.2. In contrast, the firm plainly cannot serve as an advocate for any of the three clients in negotiations with the others to establish the allocation of any award among them. More for any one of the three would necessarily mean less for at least one of the others. Nonetheless under Rule 2.2:

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

(1) The lawyer consults with each client concerning the implica-

3 "For example, even if a client provides informed and uncoerced consent, a lawyer may not undertake or continue a representation if the lawyer is unable to comply with the obligations regarding diligence, communication, and protection of client confidences provided in Rules 1.3, 1.4, and 1.6." Rule 1.7, Comment [15].

tions of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients's best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

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

(b) A lawyer should, except in unusual circumstances that may make it infeasible, provide both clients with an explanation in writing of the risks involved in the common representation and of the circumstances that may cause separate representation later to be necessary or desirable, the consent of the clients shall also be in writing.

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

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

It is essential that each client fully understand the firm's role. Because the risks are great for the lawyer as well as the clients, a written explanation of the implications of common representation should be provided whenever feasible.[4]

Thus, although the firm would be precluded from serving as an advocate for any of the clients with respect to the allocation of the award among them, the interests of all the clients might be served by having the firm serve as an intermediary to facilitate agreement. "In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment, and recrimination." Rule 2.2, Comment [5]. As noted above, full disclosure to the clients would require discussion of the possible adverse consequences to each of the clients if the attempted intermediation is unsuccessful.

Prior Settlements. Finally, the inquiry refers to confidentiality agreements governing prior settlements. Whatever the firm's contractual obligations under previous confidentiality agreements, they are independent of the firm's ethical obligations under Rule 1.6, and we express no opinion on the effect of any such agreements on the firm's representation of any of the three clients. We note, however, that the body of knowledge possessed by a firm's lawyers, including the general terms on which disputes before the Copyright Royalty Tribunal have been resolved (as distinguished from the fact that a particular entity accepted particular terms), may not be a "secret" within the meaning of Rule 1.6.[5] In any event, Rule 1.6 expressly permits a lawyer to use or reveal client confidences or secrets with the consent of the client, after full disclosure. *Cf.* Opinion 158 (1985).

Inquiry No. 90-10-39
Adopted January 15, 1991

[4] The firm should carefully consider whether its prior representation of two of the three clients makes intermediation inappropriate. "Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period of time and in a variety of matters could have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced." Rule 2.2, Comment [7]. The prior relationship certainly should be disclosed.

[5] In construing analogous provisions of the Code of Professional Responsibility, the Committee explained: "A lawyer is useful to his clients because of his knowledge of the law and how it can be applied to different factual situations. Such knowledge is not gained through formal legal training and postgraduate courses alone, but also from the everyday practice of the law while representing various clients. The Code of Professional Responsibility would surely place an unbearable burden upon every legal practitioner if it prohibited the use of such knowledge except for the benefit of the client whom he happened to represent when he acquired it. Legal expertise consists of layer upon layer of knowledge and experience gained gradually through the representation of many clients in many situations. It is not something that can be parsed and sold exclusively to any one client. The usual attorney-client relationship does not include such expectations." Opinion 175 (1986).

*Opinion No. 218*

## Retainer Agreement Providing for Mandatory Arbitration of Fee Disputes Is Not Unethical

• A retainer agreement providing for mandatory arbitration of fee disputes before the DC Bar Attorney-Client Fee Arbitration Board is not unethical provided the client is advised in writing of the availability of counselling by the staff of the ACAB and provided the client consents in writing to the mandatory arbitration.

### Applicable Rules

• **1.5** (Fees)
• **1.6(a)(5)**(Confidentiality)
• **1.8** (Conflict of Interest: Prohibited Transactions)

*Inquiry*

In Opinion 211, we decided that a law firm retainer agreement that provided for mandatory arbitration of all disputes between the lawyer and law firm, including disputes concerning lawyer malpractice, was improper unless the client is counselled by another attorney prior to entering into the retainer agreement. We specifically reserved the question of whether a retainer agreement requiring arbitration limited to fee disputes only would be a violation of the Rules of Professional Conduct. Now we are asked to address that very issue.

The inquiry comes from the Attorney-Client Arbitration Board (ACAB, formerly known as the Fee Arbitration Board) which is concerned about the status under the new rules of agreements mandating arbitration of fee disputes in light of Opinion 211. The ACAB regularly receives requests for arbitration of fee disputes based on mandatory arbitration clauses providing for arbitration before the ACAB. We are informed that approximately 10 per cent of the arbitrations handled by the ACAB involve mandatory arbitration agreements. Of these, the majority of the arbitrations are initiated by the client.

*Discussion*

No provision of the Rules of Professional Conduct specifically prohibits retainer agreements providing for mandatory arbitration of fee disputes between lawyer and client. Comment 15 to Rule 1.5 recommends that lawyers consider

submitting to arbitration or mediation of fee disputes where procedures have been established by the Bar. Rule 1.6(d)(5) encourages the lawyer to minimize disclosure of client confidences in a fee collection action. The comments suggest that the lawyer should file John Doe pleadings and seek protective orders to protect client confidences. Arbitration, which is not open to the public, furthers the purposes of 1.6(d)(5) by protecting the client from a public airing of confidential matters.

Rule 1.8(g)(1) prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice[.]" In Opinion 211, we determined that Rule 1.8(g)(1) was not applicable as a prohibition on mandatory arbitration provisions in a retainer agreement. *Id.*, at n. 3. Even if 1.8(g)(1) were deemed to apply to arbitration provisions in a retainer agreement, a mandatory arbitration provision limited to fee disputes does not by its terms implicate Rule 1.8(g)(1) because a provision for mandatory arbitration of the lawyer's claim against the client for fees is not a prospective limitation of the lawyer's liability to the client for malpractice. The client's right to have malpractice claims determined by a court remains intact.

In Opinion 211, we determined that Rule 1.8(a) governs the use of mandatory arbitration provisions in retainer agreements. Rule 1.8(a) provides:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) The client consents in writing thereto.

The retainer agreement before us in Opinion 211 required mandatory arbitration of all disputes before either the ACAB or the American Arbitration Association (AAA), required the client to consent to the jurisdiction of the D.C. Superior Court for all purposes connected with the arbitration, and provided a two-year statute of limitations within which arbitration must be started. We concluded that the complex nature of the arbitration provided for by the retainer agreement in question could not adequately be disclosed to a lay client. Thus, we determined that mandatory arbitration agreements covering *all* disputes between lawyer and client are not permitted "unless the client is in fact counselled by another attorney." *Id.* at 9.

The concerns which led us to the conclusion we reached in Opinion 211 either do not exist where the retainer agreement provides for fee only arbitration or are adequately addressed by the procedures of the ACAB. For instance, the agreement in Opinion 211 provided for ACAB or AAA arbitration, but did not disclose the AAA fees, nor that AAA arbitrators must be paid, and that in some instances the costs of AAA arbitration can be substantial. Here we address a fee agreement providing only for arbitration before the ACAB where the fees are only $25 and the arbitrators are not compensated.

More importantly, we believed the lawyer entering into a retainer agreement with a client for arbitration of all disputes, including malpractice, could not adequately explain the tactical considerations of arbitration versus litigation to the lay client--considerations such as lack of formal discovery, lack of a jury trial, and the closed nature of arbitration proceedings. We are informed that the staff of the ACAB is equipped to advise clients who are asked to sign retainer agreements with mandatory arbitration provisions of the nature of fee arbitration, the advantages and disadvantages, and the alternatives to fee arbitration. Moreover, the ACAB's procedures are relatively simple and its rules, which are also relatively simple to understand, are readily available to interested lawyers and their clients. We believe the counselling provided by the ACAB staff and the ready availability of the ACAB's rules are sufficient to adequately inform the lay client of the information necessary to make a decision about whether to agree to a provision for mandatory arbitration of fees.

We therefore conclude that a fee agreement providing for mandatory arbitration of fee disputes before the ACAB is ethically permissible provided the agreement informs the client in writing that counselling and a copy of the ACAB's rules are available through the ACAB staff and further that the lawyer encourage the client to contact the ACAB for counselling and information prior to deciding whether to sign the agreement. Moreover, the client must consent in writing to the mandatory arbitration. Rule 1.8(a)(3).

A final issue to be addressed relates to the possibility that a fee arbitration arising from a mandatory arbitration provision could preclude the client from later raising a malpractice claim against the lawyer. In many fee disputes the client's defense is the lawyer's inadequate representation. Would the client, after having raised such a defense in a fee arbitration based on a retainer agreement, be precluded on res judicata or collateral estoppel grounds from later prosecuting a malpractice claim? The rules of the ACAB provide that the result of the arbitration is an award (or the denial of an award) without any written factual findings or conclusions. Moreover, no recording or transcription is made of the testimony presented to the arbitrators. It is difficult to see how a client in such an arbitration could later be precluded from prosecuting a malpractice claim based on an adverse award in the arbitration. However, this raises a question of law and the Legal Ethics Committee does not make rulings on questions of law.

Because the legal effect of an arbitration award to the lawyer is unclear, we conclude that a lawyer relying on a mandatory fee only arbitration agreement may not ethically use the existence of an arbitration award in the lawyer's favor in an attempt to preclude a subsequent malpractice claim unless the lawyer has complied with the dictates of Opinion 211.

Inquiry No. 91-1-2
Adopted: June 18, 1991

*Opinion No. 219*

**Conflict of Ethical Obligations**

• A lawyer is not precluded from revealing a fraud committed in the course of the representation by the client on a federal tribunal or another person if regulations of the tribunal having the force and effect of law require that the fraud be revealed and the client is first af-

forded a reasonable opportunity to investigate and pursue any good faith challenge to the regulations.

**Applicable Rules**

- **Rule 1.6(d) (2) (A)** (Confidentiality of Information)
- **Rule 3.3(d)** (Candor Toward the Tribunal)
- **Rule 4.1(b)** (Truthfulness in Statements to Others)

*Inquiry*

A regulation of the U.S. Patent and Trademark Office, 37 C.F.R. § 10.85(b) (1), provides:

> A practitioner who receives information clearly establishing that . . . [a] client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the practitioner shall reveal the fraud to the affected person or tribunal. [1]

The present inquiry seeks guidance on how to reconcile the requirements of this regulation with the ethical obligations of members of the District of Columbia Bar.

*Discussion*

The comments to Rule 8.5 of the Rules of Professional Conduct now in effect refer to problems arising from conflicts between inconsistent ethical requirements of different jurisdictions, including conflicts between the rules of the Bar and those of federal tribunals. However, there can be no such problem in the absence of a true conflict. That is the circumstance here.

Rule 3.3(d) of the Rules of Professional Conduct states:

> A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the tribunal unless compliance with this duty would require disclosure of information otherwise protected by Rule 1.6, in which case the lawyer shall promptly call upon the client to rectify the fraud. [2]

*See also* Rule 4.1(b) (prohibiting knowing failure to disclose material facts to third persons when necessary to avoid assisting a criminal or fraudulent act by the client except when disclosure is prohibited by Rule 1.6). Rule 1.6, in turn, generally requires the lawyer to maintain the confidentiality of the confidences and secrets of the lawyer's client, which Rule 1.6(b) defines to include "information gained in the professional relationship . . . the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Since this definition encompasses the existence of a fraud committed by the client during the representation, a member of the D.C. Bar normally would be precluded from disclosing such a fraud even if the client has refused to rectify it. [3]

There is an important exception, however. Rule 1.6(d)(2)(A) permits a lawyer to reveal client confidences and secrets when "required by law or court order." In the Committee's view, "law" for this purpose includes federal regulations having the force and effect of law. That is the normal understanding of the term. *See, e.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979). Moreover, the comments to the rules make clear that "law" within the meaning of a related provision, Rule 1.6(d) (2) (B), includes such regulations. [4] Accordingly, we conclude that if a client refused to rectify a fraud in accordance with regulations of a federal tribunal requiring disclosure with the force and effect of law, the lawyer could make the disclosure without contravening Rule 1.6 or Rules 3.3(d) or 4.1(b).

The question remains whether 37 C.F.R. § 10.85(b) (1) constitutes such a regulation. Although this is a question of law beyond the purview of the Committee, we believe that the lawyer would be required before making any disclosure pursuant to the regulation to notify the client and provide the client a reasonable opportunity to investigate and pursue any good faith challenge to the regulation. *See* Opinion 214 (lawyer may comply with a final judicial order enforcing an IRS summons without seeking appellate review of the order so long as the client is advised and given a reasonable opportunity to seek review independently).

Inquiry No. 89-3-12
Adopted: July 17, 1991

*Opinion No. 220*

**Threats To File Disciplinary Charges**

- Threats to file disciplinary charges, either against an attorney with Bar Counsel or against a non-attorney with a relevant professional board, for the sole purpose of gaining advantage in a civil matter are a violation of the Rules of Professional Conduct.

**Applicable Rule**

- **Rule 8.4(g)**(Misconduct)

*Inquiry*

The Committee has before it three related inquiries. Two practitioners inquire about the ethical propriety of threatening to file disciplinary charges against attorneys with bar counsel in order to gain advantage in negotiating a civil settlement. A third inquires about the propriety of threatening to file a complaint with certain professional associations of realtors and appraisers for the same purpose.

The first inquirer is an attorney whose client wishes to bring a malicious prosecution action against another attorney and his client arising out of the conduct of the second attorney and client in a previous action. The inquirer asks to what extent he may threaten, or hint about, filing a disciplinary complaint against the opposing attorney in order to coerce a settlement of the malicious prosecution claim.

[1] According to the inquiry, the Patent and Trademark Office interprets fraud for this purpose to include non-compliance with 37 C.F.R.§ 1.56(a), which imposes a duty on the inventor and his or her attorney "to disclose to the Office information that they are aware of which is material to the examination of the application."

[2] We assume for purposes of this opinion that the Patent and Trademark Office constitutes a "tribunal" within the meaning of this rule. According to paragraph [12] of the Terminology section of the Rules, "tribunal" "denotes a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a judicial or quasi-judicial nature, based on information presented before it, regardless of the degree of formality or informality of the proceedings."

[3] The lawyer would be required in that case to withdraw from the representation if the fraud is ongoing and thus otherwise would involve assistance by the lawyer. *See* Rules 1.2(e), 1.16(a) (1), 3.3(a) (2); Opinion 153. *See also* Rule 1.16(b) (1) and (2) regarding permissive withdrawal when the lawyer reasonably believes (but does not know) that fraud has been committed or the fraud is not ongoing, but has previously involved the lawyer's services.

[4] Rule 1.6(d) (2) (B) permits disclosure of client confidences and secrets by a government lawyer "when permitted or authorized by law." Comment [34] to Rule 1.6 states that disclosures by government lawyers pursuant to this subparagraph "may be authorized or required by statute, executive order or regulation, depending on the constitutional or statutory powers of the authorizing entity."

The second inquiry arises in the context of a collection action by the successor counsel of a law firm against a former client of the law firm. During settlement negotiations, the defendant's counsel informed the inquirer that his client had requested that he prepare a complaint to be filed with Bar Counsel. The inquirer asks whether this reference to filing disciplinary charges in the course of settlement negotiations is unethical.

The third inquirer is an attorney representing a real estate professional in a malpractice action. In the course of settlement negotiations, opposing counsel has stated that his client has asked him to consider the filing of a complaint with the relevant associations of realtors and appraisers to seek the suspension or revocation of the inquiring attorney's client's license. The inquirer asks whether this constitutes a violation of the disciplinary rules.

*Discussion*

The relevant disciplinary requirement in the Rules of Professional Conduct represents a change from that which governed in the Code of Professional Responsibility. Rule 8.4(g) provides that, "[i]t is professional misconduct for a lawyer to: . . . (g) seek or threaten to seek criminal charges or disciplinary charges solely to obtain an advantage in a civil matter." The earlier prohibition, found in DR 7-105, was limited to the filing of or threat to file criminal charges. Neither the history nor the published comments to Rule 8.4 address the reasons for modifying the rule to include disciplinary charges. Nor do they define or otherwise explain the meaning of the term "disciplinary charges" as it is used in the Rule.[1]

*1. Filing or Threatening to File a Disciplinary Charge Against An Attorney*

The prohibition against filing disciplinary charges encompasses, on its face, the threat to file disciplinary charges against attorneys as set forth in two of the inquiries.[2] The only question under Rule 8.4(g) is whether the charges were threatened or filed "*solely* to obtain an advantage in a civil matter." (emphasis added).[3]

The determination of for what purpose or purposes the disciplinary charges at issue were threatened is a factual question which this Committee is not equipped to decide. We do note, however, that Rule 8.3(a) creates an affirmative obligation upon a lawyer to inform the appropriate professional authority where the lawyer has "knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."[4] The comments to Rule 8.3, at ¶ [3], explain that the use of the word "substantial" goes to the "seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." The comments also state that the report should be made to the Office of Bar Counsel. *Id.*

If a complaint or report is filed with Bar Counsel in a good faith effort to comply with the provisions of Rule 8.3 it cannot be said to be filed solely for the purpose of gaining advantage in a civil matter.[5] However, it is unlikely that a threat to file a disciplinary complaint could be viewed as a good faith effort to comply with Rule 8.3 since the obligation under that Rule is to report -- and not to threaten to report -- the relevant information.[6] As a result, a threat to file a disciplinary charge is not protected under Rule 8.3.

Disciplinary charges threatened or filed for purposes other than gaining advantage in a civil matter may implicate other rules. These include principally Rule 3.1 which prohibits a lawyer from bringing frivolous claims. In addition, the threat of a disciplinary charge could constitute a violation of the relevant extortion and blackmail statutes, a concern expressed by the Jordan Committee as discussed above. Again, the question of whether violations of these Rules are presented in the inquiries under consideration involve legal and factual determinations that are beyond our scope and regarding which we do not express an opinion.

*2. Threats to File Disciplinary Charges Against Persons Other Than Attorneys*

Rule 8.4(g), by its plain language, renders unethical any threat to file disciplinary charges solely in order to gain advantage in a civil matter. The type of disciplinary charge is not limited either in the Rule or in any published explanatory material. Indeed, interpreting the rule's prohibition to extend to filing charges against attorneys but not against non-attorneys would produce the anomalous result of permitting an attorney to file or threaten to file a disciplinary charge against an opposing party for the sole purpose of obtaining advantage in a civil matter but not against his or her attorney for the same reason. This Committee declines to endorse such a result. The rule applies equally to complaints threatened or filed against attorneys and non-attorneys.

Since the complaint referenced in the inquiry regarding the real estate profes-

[1] The only published explanation, which does not address why the words "disciplinary charges" were added to the prohibition, is contained in the statement which the Jordan Committee submitted to the Court of Appeals:

> The Committee also added a new paragraph (g), which is substantially similar to DR 7-105. The problem dealt with in paragraph (g) is not specifically addressed by any other provision in the proposed Rules. The Committee felt that the conduct prohibited by paragraph (g), which is tantamount to common law blackmail, was serious enough, and its occurrence frequent enough, that a rule clearly forbidding that conduct was needed.

[2] Prohibiting the threatened or actual filing of disciplinary charges against attorneys for the sole purpose of gaining advantage in a civil matter is in accordance with decisions of at least seven other jurisdictions. *See* Illinois State Bar Association Commmittee on Professional Responsibility, Opinion 87-7, 1/29/88; Indiana State Bar Association Legal Ethics Committee, Opinion 10 of 1985; the Professional Ethics Commission of the Board of Overseers of the Bar, Maine, Opinion 100 (10/4/89); Maryland State Bar Association Committee on Ethics, Docket 86-14; Massachusetts Bar Association Committee on Professional Ethics, Opinion 83-2; Michigan State Bar Committee on Professional and Judicial Ethics; Opinion CI-695 (10/18/81); Wisconsin State Bar Committee on Professional Ethics, Opinion E-89-16 (9/8/89).

[3] Insofar as the first inquirer seeks to differentiate between threats and "hints" of threats, we find no relevant distinction. Any suggestion of filing a disciplinary charge for the sole purpose of gaining advantage in civil litigation falls within the scope of the rule.

[4] The only exception to this reqirement is where the information is confidential withing the meaning of Rules 1.6. Confidentiality concerns do not appear to be implicated in any of the inquiries under consideration here.

[5] The Michigan State Bar Committee on Professional and Judicial Ethics has determined that in the face of a similar reporting requirement, the suggestion of not reporting violations in return for favorable settlement is improper. Opinion CI-695 (10/18/81).

[6] Rule 8.3 speaks in terms of "informing" the appropriate professional authority. Neither the Rule nor comments explain what precisely is meant by this term. Nonetheless, filing a disciplinary charge is clearly a method of informing the authority and thus falls within its plain meaning.

sional could result in the suspension or revocation of a license, it is a disciplinary charge within the meaning of the rule. Again, the matter of whether the complaint is filed solely to gain advantage in a civil matter is a factual question which this Committee is not equipped to decide.

*Conclusion*

In conclusion, the Committee finds that threats to file disciplinary charges against either attorneys or non-attorneys solely to gain advantage in a civil matter violate Rule 8.4 (g) of the Rules of Professional Conduct.

Inquiries: 85-9-34; 90-2-8; 90-5-24
Adopted: September 17, 1991

*Opinion No. 221*

**Law Firm Employment Agreement**

• An employment agreement allocating contingent fees on a percentage basis between a firm and a departing attorney who takes a firm client may be determined according to the amount of time the case was with the firm and the amount of time it was with the departing lawyer before the fee was realized. It may not include a provision restricting the attorney's right to send an announcement notifying clients of his or her departure, nor prohibit discussion of the departure should the client initiate the contact with the attorney.

**Applicable Rules**

• **Rule 1.4** (Communication)
• **Rule 5.6(a)** (Restrictions on Right to Practice)
• **Rule 7.1** (Communications Concerning A Lawyer's Services)

*Inquiry*

The inquirer asks about the propriety of several provisions of a law firm's employment agreement. Paragraph 5 of the agreement addresses the division of contingent fees between the firm and a lawyer who departs the firm and takes a firm client. It provides a sliding chart whereby the fee will be divided between the departed attorney and the firm based on a combination of length of time the case was with the firm before the attorney left and length of time it is with the attorney before the fee is realized. For example, if the firm was retained prior to two years before the attorney left the firm and the fee is realized within one year after the attorney's departure, the firm is entitled to 75% of the fee. The lowest percentage taken by the firm is 55% for cases in which the firm was retained within one year of the attorney's departure and where the fee is not realized until two to three years after the departure date.

Paragraph 3 of the agreement concerns notification to clients that a lawyer has left or will be leaving the firm. Under this provision, the firm agrees to send a standardized letter to the departing lawyer's clients not later than 3 days after the lawyer's departure.[1] This letter gives the client the option of remaining with the firm or going with the departing lawyer. In return, the lawyer agrees not to contact the client or discuss his/her departure until after the firm has received the client's response.

*Discussion*

*Division of Fees.*

The Committee concludes that the fee provisions of paragraph five of the employment agreement do not violate the Rules of Professional Conduct. This agreement differs from others considered and rejected by the Committee since it seeks compensation for work already performed for the client. Rejections have generally been based on DR 2-108(A), predecessor to Rule 5.6(a), which provides:

> A lawyer shall not participate in offering or making: (a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship....

Opinion 65 rejected an agreement which required 40% of an attorney's net billings to any client of his former firm be paid to the firm for two years after termination. The Committee decided that this "economic disincentive", though not a direct prohibition on representation, was "nonetheless a restriction on the right of a lawyer to practice," in violation of DR 2-108(A). The agreement required a flat percentage of *future hourly billings* in an attempt to "impose a barrier to the creation of a lawyer/client relationship between the departing lawyer and clients of his former firm". Opinion 65. *See also* Opinion 194 (disapproving reduction of payments otherwise due to withdrawing partner if that partner entered into a competing practice within one year of withdrawal).

By contrast, the fee division agreement at issue in this inquiry seeks compensation for work already performed by the firm. One purpose of predetermined fee-sharing with a departing lawyer is to avoid the unseemly bickering and the potential for litigation over clients and fees that can occur when a departing lawyer takes clients whose matters are being handled on a contingent fee basis. The agreement here applies only in contingent fee personal injury cases in which significant costs may be incurred by the firm near the beginning of the attorney-client relationship.[2] Fees ultimately realized are divided on a percentage basis which varies according to the length of time the case was handled by the firm and the length of time it was handled separately by the departed lawyer.

The Committee can neither approve nor disapprove the specific percentages used by this firm. If the percentages represent a generally fair allocation of fees based on the firm's historical experience there is no violation of Rule 5.6(a). On the other hand if the firm's share is excessive, this would have the effect of restricting the right of the departing lawyer to practice after the termination of the relationship in violation of Rule 5.6(a). Opinion 65. The determination whether the percentages are generally fair under the varying circumstances addressed by the employment agreement is a factual determination. The Committee cannot make fact findings.

In sum, we conclude that in general a scheme for dividing contingent fees between a firm and a departing lawyer based on the length of time the case was with the firm and the length it was with the departed lawyer is ethically permissible. But we make no determination about the particular percentages used in the agreement before us.

*Announcements.*

We reach a different conclusion about paragraph three's provisions for client notification.

[1] The agreement provides that the letter may be sent sooner if the attorney so requests, though this remains at the firm's discretion.

[2] Rule 1.8(d) permits the lawyer to advance costs of litigiation even when the client is not ultimately liable for them.

This Committee has determined that direct personal solicitation of a firm's clients by a departing lawyer may be limited by agreement without running afoul of the predecessor to Rule 5.6(a). Opinion 77. In Opinion 97, which involved a similar agreement, the Committee stated that the right to mail announcements sufficiently protected the attorney's right to practice law and the client's ability to make an informed choice. "*[I]f the right to send announcements is preserved*, the firm may ethically enter into an employment agreement which limits direct solicitation by the associate after termination of his employment." Opinion 97 (emphasis added).

Though no employment agreement was involved, a similar conclusion was enforced by the Pennsylvania Supreme Court. That court let stand an injunction which prohibited attorneys from directly communicating with clients of their former firm. The injunction expressly permitted the attorneys to send announcements, and emphasized the client's right to choose counsel. *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978). At a minimum, it appears, the attorney retains the right to send announcements. *Id.* at 1179; *see also* Rule 7.1.

The present agreement, however, provides that the firm will control the content and timing of the notification letter, that the client will respond to the letter by contacting the firm, and that the attorney may not discuss his or her departure with the client until after the client has responded to the firm's notification. This creates a situation in which the firm controls all communication with the client relevant to the client's decision on continued representation.

The importance of the client's right to freely choose counsel is widely recognized. "An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." Rule 5.6, Comment [1]. The Committee has declined to approve efforts which "prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing who may have formed new associations." Opinion 181. This is consistent with opinions of other jurisdictions. *See, e.g.*, Virginia Bar Opinion 1232 (lawyer may do nothing that restricts the client's right to counsel of his or her choice); Illinois Bar Opinion 86-16 (law firm may not restrict a client's right to choose his own legal representation, either generally or as between the firm and a departing associate).

Our opinions safeguard the client's ability to make informed decisions with regard to continued representation. This is done, at a minimum, by allowing the departing attorney to send announcements containing information sufficient to permit such decisions. Though the firm has argued that announcements are in fact being sent, its control over the announcement means that information received by the client may be biased in favor of the firm. Indeed, the firm's form notification to the client does not even tell the client where the departing lawyer can be contacted. The client's decision on representation may well be affected by the attorney's unexplained failure to communicate regarding his or her departure combined with a lack of information with which the client can contact the lawyer. Thus, we conclude the firm's form notification letter is insufficient as a substitute for the departed lawyer's right to send announcements after the termination of employment.[3]

Finally, we address the restrictions on the lawyer's right to speak with the client about the departure until after the client has responded to the notification letter. We have previously determined that Rule 5.6(a) (in its predecessor form) permits a firm to limit such contacts when initiated by the lawyer. Opinion 77; Opinion 97. This agreement goes beyond such a restriction, however, to prohibit truthful responses to client-initiated inquiries. As such it has the same effect as the one rejected in Opinion 181: "[T]he Agreement appears to prevent a departed lawyer from responding to unsolicited questions about the possibility of representation from firm clients... DR 2-108(A) clearly condemns these types of restrictions."[4] *See also* Rule 1.4.

*Conclusion*

In summary, the Committee finds that an employment agreement allocating contingent fees between a firm and a departing lawyer may be on a percentage basis determined according to the amount of time the case was with each. The firm may not restrict the attorney's right to send an announcement notifying clients of his or her departure, nor prohibit discussion of the termination should the client initiate the discussion with the attorney.

Inquiry No. 90-12-47
Adopted: October 15, 1991

*Opinion No. 222*

**Attorney's Obligation Under Rule 9.1 Does Not Apply To Lawful Acts Outside The District Of Columbia**

- A member of the District of Columbia Bar who works in Virginia for a legal defense organization does not violate Rule 9.1 even though the lawyer engages in acts of employment discrimination in Virginia and Maryland that would violate that Rule and the D.C. Human Rights Act if done within the District of Columbia, because these acts are not unlawful in the states where committed.

**Applicable Rules**

- **Rule 8.5** (Jurisdiction)
- **Rule 9.1** (Discrimination in Employment)

*Inquiry*

The inquirer, a member of the District of Columbia bar, is an officer of a legal defense organization located in Virginia which provides legal counsel to persons involved in litigation of a constitutional and political nature relating to educational issues.

Although his office is located in Virginia, he is not licensed to and does not practice law there. The inquirer sits on the board of elders of his church and the board of directors of an international

[3] Our prior Opinions have not decided, and we do not decide here, the question whether a *firm* has an ethical obligation to notify a client of the impending departure of a lawyer prior to the date of such departure. We note, however, that there may be situations in which notice of an impending departure is required to safeguard the client's right to make informed decisions with regard to his or her representation. In such circumstances, a firm that prohibits predeparture contact by the departing lawyer may itself be under an obligation to notify its clients of the impending departure.

[4] That agreement prohibited an attorney from taking any action which would "interfere with the business of the firm in any way." This would apparently have precluded the sending of new practice announcements.

religious human rights organization. The church board of elders is located in Virginia, and the religious rights organization is located in Maryland. Both the church and the religious rights organization are opposed as a matter of principle to homosexuality and to those who condone or practice it. The inquirer does not provide legal counsel or services to his church or to the religious rights organization.

Unlike the District of Columbia neither Virginia nor Maryland, nor the Federal law, expressly forbid discrimination in employment based on sexual orientation. The inquirer asks for the committee's views on the propriety of his participation and concurrence in hiring decisions by these boards of directors denying employment to homosexuals as a matter of policy. Specifically, the inquirer asks whether Rule 9.1 of the Rules of Professional Conduct, which became effective January 1, 1991, is applicable to a person licensed to practice in the District of Columbia but whose office is located in another jurisdiction in which discrimination in employment based on sexual orientation is not unlawful; and whether this Rule is applicable to a hiring decision "made outside the legal profession."

*Discussion*

Rule 9.1 of the Rules of Professional Conduct, effective January 1, 1991, provides that

> "[A] lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility or physical handicap."

As noted in the commentary, this provision was modeled after the District of Columbia Human Rights Act, D.C. Code 1-2512 (1981), "though in some respects [it is] more limited in scope."[1] Comment [1]. The comment further notes that the "rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law."

Neither Virginia nor Maryland law, nor Federal law, expressly forbid discrimination in employment based on "sexual orientation."

The question raised by this inquiry is whether acts of discrimination, which are not committed in the lawyer's professional capacity and which are not specifically unlawful in the jurisdictions where they take place, may nevertheless be deemed to be professional misconduct under the standard set forth in Rule 9.1 governing members of the District of Columbia Bar, regardless of where this conduct occurs. A related issue is the extent to which a member of the District of Columbia bar is governed by the D.C. Rules of Professional Conduct, and subject to discipline for violations, for conduct occurring in another jurisdiction.

With regard to the latter issue, Rule 8.5 makes it abundantly clear that all lawyers admitted to practice in this jurisdiction are "subject to the disciplinary authority of this jurisdiction." As the comment to this rules notes (Comment [1]):

> "In modern practice, lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice."

In the circumstances presented here, however, the principal question to be determined is whether Rule 9.1 is violated where the lawyer's conduct occurs outside the District of Columbia in jurisdictions that do not expressly forbid acts of discrimination based on sexual orientation. Comment [1] to Rule 9.1 recognizes that the law in other jurisdictions may be broader or narrower than the Rule, and states that "[t]he rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law."

Since neither Virginia nor Maryland, nor the Federal law, outlaw acts of discrimination in employment based on "sexual orientation", the inquirer has no obligation to ignore this factor when he participates in hiring or other employment decisions in those states.

The Committee concludes, therefore, that Rule 9.1 is not applicable in these circumstances and that the inquirer is not subject to discipline under Rule 8.5. The Committee notes, however, that if Maryland or Virginia law, or the Federal law, should be changed to include "sexual orientation" as a forbidden ground for employment discrimination, Rule 9.1 would then apply to such acts of discrimination by a member of the D.C. bar in those states, as well as in the District of Columbia.

In view of its determination that Rule 9.1 is not applicable to the fact situation presented here, the Committee believes that it is unnecessary at this time to consider the other question raised by the inquirer, namely, whether Rule 9.1 applies to employment decisions made by a member of the D.C. Bar "outside the legal profession" -- i.e., in connection with church-related or other non-legal organizations in which the lawyer is involved.

*Dissent of One Member from Opinion No. 222*

The Rules of Professional Conduct (Rules) are established by Order of the District of Columbia Court of Appeals as "the standards governing the practice of law in the District of Columbia." Order No. M-165-33 (3/1/90), p. v., D.C. Rules of Professional Conduct. "They should be interpreted with reference to the purposes of legal representation and the law itself." (Scope, *id.* at p. ix, ¶ [1]) "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer ... The Rules simply provide a framework for the ethical practice of law." *Id.* ¶[2].

The Rules themselves provide a means for enforceable interpretation of the language of the Order.

Rule 8.4, relating to professional misconduct, proscribes activities which may occur outside the specific "practice" of law but which have a discernable relation

[1] The Rule is more limited than the D.C. Code in several respects. The acts prohibited by D.C. Code § 1-2512 (1981) include discrimination based upon "personal appearance" and "matriculation, or political affiliation of any individual", in addition to the factors specified in Rule 9.1. The D.C. Code provision also defines more comprehensively and specifically the nature of the employment practices against which it is directed, declaring that it is an unlawful discriminatory practice, among other things, "to fail or refuse to hire, or to discarge, any individual" based on the prohibited factors; or to discriminate for these reasons against any individual "with respect to his compensation, terms, conditions, or privileges of employment, including promotion."

Thus, it is unclear whether the language used in Rule 9.1, ("in conditions of employment"), was intended to encompass all of the employment-related conduct covered by D.C. Code §1-2512. For purposes of this opinion, however, the Committee assumes that the Rule's phrase "conditions of employment" is coextensive with the employment-related determinations forbidden by the D.C. Code.

to the lawyer's ability to practice law in accordance with the rules, e.g., the actions involve a moral or personality flaw or a characteristic which reasonably may be expected to assert itself in the lawyer's practice and so result in a violation of the Rules. However, in making determinations of application of the Rules, we must recall that it applies "only for offenses that indicate lack of those characteristics relevant to law practice." (Comment [1] to Rule 8.4) and "with reference to the purposes of legal representation and the law itself." (Scope, *supra*, at¶[1])

Rule 8.5, relating to jurisdiction, extends the reach of the Rules outside the territorial boundaries of the District of Columbia, presumably in parallel with Rule 8.4 that an action outside the local jurisdiction may affect practice "in" the District of Columbia. Comments to Rule 8.5 recognize that some limitations in application of the Rules may be appropriate where conformance to the rules is not compatible with obligations placed on the lawyer in the other jurisdiction. *See* Comments [2] and [3]. However, no limitations are imposed where the obligations in the other jurisdiction are compatible with the rules, where there are no obligations imposed on the lawyer in the other jurisdiction, or where the "acts" (Comment [1]) in the other jurisdiction cannot truly be "practice" in that jurisdiction. Under these conditions, there is no conflict and the reach of Rule 8.5 is limited only in terms of the reach of Rule 8.4.

Rule 9.1, relating to discrimination in employment, bars discrimination in employment due to sexual orientation and other specified factors not at issue here. Both the legislative history of the rule and Comment [1] make it clear that the rule is modeled after and enacted in consequence of the D.C. statute and the rule presumably is subject to modification in application as court rulings interpret the statute. It is more limited than the statute and defers to District government action. Any violation of Rule 9.1 inevitably violates the statute. Within the jurisdiction of the District government, therefore, there can be no conflict and neither Rule 8.4 nor Rule 8.5 is applicable.

That, however, is not true where the District statute does not apply. While the language of Rule 9.1 is clear and direct, it is no more so than other rules, and there is nothing to indicate that it stands in isolation of other rules. It is established committee practice that no rule is an isolate considered entirely of its own but each must be interpreted in accord with other relevant rules. Rules 8.4 and 8.5, speaking to the scope of the Order and the whole body of the Rules, are clearly applicable here. Indeed, in Comment [1] to Rule 9.1, the Court places Rule 9.1 within the limits of Rule 8.5, and there is no reason to believe it intended to exempt it from Rule 8.4. One may conclude that since Rule 8.5 does not apply within the District, the Court in its comment intended that 8.5, and by implication 8.4, applies to the interpretation of Rule 9.1 outside the District.

The inquirer is a lawyer licensed in the District of Columbia but not in any other jurisdiction. He is an elder in several religious organizations presumably participating in employment decisions. The religious organizations as a matter of conviction restrict employment based on sexual orientation. There is no color of legal practice in the lawyer's participation in these organizations, and there is no basis for believing that his participation colors his legal practice in the District of Columbia. We may assume that his participation in them reflects personal beliefs and, hypothetically, that these beliefs *may* affect the way he conducts his practice. However, many lawyers have deeply felt beliefs or convictions, religious or otherwise, which may influence their practice. Unless there is clear indication that conformance to such a conviction has resulted in actions within his practice that violate the Rules, we cannot say that he cannot practice law if he holds what may well be contentious or even offensive convictions. *See* ¶ 1 above.

In sum, it is my view that Rule 9.1 must in this instance be interpreted in light of Rule 8.4, and that under Rule 8.4 the lawyer's activities as a member of a religious organization outside the District of Columbia are not subject to application of the Rules.

The inquirer also asks about his employment practices in his law office which is located outside the territory of the District of Columbia, in this instance in Virginia. We do not know where the office is located, or whether the inquirer is in active practice, but he is a licensed member of the D.C. Bar, and he may engage in practice whenever and from wherever he wishes. He is not licensed in the jurisdiction in which his office is physically located, nor is he in practice in any jurisdiction other than the District of Columbia which is at issue here. The only function of the Virginia office is to support the practice of law in the District. Much, perhaps most, of what a lawyer does in the practice of law takes place in his office. Indeed, depending on the nature of his practice, all "acts" related to that practice may occur without the lawyer ever setting foot within the boundaries of the District. All people employed in that office, lawyers, paralegals, and clerks are in support of the lawyer's practice in the District. Quite aside from Rule 9.1, and prior to its enactment, we have found employment practices an integral part of the lawyer's legal practice and subject to the Rules (Opinion Nos. 65, 181, 209). There is no reason to believe that the obligations with respect to conditions of employment established in Rule 9.1 should be treated any differently than the obligations established under other rules. The only issue, therefore, is whether employment practices outside the territory of the District are subject to the Rules.

Rule 8.5, in extending application of the rules to lawyers "act[ing] outside the territorial limits of the [District of Columbia]" (Comment [1]) contemplates the possibility of conflicting obligations. However, there is no conflict here. There is no limiting language in Rule 9.1 itself; Comment [1] explains that "The rule is not intended to create ethical obligations *imposed* on a lawyer by *applicable law.*" (Emphasis supplied) But there is no applicable law in Virginia and nothing is "imposed" on the lawyer except, in fact, Rule 9.1. The lawyer is in fact obligated to be aware that there is no federal law nor Virginia law or rule that affects his employment practices, but there is a body of rules that affects all of his practice of D.C. law. The lawyer does not practice in Virginia and, in any event, Virginia law is silent on the sexual orientation issue: the lawyer is free to discriminate in hiring or not to do so. His employment practices, therefore, are bound only by his conscience and the obligations placed on him as a condition of the practice of law in the District of Columbia.

Rule 8.5 clearly was established to make certain that lawyers do not escape the reach of the Rules and the disciplinary authority when practicing District of Columbia law. The lawyer, in this in-

stance, is not subject to the rules of the jurisdiction in which he is located. If he is not subject to the rules in the jurisdiction in which he practices, any lawyer with a Metrocard may place himself in that limbo of lawyerly delight where he is subject to no rules.

I would have the opinion state that a member of the District of Columbia Bar who is not licensed to practice law elsewhere, but whose office in support of his practice in the District is located outside D.C. violates the prohibitions of Rule 9.1 if he discriminates in employment for that office, and that he is not subject to the provisions of Rule 9.1 if he participates in employment decisions as a member of religious organizations having no relation to his practice of law, and where such actions are not illegal.

Inquiry No. 90-5-20
Adopted: November 19, 1991

*Opinion No. 223*

**Nondisclosure of Protected Information to Funding Agency**

• Attorneys for a legal services support center must refuse to allow representatives of a funding agency to see materials that include confidences and secrets of clients assisted by the support center through consultation and advice to field program attorneys retained by the clients. Redaction of client names is insufficient to preserve confidentiality when unredacted information could link the confidence or secret revealed to the client.

**Applicable Rule**

• **Rule 1.6** (Confidentiality of Information)

*Inquiry*

The inquirers are attorneys employed by a non-profit organization that receives a grant from the Legal Services Corporation (LSC) to serve as the national support center for field legal services programs in a particular subject matter. When a field program accepts a client with a problem in that subject matter, a field attorney may call or write the inquirers' organization for assistance on the case.

In the course of a visit to monitor the organization's compliance with their LSC contract and with LSC laws and regulations, LSC requested to see log forms used by the organization to record requests for assistance from field attorneys and all notes and correspondence on contacts with field attorneys. The inquirers report that assistance logs are used to expedite follow-up conversations with field attorneys by providing a quick reference on the nature of the case and the substance of the previous discussion between the field and organization attorney. The inquirers report that logs often include case facts, discussion of possible legal theories, and notes on legal or factual research.

The support center provided to LSC time sheets and summary logs of requests for assistance. Time sheets account for hours charged to the LSC grant by functional category (e.g., legal services, public education). Time sheets do not identify individual clients. The summary log of requests includes the date assistance was requested, the caller's name, the legal services program with which the caller is affiliated, and the general subject matter of the inquiry. These summary logs are used to prepare quarterly reports to LSC. In a few instances, the local attorney's name was redacted when the summary logs were provided to LSC.

The inquirers deem information in the original logs (as distinguished from the time sheets and log summaries) to include information subject to confidentiality duties in D.C. Rule 1.6 (and predecessor DR 4-101) as well as to be protected by the attorney-client privilege. They thus refused to produce unredacted logs for LSC. LSC agreed to redacting client names, but the inquirers consider that insufficient to avoid a breach of the D.C. Rule's confidentiality duty and the attorney-client privilege. In response, LSC suggested limiting the notes that would be taken after looking at the logs or having a non-attorney member of the team look at the logs.

The organization provided some sample logs to LSC after redacting the name of the attorney requesting assistance, specifics of the problem, and specifics of the response. LSC has notified the organization that they consider this to be out of compliance with a grant assurance permitting LSC access to information not subject to the attorney-client privilege. (42 U.S.C. § 2996h(d) denies LSC, as well as the Comptroller General, access to any report or records subject to the attorney-client privilege.)

*Discussion*

One of the functions that legal services national support centers are funded to provide is:

> Support of legal services program staff and clients through individual service work, library and resource material, training, communications, the development of manuals and material, technical assistance and development of strategies for use by local program staff.[1]

*National Senior Citizens Law Center v. Legal Services Corporation*, 751 F.2d 1391 (D.C. Cir. 1985). For the purposes of this opinion, we assume that the confidential information conveyed to the support center attorney by the field attorney was communicated in confidence for the purposes of furthering representation of the client. Therefore, Rule 1.6 applies to the support center attorney to the same extent that it would apply to the field attorney.

D.C. Rule 1.6 (a) requires that "a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client." D.C. Rule 1.6 (b) says:

> "confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client.

Predecessor D.C. Code DR 4-101(A) contained identical language.

For this opinion, it is not necessary to resolve whether the client material that the inquirers wish to protect is a confidence *or* a secret since the same ethical duty in Rule 1.6 extends to both. When disclosure is sought by a court, the distinction may become relevant, but that situation is not before the Committee. Opinion No. 82 (undated) reminds that scope of the attorney-client privilege is a question of evidentiary law on which jurisdictions differ, and that the Commit-

[1] In this context, "individual service work" refers to day-to-day consultants between support center and local program staff about client matters which do not rise to the level of joint representations. "Litigation, including serving as counsel for eligible clients and as co-counsel with local program staff; is specified as a distinct function in the same list of support center functions. *Id.*

tee does not resolve questions of law. Other bar associations have refused to allow disclosure of confidential client information about legal services clients to their funding sources. American Bar Association Informal Op. No. 1394 (Nov. 2, 1977) says that a legal services program would violate Canon 4 within the meaning of DR 4-101 if they allowed inspectors from a funding agency to examine files relating to client matters when the files contain confidences and secrets. The Washington State Bar recently prohibited a legal services office from disclosing original records or other information that contained client confidences or secrets to LSC or other third parties that provide funding without the informed consent of the client. Washington Op. No. 183 (1990), ABA/BNA Man. of Prof. Conduct 901:8901.

The New Hampshire Bar said it would be unethical to disclose client names and addresses, information about client eligibility and client trust funds, information in grievance files, satisfaction questionnaires, or other program files that contain client identifying information unless the client consents after consultation. Their Committee went on to say that the issue of confidentiality could not be circumvented by requiring legal aid clients to waive their protection and furnish information to LSC. New Hampshire Op. No. 1988-9/13, (Feb.16, 1989), ABA/BNA Man. of Prof. Conduct 901:5901.

The Ethics Committee of the Mississippi State Bar Association expressed concern about LSC examination of agency files relating to particular clients because those files could contain "attorney's work product, including memoranda reflecting trial strategy and tactics in matters involving litigation or proposed litigation." Mississippi Op. No. 101, (Jan. 29, 1985), ABA/BNA Man. of Prof. Conduct 801:4855. The Committee went on to note that the agency represents clients in claims or suits against governmental agencies including LSC. The Committee found it to be futile to define "secret" in the context of an individual case beyond the reference in 4-101(A), but said "any information that would tend to identify the client in a given case, *whether it be name, particulars of the case, objective sought, or other,* is a secret within the meaning of DR 4-101(A)." (emphasis added)

Recognizing the legitimacy of audits by funding agencies, state ethics committees have approved the alternative of aggregate reports which restrict access to confidential information. Alabama Op. No. 90-17, (Feb. 21, 1990), ABA/BNA Man. of Prof. Conduct 901:1065. *See also In Re Adv. Op. No. 544,* 103 N.J. 399, 500 A.2d 609 (1986).

D.C. Rule 1.6 and previous opinions of this Committee also point to the inquirers' duty to refuse access to records that would reveal client confidences or secrets. In Opinion No. 214 (Sept. 18, 1990), the Committee recently reviewed D.C. rulings on confidentiality. In doing so, the Committee quoted Opinion No. 99 (Jan. 28, 1981):

> that where there is a "colorable basis" for asserting that statements made to an attorney are confidences or secrets protected from disclosure by DR 4-101 "the lawyer must resolve the question . . . in favor of preserving the confidentiality of the disclosures." *Accord.* D.C. Op. No. 186 (Oct. 20, 1987).

The Committee has applied the confidentiality duty broadly to several types of material. In Opinion No. 14 (Mar. 22, 1976), the Committee said the ethical duty to preserve a client's confidences and secrets extends to the attorney's work produced during the course of the representation.

The Committee has forbidden an attorney to submit to a regulatory agency bills requested when they would reveal "the fact of the attorney's representation, which, in some instances is a secret . . . the tasks performed by the attorney and the scope of his employment, which might reveal both confidences and secrets." D.C. Op. No. 58 (undated).

The Committee held that real estate transaction information which was a matter of public record or previously had been disclosed to third parties could be released to D.C. auditors, but other information could be revealed only with a client's informed consent. D.C. Op. No. 72 (July 31, 1979). In D.C. Opinion No. 124 (Mar. 22, 1983), the Committee said that voluntary disclosure of client identity to the IRS without client consent was impermissible when such disclosure likely would reveal confidences or secrets. In so ruling, the Opinion cited with approval ABA Informal Opinion No. 1287 (1974), finding the identities of legal service clients to be secrets within the meaning of DR 4-101(A). D.C. Opinion No. 214 (Sept. 18, 1990) reaffirmed an attorney's duty to resist disclosure of a client's identity to the IRS absent client consent when circumstances could render that information a client confidence or secret.

By linking some combination of legal services program name, representing attorney, legal theory, and client facts, it often would be possible to identify the case and client involved. There may be only one case of a particular type pending in a jurisdiction. Even more often, there may be only one case with a particular fact pattern. The Maryland bar recently cautioned participants in a volunteer program for senior attorneys to provide assistance in their fields to junior attorneys that not only names, but also facts, may disclose the identity of a client. Maryland Op. No. 86-51, (Feb. 18, 1986), ABA/BNA Man. of Prof. Conduct 901:4302.

Opinion No. 82 (undated) explicitly includes attorney work product in the confidentiality duty. Revelation of case facts, legal theory speculations, and legal or factual research could be embarrassing or detrimental to a client. As the previously cited opinions indicate, the Committee consistently has acted to forbid requests for information that could result in revelation of clients' confidences or secrets. Redaction of the client's name is insufficient to cure the potential breach when the combination of information revealed could link the client to the confidence or secret.

None of the possible exceptions to Rule 1.6 negates the confidentiality duty in these circumstances.

Clients have not consented to disclosure of these confidences and secrets after full disclosure.

Production of the logs is not *specifically* authorized under D.C. Rule 1.6 (d)(2)(A) allowing disclosure when "required by law or court order." This inquiry does not involve an order from a court of competent jurisdiction that compels revelation. Comment 26 to D.C. Rule 1.6 forbids a lawyer from complying even with the order of a court or other tribunal of competent jurisdiction requiring revelation of confidences or secrets until "the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the

order and given the client the opportunity to challenge it."

Opinion No. 214 defines compliance with agency requests that would be "required by law" as those under statutory authority that is "narrowly and specifically drawn to require disclosure" as distinguished from "general authority to examine 'relevant and material' books and records." Opinion No. 214 held the IRS's statutory authority for Form 8300, requiring disclosure of the identity of persons making cash payments in excess of $10,000, to flow from a sufficiently narrow and specific statutory grant to be "required by law." Nonetheless, the Committee held that the inquirer could not ethically disclose the requested client names until other questions regarding applicability of the statute were resolved definitively. The Opinion said that disclosure still had to be resisted because "substantial good faith arguments" existed regarding the statute's applicability to the lawyer-client relationship and whether Congress intended the statute to override traditional lawyer-client confidentiality.

LSC's statutory authority to seek information from grantees is insufficiently narrow and specific for requests under it to be considered "required by law" under D.C.1.6(d)(2)(A). 42U.S.C. §2996g grants the Legal Services Corporation authority to require reports (subsection a) and to have access to records in order to insure compliance with grant or contract terms (subsection b). §42U.S.C 2996h (c)(1) requires LSC to conduct or require grantees to provide for a financial audit of grantees each year.

LSC also has claimed that access to grantees' documents flows from LSC's general monitoring authority found in 42U.S.C. §2996f(d). *National Clients Council v. Legal Services Corporation,* 617 F. Supp. 480, 490 (D.D.C. 1985). This statutory authority, however, is more general than the previously cited sections pertaining to record access.

Even if the statutory grant had been narrowly drawn, a question would remain about congressional intent with respect to overriding the attorney-client privilege. 42 U.S.C. §2996h(d) says that nothing in the previously cited sections gives LSC access to any reports or records subject to the attorney-client privilege. No reported case law has interpreted the scope of this section.

Disclosure of facts about client cases, legal theories considered, and legal or factual research is not authorized by Comment 11 to D.C. Rule 1.6 allowing lawyers to "give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes."

The breach of confidentiality occurs in showing the logs in question unredacted logs to LSC monitors. An agreement by LSC to restrict the items on which notes would be taken or stipulating that a monitor who is not an attorney review the files would be of no effect in curing the breach.

Thus, the Committee holds that the inquirers have a duty under D.C. Rule 1.6 to withhold production of requested documents that would reveal confidences and secrets of a client. A funding agency's request for documents under a general statutory authority to request information is not sufficient to authorize disclosure. Disclosure could be authorized by the order of a court of competent jurisdiction or by a request under a narrow and specifically drawn statutory authority addressing the information requested. Even in those cases, a lawyer must give reasonable notice to the client to allow the client to consider an appeal of the order or request.

Inquiry No.90-4-16
Adopted: December 17, 1991

*Opinion No. 224*

**Misleading Firm Name**

- A lawyer, all of whose partners die, retire, or otherwise leave the partnership, is not precluded from continuing to use the former partnership name, absent reason to believe that clients or potential clients are led by the firm name to believe that the lawyer practices in a partnership or with other lawyers.

**Applicable Rules**

- **Rule 7.1(a)** (false or misleading communications)
- **Rule 7.5(a)** (use of firm name violating Rule 7.1)
- **Rule 7.5(b)** (implying practice in a partnership)

*The Inquiry*

B is a name partner in "A, B & C," a partnership consisting of B and C. A is dead and C is considering either becoming "of counsel" or retiring. The question asked is (1) whether the firm may continue to use its present name if as result of C's changed relationship it is no longer a partnership.

*Discussion*

The relevant rules are 7.1 and 7.5. Rule 7.1 provides in relevant part:

> (a) 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:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

Rule 7.5 provides in relevant part:

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

If partner C were to assume "of counsel" status and were no longer to be a partner, it might be argued that the continued use of the firm name would appear to violate Rule 7.5(d) because it implied that B practiced in a partnership when that is not the fact.[1] *See also* Opinion No. 189. Similarly, if C were to have no further connection with the firm, it might be argued that the continued use of the name "A, B & C" would also appear to violate Rule 7.5(d) because it would imply the existence of a partnership where there was not one in fact.

[1] Of course, in order not to violate Rule 7.1, if C were to assume "of counsel" status his relationshi would have to satisfy the requirements applicable t that relationship. *See* Opinion Nos. 151, 197; ABA Formal Opinion No. 90-357 (1990).

However, the crucial question is whether the mere use of a firm name containing multiple names implies the existence of a partnership either among those in the name or otherwise. There are persuasive reasons for concluding that it does not. Thus, Comment 1 to Rule 7.5 observes that "any firm name including the name of a deceased partner is, strictly speaking, a trade name," which, like any trade name, may be used if not misleading. Prior to adoption of the Rules of Professional Responsibility, DR 2-102(B) permitted a firm to use in its name the names of one or more deceased or retired members "of the firm or a predecessor firm if otherwise lawful."[2] This suggests that a multiple name firm name is not necessarily read as implying a partnership among those named in the firm name.

The remaining question is whether use of a firm name including multiple names (most or all of whom may be dead or retired) implies that the firm is a partnership. If it did, a problem would arise for small firms when only one partner remains, if the firm name could no longer be used, particularly for an interim period during which the surviving partner considers whether to obtain a new partner or attempts to do so. We do not believe that such an implication necessarily follows from use of a multi-name firm name.

A related issue is whether a single lawyer's use of a firm name with multiple names in it would violate Rules 7.1 and 7.5(a) by being false or misleading in implying that the firm consisted of more than one lawyer, when only one of the partners remains and he or she practices alone. In Opinion No. 189 the Committee concluded that the name "John Doe & Associates" would have violated the predecessor provisions of DR 2-101(B)(3) and DR 2-102(A) and (B), prohibiting "deceptive" firm names, if the attorney did not normally employ two or more associates, but would not be inherently misleading if the attorney did normally employ two or more associates. The Opinion added that if the firm received legitimate indications that use of the name was in fact misleading it would have to take steps to remedy the problem.

However, if, as we conclude, the multi-name firm does not necessarily imply the existence of a partnership, nor would it necessarily imply that B practices with other lawyers. Nevertheless, we would expect that a lawyer continuing to practice alone under a multi-person firm name will promptly inform new clients that he or she practices alone.

Our analysis thus far considers no fact other than the lawyer's continued use of the name of his former partnership. We recognize that additional facts could lead to different conclusions. For example, if the lawyer learns that clients or potential clients have been led by the firm name to believe that he or she practices in a partnership or with other lawyers, the lawyer may have a duty to take steps to dispel such misapprehensions. What evidence would demonstrate that the firm name has been misunderstood is a factual issue beyond the Committee's authority to resolve.

Inquiry No. 90-12-52
Adopted December 17, 1991

*Opinion No. 225*

**Prepaid Legal Services**

• A law firm does not violate any Rule of Professional Conduct by participating in a prepaid legal services program under which a third-party (1) pays the law firm a fee for providing legal advice to individual subscribers and (2) markets the service to potential subscribers, if the individual subscribers consent to payment of the law firm's fees by the third-party after consultation.

The usual rules governing the attorney-client relationship are fully applicable to the firm's relationship with its clients, the individual subscribers, including, for example, the duty to represent the interests of its clients diligently and zealously, without interference from any third-party, to protect client confidences and secrets, and to avoid conflicting representations that will hamper adequate representation of the client. In addition, the interposition of the third-party marketing agent for the service does not relieve the law firm of its responsibilities under Rule 7.1 to avoid any false or misleading statements about the services offered under the program.

**Applicable Rules**

- **Rule 1.3** (Diligence and Zeal)
- **Rule 1.6** (Client Confidences and Secrets)
- **Rule 1.7** (Conflicts of Interest)
- **Rule 1.8(e)** (Payment of Legal Fees by a Third Party)
- **Rule 5.4(e)** (Interference with Independent Professional Judgment)
- **Rule 5.5** (Unauthorized Practice of Law)
- **Rule 7.1** (Communications Concerning a Lawyer's Services)

*Inquiry*

Company A, which publishes a bimonthly newsletter concerning legal and tax developments that affect churches and clergy and presents continuing education seminars for church leaders, proposes to offer a new service under which subscribers to the new service will obtain general legal advice about federal tax issues concerning matters such as (1) withholding, reporting, and depositing federal income and social security taxes, (2) the exclusion of a minister's housing allowance under §107 of the Internal Revenue Code, and (3) the deduction of contributions to a church under §170 of the Code. A relatively small annual fee of approximately $100 would entitle the subscriber to make unlimited inquiries through the service.

Company A will market the service to potential subscribers and keep records of the subscribers, but will not be involved in the provision of legal advice. Each subscriber will sign a contract specifying the nature of the services available; the types of services that are not available; the relationships among Company A, the law firm, and the subscriber; disclosing that the law firm's fee will be paid by Company A; prohibiting Company A from interfering with the attorney-client relationship between the law firm and the subscriber; and seeking the subscriber's consent to payment of the law firm's fee by Company A.

Specifically, we are advised that the subscriber agreement will include the following paragraph:

> "*Lawyer-client relationship.* [Company A] and the [subscriber] agree that any legal services provided to the [subscriber] under this Agreement will be provided by one or more licensed attorneys who are paid a fee by, but are not employees of [Company A], and who

[2] Similarly, ABA Opinion 90-357 states that a firm name can include a former partner who is now of counsel if the name was "long-established and well-recognized."

are familiar with the topics concerning which [Company A's publications] are available. Accordingly, the [subscriber] and [Company A] agree that:

"(a) When services are obtained by the [subscriber], an attorney-client relationship will exist between the [subscriber] and the attorney or attorneys providing the services;

"(b) [Company A] will not interfere in any manner with the attorneys' independence of professional judgment or with the lawyer-client relationship described in paragraph (a);

"(c) Confidences and secrets disclosed by the [subscriber] to any attorney providing the services to the [subscriber] will not be disclosed by the attorney to [Company A] or any other person without the [subscriber's] prior consent;

"(d) [Company A] and any of its principals, partners, or employees shall not be liable for any claim for damages, penalties, or interest in any way on the provision of erroneous information or advice under this Agreement; and

"(e) Having read and understood the foregoing paragraphs (a) - (d), the [subscriber] consents to the payment of a fee for the services by [Company A] to the attorney or attorneys who provide the services under this Agreement."

After the subscriber contract is accepted by Company A, the subscriber will be given a telephone number and account number to use in obtaining services under the agreement.

The inquirer, a law firm in the District of Columbia, proposes to contract with Company A to make one or more of its experienced tax lawyers available to answer subscriber questions. The basis for the firm's fee has not yet been established. Individual subscribers would not pay the law firm directly for any services rendered under the contract, but Company A and the law firm recognize that the firm would be providing legal advice to individual calling subscribers and that the firm's client in each instance would be the subscriber and not Company A.

For services outside the scope of the contract, the subscriber would be advised to hire individual counsel. The subscriber would be free to retain the law firm on a "fee-for-service basis" or hire other counsel.

*Discussion*

Nothing in the Rules of Professional Responsibility purports to limit or discourage the use of innovative ways of providing basic legal services.[1] As the Committee explained in construing the Code, "there is nothing improper *per se* about the formation of a prepaid legal services plan. Innovative approaches and fresh ideas in this area may result in the availability of necessary low-cost legal services to individuals who could not previously afford to employ an attorney. This wider availability is a goal to which the profession is, and should be, committed. The committee encourages the development of new approaches to the provision of legal services, so long as those approaches conform to the general and accepted norms of ethical conduct designed to protect the public and the profession." Opinion No. 91 (1980).

*Rule 1.8.*

Since Company A will pay the law firm's fee for services under the contract, Rule 1.8 (e) requires that the client (*i.e.*, the individual subscriber) "consent[] after consultation."[2] The heart of the proposal is that for a relatively small fee paid to Company A, subscribers will be entitled to limited, general legal advice concerning certain types of federal tax issues. As described above, the agreement between Company A and subscribers to the service explains that the law firm's fees for services under the contract will be paid by Company A, explains the nature of the relationship that will exist between the subscriber and the law firm, provides assurance that Company A will not interfere with the attorney-client relationship between the subscriber and the firm, and requires that the subscribers consent to the payment of fees by Company A. In this context, we believe the requirements of Rule 1.8(e) are satisfied by these provisions.

*Rule 5.5.*

In Opinion No. 182 we considered a very different sort of proposal under which lawyers who were both employees of a consulting firm and partners in a law firm provided legal services to law firm clients who had no relationship with the consulting firm. The clients paid the law firm at its standard rates, and the law firm proposed to compensate the consulting firm for the time spent by the lawyers employed by the consulting firm in serving the law firm's clients. In that context, we explained:

> "[W]hen a lay organization sells, loans or rents the time of lawyers to be engaged in the practice of law on behalf of clients unrelated to the lay organization at rates that are expected to return a profit to that organization, the lay organization is engaged in the unauthorized 'business' of practicing law. Likewise, a law firm that would assist or participate in such a procedure would violate DR 3-101(A) by aiding in the unauthorized practice of the law."

The critical facts in Opinion No. 182 were that (1) employees of a lay consulting firm (2) were to provide legal services to a law firm's clients, (3) for which the law firm was to pay a fee to the consulting firm. Opinion No. 94 is similar in that it involved a proposal to have lawyers employed in the general counsel's office of a trade association provide legal services to another association for a fee to be paid to the lawyers' employer. We approved the Opinion No. 94 proposal. In disapproving the proposal in Opinion No. 182, however, we distinguished the result in Opinion No. 94 on the ground that the entity to whom the in-house lawyer was to provide legal services was a related trade association.

In contrast to both of the proposals considered in Opinion Nos. 182 and 94, the attorneys who will provide legal services to Company A's subscribers are not employees of Company A. No employee of Company A will participate in providing legal services to anyone. Thus, compensation received by Company A is attributable solely to its efforts in establishing, marketing, and administering the service, and not to providing legal services. In these circumstances, Company A cannot be said to be engaged in the practice of law through the activities of any of its employees.

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[1] The Committee considered several prepaid legal services proposals under the Code of Professional Responsibility. Opinion No. 170 (1986); Opinion No. 155 (1985); Opinion No. 91 (1980); Opinion No. 30 (1977).

[2] Rule 1.8(e) provides that "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and information relating to representation of a client is protected as required by Rule 1.6."

For purposes of the Rules, "'consent' denotes a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." Terminology [2]. Similarly, "'consult' or 'consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology[3].

*Rule 7.1.*

Company A (and not the law firm) will solicit potential subscribers for the service. Nonetheless, Rule 7.1 governing communications concerning a lawyer's services is fully applicable.[3] Legal advice is the service being offered to potential subscribers. Interposition of a marketing agent does not diminish the lawyer's obligation to avoid false or misleading statements about his services. Accordingly, the law firm must satisfy itself that statements by Company A concerning the service are not false or misleading within the meaning of Rule 7.1. In particular, it is essential that both the limited nature of the services being offered and the possibility of additional expense be described clearly to avoid misleading potential subscribers as to what is being purchased. *Cf.* Opinion No. 91 (1980).

*Other Rules.*

As the parties recognize, the individual subscriber and not Company A will be the law firm's client. The lawyer's obligations to individual subscribers will include all of a lawyer's usual duties to his client including, for example, the duty (1) to maintain confidences and secrets, Rule 1.6, (2) to exercise independent professional judgment on behalf of the individual subscriber without interference from Company A or anyone else, Rules 1.8 (e) and 5.4(c), and (3) to decline any representation that may conflict with the duty of loyalty or zealous representation of the individual subscriber, Rule 1.7.

Accordingly, subject to the foregoing, we find nothing in the Rules of Professional Conduct that precludes a law firm's participation in offering the proposed service.

Inquiry No. 91-6-21
Adopted: January 21, 1992

*Opinion No. 226*

**Service by Lawyer in Private Practice as In-House Counsel and Real Estate Broker**

• Lawyer in private practice may serve as part-time, salaried in-house counsel for client, while continuing to represent that client in his private practice, so long as he complies fully with applicable Rules of Professional Conduct in both capacities. He may also serve as a licensed real estate broker for a client, compensated on an hourly-fee basis, so long as his work as a broker does not cause him to violate the Rules of Professional Conduct and so long as he clearly discloses to affected parties the capacity in which he is acting and obtains informed consent where he represents two related parties in a transaction as broker and lawyer.

**Applicable Rules Provisions**

• **Rule 1.7(b)** (Waivable Conflicts of Interest).

• **Rule 1.7(c)(2)** (Compliance with Other Rules as Condition of Waivability of Conflicts of Interest).

• **Rule 7.1(a)** (False or Misleading Communications About Legal Services).

*Inquiry*

The inquirer is a lawyer engaged in private practice representing an affiliated group of real estate partnerships, corporations, and entities organized under a single operating company (for purposes of this opinion, the "XYZ Company"). There are approximately 60 such related entities for which the inquirer performs legal services, all of which have substantial common ownership. (In some cases, the percentage of ownership by the common individual owners varies, and in some cases the entities are ventures including partners not otherwise affiliated with XYZ Company.) The inquirer represents XYZ and affiliated entities chiefly in real estate transactional matters. The inquirer represents that he complies fully with Rule 1.7 in dealing with the occasional engagement that involves a conflict or potential conflict of interest between XYZ and an affiliated entity.

XYZ Company has recently asked the inquiring lawyer to perform certain "in-house" services -- now performed by the inquirer as outside counsel -- as a part-time employee of its regional operating company, with the title of Regional General Counsel. The inquirer would, however, also continue to represent XYZ and affiliated entities on transactional matters as outside counsel. While the inquirer would conduct his work as Regional General Counsel out of his own law offices, he would use separate business cards and letterhead and maintain separate files. The inquirer states that he would not represent an XYZ-affiliated entity in any transaction in which the XYZ regional operating company had an interest without disclosing his role as in-house counsel for the operating company and obtaining the consents required by Rule 1.7(b) and (c). He also recognizes that in some such matters, he might be barred by Rule 1.7(a) or Rule 1.7(c)(2) from undertaking representation of the XYZ-affiliated entity.

The inquirer asks whether in these circumstances he may ethically continue to represent XYZ Company and its affiliated entities in real estate transactions while serving as a part-time, salaried in-house lawyer for XYZ's regional operating company.

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[3] Rule 7.1 is, in pertinent part, as follows:

(a) 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:

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

(2) contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) A lawyer shall not seek by in-person contact, or through an intermediary, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

(1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph(a);

(2) The solicitation involves the use of undue influence;

(3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer;

(4) The solicitation involves use of an intermediary and the lawyer knows or could reasonably ascertain that such conduct violates the intermediary's contractual or other legal obligations; or

(5) The solicitation involves the use of an intermediary and the lawyer has not taken all reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct."

At the request of his client XYZ Company, the inquirer has also become licensed as a real estate broker in Maryland. (The inquirer is a member of the bar of Maryland as well as the District of Columbia Bar). He has been asked by XYZ Company to serve as broker of record in connection with third-party leasing, sale and property management activities engaged in by a Maryland entity affiliated with XYZ. In that capacity, he would supervise associate brokers and licensed salespersons, as required by Maryland law.

The inquirer would be compensated for his brokerage services by XYZ's Maryland affiliate on an hourly-fee basis, and would not receive commissions or any other compensation based on the value or success of any transaction. The inquirer might also perform legal services for XYZ-affiliated companies in some transactions in which he also served as broker of record for XYZ's Maryland affiliate. In no case, however, would the fees received by the inquirer as broker of record duplicate fees received by him for legal services performed for XYZ's Maryland affiliate. And where the inquirer served as counsel for another XYZ affiliate in a transaction where he was also broker of record for XYZ's Maryland affiliate, he would disclose his brokerage role to the affiliated company and comply with the provisions of Rule 1.7 in the event of any potential conflict of interest.

The inquirer's activities as broker of record would be performed principally in the offices of XYZ's Maryland affiliate, separate from the inquirer's law office. He would use separate stationery, business cards and telephone listings as a broker.

The inquirer asks whether his performance of real estate brokerage services in the manner set forth above would be consistent with the Rules of Professional Conduct. [1]

*Discussion*

*1. Role as In-House Counsel*

There is no *per se* bar to a lawyer serving as in-house counsel to a business entity, on a part-time salaried basis, while continuing to represent that entity and affiliated entities as outside counsel on a fee-for-service basis. Of course, the lawyer must comply with all provisions of the Rules of Professional Conduct in both capacities.

In particular, it is important to ensure that no client or third party is misled as to the role of the lawyer and his status as an employee of a client. Rule 7.1(a).[2] The steps that the inquirer plans to take, as set forth above (separate letterhead and business cards, etc.) should go far to assure compliance with Rule 7.1(a). The lawyer should be careful to make an affirmative disclosure of his dual capacity as in-house and outside counsel whenever that fact would be of importance to another client or a third party.

The inquirer must also take care to comply fully with the provisions of Rule 1.7 (Conflicts of Interest). Thus, as the inquirer recognizes, under Rule 1.7(b), he may not be able to serve as counsel for another entity (including an XYZ-affiliated entity) in a transaction in which XYZ's regional operating company has a potential conflicting interest, without the consent of both parties after full disclosure of the possible conflict. There could even be situations in which the adverse consequences to XYZ's regional operating company from his representation of another party in a particular transaction would be serious enough that the lawyer himself might conclude that his ability zealously to represent the other party (as required by Rule 1.3) would be compromised. In such a case, representation of the other party -- even with consent -- would be improper. Rule 1.7(c)(2); Opinion No. 94.

*2. Role as Real Estate Broker*

The Rules of Professional Conduct erect no bar to a lawyer engaging in another business, separate from his or her law practice, so long as the lawyer's engagement in that other business does not result in violations of applicable provisions of the Rules. *E.g.*, Rules 1.3 (duty of zealous representation); 1.7(b)(4) (professional judgment adversely affected by lawyer's responsibility to third party or lawyer's own financial interests; 1.8(a) (transactions with client). Moreover, where the inquirer is performing both professional roles (lawyer and broker) with respect to a single transaction, we believe that he should comply with applicable provisions of the Rules of Professional Conduct regardless of which "hat" he is wearing in particular aspects of that transaction.[3]

In any transaction in which the inquirer is serving as broker of record on behalf of one entity and lawyer on behalf of a related entity, he should take special care to ensure that there has been full disclosure of his dual roles to all affected parties. Rule 7.1(a). We also believe that, to assure full compliance with Rule 1.7(b), the inquirer should obtain informed consent from related entities which he represents as lawyer and broker in a particular transaction, because of the potential conflict of interest between the related entities and the potential conflict of interest created by the inquirer's financial interest in brokerage fees. While that financial interest is not as significant as it would be were the inquirer receiving a brokerage commission contingent on consummation of the transaction and tied to the transaction's value, we believe that the inquirer should obtain informed consent before proceeding.

Inquiry No. 91-8-35
Adopted March 17, 1992

*Opinion No. 227*

**Migratory Paralegals And Lawyers/ Imputed Disqualification/screening**

*Synopsis*

• If a paralegal moves from Law Firm A to Law Firm B, and that paralegal

[1] The inquirer has made the same inquiry of the Committee on Legal Ethics of the Maryland State Bar. We do not address any question as to the rules in Maryland or, in the event of a conflict, whether the Maryland or D.C. rules should apply.

[2] Rule 7.1(a) provides that "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services," and that a communication is false or misleading if, *inter alia,* it "omits a fact necessary to make the statement considered as a whole not materially misleading."

[3] ABA Formal Opinon 328 (June 1972) goes further, holding that a lawyer who engages in another occupation must comply with legal ethical standards in his or her other professional capacity whenever that other occupation "is so law-related that the work of the lawyer in such occupation will involve, inseparably, the practice of law." We do not reach this broader question here, but merely hold that the Rules of Professional Conduct apply to a lawyer's conduct in another professional capacity where he is acting in that capacity as well as his capacity as a lawyer in the same transaction or matter. We note, however, that it is important as a general matter for the inquirer to assure that clients and third parties are not misled as to whether he is providing services as a real estate broker or as a lawyer.

is personally disqualified from a matter pending in Law Firm B because the paralegal worked on a substantially related matter at Law Firm A, Law Firm B ordinarily may avoid imputed disqualification by "screening" the paralegal from that matter in Law Firm B. However, it is not permissible for Law Firm B purportedly to "screen" the paralegal from only that portion of the matter that is related to the paralegal's previous work at Law Firm A, and assign the paralegal to work on other, assertedly unrelated aspects of that same matter. Absent informed consent from Law Firm A's client, the paralegal must be effectively isolated at Law Firm B from the *entire* matter, otherwise Law Firm B risks being disqualified from that matter. In general, in the case of a migratory lawyer (as distinguished from a nonlawyer), screening *plus* consent of the former client is required.

**Applicable Rules**

- **Rule 1.9** (Conflict of Interest: Former Client)
- **Rule 1.10** (Imputed Disqualification: General Rule)
- **Rule 5.3** (Responsibilities Regarding Non-Lawyer Assistants)

*Inquiry*

A paralegal has recently become employed by Law Firm B (the inquirer) after having worked the previous two years at Law Firm A. Law Firm B represents Wife in her divorce proceeding against Husband. Husband is the principal owner of the ABC Company. While at Law Firm A the paralegal worked on matters regarding the pension and profit-sharing plans (the "Plans") of the ABC Company. She had access to the terms of the Plans and on at least one occasion she assisted in preparing the Summary Plan Descriptions for the Plans. The inquirer represents that the paralegal "does not recall" having access to underlying financial and accounting data for the Plans, that Law Firm A did no other legal work for the ABC Company or Husband, and that the paralegal never met Husband while she was employed by Law Firm A. Law Firm A is not involved in the divorce proceeding brought by Wife against Husband.

The paralegal is the only litigation paralegal employed by Law Firm B, which wishes to assign her to work on the divorce matter between Wife and Husband. Law Firm B represents that the issues in the divorce case relating to the Plans "are a very small and easily segregated part of the [divorce] case." The inquirer therefore proposes to implement a protective "screening" procedure so that the paralegal would be isolated from all aspects of the divorce case relating to the Plans, and would assist only on the other aspects of the divorce case as if Husband was not involved in any pension or profit-sharing plans relevant to the divorce case.

*Discussion*

In the case of a nonlawyer moving from one law firm to another, the strict general rule of imputed disqualification reflected in Rule 1.10 does not apply because Rule 1.10 literally refers only to "lawyers." Nevertheless, Rule 5.3(a) requires a law firm to make reasonable efforts to ensure that the conduct of all nonlawyers "is compatible with the professional obligations of" the lawyers. One of the most fundamental obligations of the lawyers that must also be adhered to by the nonlawyers is the preservation of confidences and secrets of current clients *and* former clients. That leads to a consideration of "screening" or an "ethical wall" in the instant case within Law Firm B as a means of ensuring that Husband's confidences and secrets relating to the Plans will be preserved.

At the outset we hold that the work performed by the paralegal on the Plans at Law Firm A is a matter that is "substantially related" within the meaning of Rules 1.9 and 1.10(b) to the divorce matter pending at Law Firm B. See, e.g., our Opinion No. 158 (9/17/85). The relationship between the Plans and the divorce matter in this inquiry may not be quite as close and direct as the relationship between the two matters discussed in a similar context in Opinion No. 158. Nevertheless, it is clear that Husband, as the principal owner of ABC Company, has a significant interest in, and from Wife's point of view there is significant economic value associated with, the ABC Company's Plans.

It may be that at Law Firm A the paralegal did not actually have access to confidential information regarding the Plans or Husband's interest therein, and that in any event such sensitive and confidential information as may exist regarding Husband's interest in the Plans will be required to be disclosed by him as part of the normal discovery process in the divorce matter. If so, those facts nevertheless are irrelevant under Rule 1.9, which requires an end to the analysis if the two matters are "substantially related," which we hold they are.

The inquirer appears to recognize the foregoing principle by its proposal to cure the problem by screening the paralegal from all aspects of the divorce matter (namely, the Plans) that are substantially related to the paralegal's previous work at Law Firm A on the Plans. We conclude that a screening mechanism in the circumstances presented by this inquiry is permissible only if it effectively isolates the paralegal from the *entire* divorce matter at Law Firm B.

We have found no case law, legal ethics opinions, or other legal authority supporting the concept that, where screening is appropriate to cure imputed disqualification in a particular matter, the screen may exist only as to a portion of that matter, and that the personally disqualified individual may participate in other portions of that matter that are assertedly unrelated to that individual's prior work for the former client. As it is, in the District of Columbia and elsewhere there is considerable controversy regarding the propriety and practical effectiveness in general of a "screen" (also sometimes referred to as an "ethical wall" or "cone of silence") as a cure for imputed disqualification. We decline to approve the novel concept of a partial screen as to a portion of a matter without the former client's (in this case the Husband's) consent.

In the case of migratory *nonlawyers* generally, we approve the pro-screening approach reflected in Informal Opinion 88-1526 (6/22/88) of the ABA Standing Committee on Ethics and Professional Responsibility, the official synopsis of which is as follows:

> "A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm. In addition, the nonlawyer's former

employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer."

Therefore, if the paralegal at Law Firm B is effectively isolated from all aspects of the divorce matter between Wife and Husband, Law Firm B may continue as counsel to Wife in that matter, whether or not Husband consents. In this connection, we suggest that Law Firm B consider one or more of the following precautionary techniques in order to satisfy its obligation under Rule 5.3 to ensure that the paralegal is effectively isolated from the divorce matter:

(a) On or before the date on which the paralegal reports for work at Law Firm B, (i) instruct the paralegal in writing not to discuss the divorce matter or the Plans with any partner or employee of Law Firm B, and (ii) conversely, instruct every partner and employee of Law Firm B in writing not to discuss the divorce matter or the Plans with the paralegal.

(b) All of Law Firm B's files relating to the divorce matter could be "stickered" with a legend containing the substance of the restrictions described in (a) above.

(c) Investigate whether the paralegal has brought with her from Law Firm A any files or other information relating to the Plans, or the ABC Company, or Husband.

We note that, if the facts were otherwise the same as described above except that the person who was a paralegal at Law Firm A had subsequently attended law school and become a member of the Bar by the time she reported to work at Law Firm B, there is a special provision -- unique to the District of Columbia -- included in Rule 1.10(b) that would cause our holding to be the same notwithstanding the fact that the person involved is actually a member of the Bar upon reporting for work at Law Firm B:

"The [imputed] disqualification of the firm does not apply [under Rule 1.10] if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(g)."

Rule 1.6(g) explicitly extends the obligation of confidentiality imposed upon a lawyer to confidences and secrets obtained by a lawyer prior to becoming a member of the Bar "in the course of providing assistance to another lawyer."

Further, we observe that, if the facts were otherwise the same as described above except that the person involved was a member of the Bar while working on the Plans at Law Firm A, and was a member of the Bar when she reported for work at Law Firm B, a screening process of the kind approved above is not in itself effective to avoid the imputation of that individual's personal disqualification to the entire Law Firm B. Under the language of Rule 1.10, paragraphs (a) and (b), Law Firm B could avoid imputed disqualification from the divorce matter only by obtaining Husband's consent to its hiring (and screening) of that person. This Committee held to that effect in Opinion No. 174 (6/17/86) under the previous Code, and the District of Columbia Court of Appeals in Comment [15] under Rule 1.10 has explicitly confirmed that screening, without more, is not sufficient to avoid imputed disqualification under Rule 1.10(b) in the case of a migratory *lawyer.* In addition to screening, consent of the former client is required. The willingness of the former client to give such consent presumably will depend primarily on the extent to which that former client is satisfied that the migratory lawyer and his or her new firm are trustworthy, and that the screen will be effective. Finally, in the context of movement to a private law firm by former government lawyers and other public officials, including judges, see Rule 1.11, which generally permits screening subject to certain conditions.

Inquiry No. 91-10-45
Approved: April 21, 1992

*Opinion No. 228*

**Lawyer-Witness Participation in Pre-Trial Proceedings**

• Although precluded from acting as trial counsel, a lawyer who is likely to be a necessary witness at trial ethically may assist substitute counsel in both pre-trial matters and trial preparation and may continue him/herself to represent the party in most pre-trial proceedings.

**Applicable Rule Provisions**

- **Rule 3.7(a)**(Lawyer As Witness)
- **Rule 1.7(b)**(Conflict of Interest)
- **Rule 1.4(b)**(Communication)

*Inquiry*

The inquirer has represented a client (the association) for several years. The association currently is involved in litigation in which opposing counsel successfully sought inquirer's disqualification from representation based on the opposition's intention to call inquirer as a witness. The association retained substitute trial counsel whom inquirer has assisted in preparing for trial.[1]

Opposing counsel objects to the assistance that inquirer has been providing to substitute counsel. Opposing counsel contends that this assistance violates Rule 3.7(a). Inquirer believes the court's disqualification of him as trial counsel does not affect his ability to assist his client in preparation for trial; he is limited only in his ability to represent the association at trial.

*Discussion*

Rule 3.7(a) provides that "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness...." As Comment [2] explains, the advocate-witness rule is intended to prevent prejudice that could result from the lawyer's assumption of dual roles at trial: "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 an analysis of the proof."

Beyond the confusion that this combination of roles might create, the rule is justified on at least three other bases: (1) it is necessary to prevent the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; (2) it will prevent the difficult situation that occurs when an opposing counsel must cross-examine a lawyer-adversary and seek to impeach his credibility; and (3) the rule also will prevent the implication that the testifying

[1] The events in this inquiry occurred before the adoption of the Rules of Professional Conduct. Under the former Code of Professional Responsibility, the inquirer's disqualification under DR 5-102(a) was imputed to his law firm. Rule 3.7 removes this imputed disqualification. Assuming that the applicable court order would permit, the change effected by Rule 3.7 would allow previously-disqualified law firms to resume representations in which a firm member is a necessary witness.

lawyer is distorting the truth for his/her client's benefit. *Culebras Enterprises Corp. v. Rivera-Rios,* 846 F.2d 94, 99 (1st Cir. 1988), citing *Bottaro v. Hatton Associates*, 680 F.2d 895, 897 (2d Cir. 1982); *International Electronics v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975); *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1208 (S.D.N.Y. 1981). *See also* A.B.A., Annotated Model Rules Of Professional Conduct, at 387 - 389 (2d ed. 1992).

All of the reasons underlying the rule relate to concerns that might arise only at trial. Indeed, Rule 3.7(a)'s reach is limited to the trial stage, *i.e.,* the lawyer is prohibited from acting only as "advocate at a trial" when he or she is likely to be a necessary witness. Given the Rule's express limitation and the trial-stage purposes it is intended to serve, we conclude that a lawyer who is likely to be a necessary witness at trial may represent a client in most pre-trial matters. This includes, but is not limited to, taking witness depositions, pre-trial discovery and argument of most pre-trial motions, and also assisting in trial preparation.[2] It follows *a fortiori* that the lawyer-witness may assist substitute counsel in similar matters.

The American Bar Association Committee on Ethics and Professional Responsibility considered the same issue in Informal Opinion 89-1529 (10/20/89). In reaching the same conclusion under substantially the same rule,[3] the ABA committee found several reasons for permitting the lawyer-witness to represent the client advocate during the pre-trial stage: (1) the case may be settled in advance of trial so that the lawyer is not needed to testify; (2) the lawyer's testimony may be replaced with other evidence at trial; (3) the client may choose to forego the lawyer's testimony rather than lose the lawyer's services at trial; (4) there is little likelihood of prejudice to the client or the justice system since the Rules now permit the lawyer's partner to act as trial counsel; and (5) the lawyer-witness may have the most knowledge about the case, and it would be unfair to the client not to permit that lawyer to participate in pre-trial proceedings.

We agree, and add that the Rules should not be interpreted to interfere unnecessarily with a client's choice of counsel. Where none of the Rule 3.7's purposes are served by pre-trial disqualification, such a disqualification of the advocate-witness would serve only to deprive the client of the lawyer or firm which not only knows the case best but with whom the client most likely has an established relationship. *See Norell, Inc. v. Federated Department Stores, Inc.,* 450 F.Supp. 127, 130 (S.D.N.Y. 1978).

Courts considering the issue of advocate-witness participation in pre-trial matters generally have permitted such participation. In *Culebras Enterprises, supra* at 99, the First Circuit squarely was asked and squarely refused to construe Rule 3.7 broadly: "The question is whether the prohibition against acting as 'advocate at a trial' should be read as broadly prohibiting the rendition of case-related out-of-court services prior to trial. We think not."

Even under the former and arguably broader rule, DR 5-102(B),[4] Courts permitted advocate-witnesses to participate in pre-trial proceedings though disqualified or likely to be disqualified from representation at trial. *See Moyer v. 1330 Nineteenth Street Corp.,* 597 F.Supp. 14, 17 (D.D.C. 1984); *Brotherhood Railway Carmen v. Delpro Co.,* 549 F.Supp. 780, 790 (D.Del. 1982); *MacArthur v. Bank of New York, supra* at 1211 ("The disqualified firm may consult with defendant's substitute counsel and assist in preparing for trial."); *Norell,Inc., supra. But see Munk v. Goldane National Corp.*, 697 F.Supp. 784, 788 (S.D.N.Y. 1988)(interests of justice best served if advocate-witness disqualified from pre-trial proceedings); *General Mill Supply Co. v. SCA Services,* 697 F.2d 704, 716 (6th Cir. 1982)("The most acute evils we would foresee from failure to enforce [DR 5-102] in this instance would occur in the pretrial period....")

Although noting that Rule 3.7 applies "specifically to service 'as advocate at a trial'," the ABA ethics committee nonetheless believed "the policy behind the prohibition applies to any situation where the lawyer[-witness] is placed in the position of arguing the lawyer's own veracity" in a pre-trial proceeding. Inf. Op. 89-1529, *supra* note 1. The ABA thus felt that a lawyer should not argue, without the client's consent, a pre-trial motion where the lawyer's testimony is both disputed and material to a contested matter being decided before trial. In a single-sentence footnote, the Court in *Brotherhood of Railway Carmen, supra* note 20, also precluded the advocate-witness from participating in pre-trial motions that required him to testify to the matter at issue. Neither opinion cited an ethics rule or previous judicial opinion.

While in some instances it may be best for a lawyer-witness to decline representation of a client in a pre-trial motion requiring argument of his/her own testimony, D.C. Rule 3.7(a), by its terms, extends only to prohibit advocacy at a trial. Although it is identical to ABA Model Rule 3.7(a), we decline to extend the D.C. rule beyond its terms. Had the District of Columbia Court of Appeals intended the rule to apply beyond prohibition of courtroom representation, the rule could have been so written.[5] However, in any case in which the lawyer's professional judgment on behalf of a client may be adversely affected by his/her role as a witness, the lawyer may not represent the client in pre-trial motions without the client's consent. Rule 1.7(b)(4). A lawyer-witness should carefully consider whether this is the case when his/her own testimony is at issue in a pre-trial motion.

Another representational issue that is raised concerns the lawyer-witness representing the client at the lawyer's own pre-trial deposition. While Rule 3.7 does not prohibit such representation, other ethical issues may be raised when a lawyer assumes both roles at his/her own deposition. Chief among these issues is whether the lawyer-witness will be able to protect his/her client's confidences and secrets diligently, as required by Rule 1.6. The ABA Committee, in cautioning against this practice, thought the "better practice is that another lawyer serve as counsel to the client at that deposition."

Once it becomes apparent that the lawyer likely will be a necessary witness

[2] This is subject to any applicable rules of court, including rules regarding witnesses.

[3] D.C. and Model Rules 3.7(a) are identical; subsection (b) of each rule is substantially the same.

[4] DR 5-102(A) provided that a lawyer "shall withdraw from the conduct of the trial" if the lawyer learns or it is obvious that the lawyer ought to be called as a witness; the lawyer's firm "shall not continue representation in the trial."

[5] For example, in Rule 3.4 (Fairness to Opposing Party and Counsel), subsections (d) and (e) clearly distinguish between pretrial and trial obligations.

at trial, it follows from Rules 1.4(b)[6] that the advocate-witness must inform his/her client of this development and seek the client's informed consent to the continued pre-trial representation. The client should understand the effect that withdrawal prior to trail will have, including the financial impact, if any, of retaining new counsel and the point at which new counsel should be retained. As with any withdrawal from employment, the advocate-witness is bound by the requirements of Rule 1.16(d).

Inquiry No. 91-10-38
Adopted: May 19, 1992

*Opinion No. 229*

**Surreptitious Tape Recording by Attorney**

• A lawyer who tapes a meeting attended by him, his client, and representatives of a federal agency investigating his client commits no ethical violation, even if he does not reveal that a tape is being made, so long as the attorney makes no affirmative misrepresentations about the taping. The agency reasonably should not expect that the preliminary phase discussions are confidential. The agency also should expect that such discussions will be memorialized in some fashion by the investigated party's attorney and that the record made may be used to support a claim against the agency.

**Applicable Rule Provision**

• **Rule 8.4 (c)** (Misconduct involving dishonesty, fraud, deceit, or misrepresentation)

*Inquiry*

The inquirer is employed in the inspector general's office of a federal agency. The agency was conducting a "formal administrative/employment investigation" concerning one of the agency's employees. The subject of the investigation was informed that no criminal ramifications would result from this investigation and had received a "non-prosecution assurance." The subject/employee chose to be represented by a member of the D.C. bar at an interview conducted by an investigator in the Inspector General's office.

The inquirer reports that, during the "preliminary phase" of the interview in which ground rules and guidelines for the participants were being explained, the interview was terminated. The inquirer ascribes this to the "disruptive actions" of the employee's attorney. No specific examples are given, but the inquirer seems to mean that the employee's attorney took a more adversarial approach to the "interview" than the agency thought appropriate.

The inquirer came to believe that the attorney had been surreptitiously tape recording the proceeding, including the informal "preliminary phase" of the meeting. The agency's investigator had agreed during the preliminary phase to tape the formal portion to follow, and the inquirer reports that a copy of this tape would have been provided to the subject/employee. The inquirer asks if surreptitious taping of the "preliminary phase" of such a proceeding is unethical.

*Discussion*

The Committee does not address questions of law outside the scope of the disciplinary rules. We assume for the purposes of this opinion that there was nothing illegal about the tape recording. We comment only on the legal ethics question involved in surreptitious tape recording in these circumstances.

In our Committee's Opinion 178, Attorney A gained permission from Attorney B to interview B's client as part of a criminal investigation. The Committee held that A's failure to disclose A's intention to record the interview meant that the consent obtained from Attorney B under DR 7-104(A)(1) was not a sufficiently informed one. The majority opined that the client would be "lulled into a false sense of security and confidentiality in the interview" because of having obtained the "shield and protect[ion]" of retaining an attorney and the attorney having consented to the interview. The opinion also said that the standard created by DR 1-102(A)(4) obligated Attorney A to inform Attorney B that the interview would be recorded.

Four concurring members of the Committee would have gone further and found the conduct to be "conduct involving dishonesty, fraud, deceit or misrepresentation" under DR 1-102(A)(4), now Rule 8.4(c). Four other members dissented, disagreeing on whether the witness was a party to the matter under DR 7-104(A)(1) and whether the conduct violated DR 1-102(A)(4).

No question concerning DR 7-104(A)(1) or its successor Rule 4.2 is involved here. This circumstance does not involve what was disclosed to an attorney in seeking permission to talk to his client. The agency representatives may be unaware that preliminary phase discussions are being taped. They, however, do not have any basis for being "lulled into a false sense of security and confidentiality" that their words will not be memorialized and used to support a claim against the agency.

In 1974, Opinion 337 of the American Bar Association Committee on Ethics and Professional Responsibility held that attorneys' taping of others was *per se* unethical in almost all circumstances.[1] The ABA Committee relied on Canon 9 of the Model Code of Professional Responsibility and the DR1-102(A)(4) prohibition on conduct involving dishonesty, fraud, deceit or misrepresentation. The broad holding of Opinion 337 has been criticized. Some states have elected to vary from the general rule stated in Opinion 337.

Ethics committees of several bars have excepted recording of witnesses by a criminal defense lawyer. Ariz. Bar Op. 90-02 (March 16, 1990); Ky. Op. E-279 (1984); Assn. of the City Bar of N.Y. 80-95 (undated); Tenn. Op. 86-F-14 (July 18, 1986). The Idaho bar recently opined that lawyers may not secretly record telephone conversations with other lawyers or potential witnesses but said it was permissible to record conversations

[6] Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

[1] The only exception given by the ABA committee was:

> ...extraordinary circumstances in which the Attorney General of the United States or the principal prosecuting attorney of a state or local government or law enforcement attorneys or officers acting under the direction of the Attorney General or such principal prosecuting attorneys might ethically make and use secret recordings if acting within strict statutory limitations conforming to constitutional requirements. This opinion does not address such exceptions which would necessarily require examination on a case by case basis. It should be stressed, however, that the mere fact that secret recordation in a particular instance is not illegal will not necessarily render the conduct of a public law enforcement officer in making such a recording ethical.

between lawyer and client since these were confidential. Idaho Op. No. 130 (May 10, 1989) The Utah Bar has held lawyers may record surreptitiously by electronic or mechanical means communications with clients, witnesses, or other lawyers. (Utah Op. No.90, undated) A 1975 Arizona Opinion outlined four exceptions in vacating previous opinions stating an absolute ban on surreptitious tape recording.[2] Ariz. Op. No. 75-13 (June 11, 1975).

Although we do not necessarily concur with any of the preceding opinions, we, too, do not believe that a *per se* rule with respect to tape recording is appropriate. Rather, applicable circumstances should be evaluated to determine whether the particular conduct constitutes dishonesty, fraud, deceit or misrepresentation.

Here the agency expects to tape at least the formal part of the hearing and will supply participating attorneys with a copy. The agency has no reasonable expectation that any statements made during the preliminary or formal phase of the hearing are secret or confidential as to the employee. Absent affirmative misrepresentations about taping the proceedings, we see nothing unethical in an employee's attorney having done so.

We find this to be a different circumstance than when Attorney A in our Opinion 178 sought permission for an informal interview with Attorney B's client without telling Attorney B that he intended to tape the interview. The conduct of a bar member in recording preliminary discussions in the type of proceedings involved in this opinion may be a prudent protection for the client. Absent affirmative misrepresentations to the contrary, we see no deceit in taping in these circumstances because the inquiring agency has reason to believe that the employee and his or her attorney may memorialize all discussions in some fashion and use that record to support a claim against the agency.

Inquiry No. 91-12-50
Adopted: June 16, 1992

[2] These exceptions are: (a) utterances that are themselves crimes, *e.g.*, bribe offers, threats, extortion attempts and obscene calls; (b) a conversation to protect the attorney or his client from perjured testimony; (c) conversations with informants and or persons under investigation for self-protection; and (d) conversations "where specifically authorized by statute, court rule or court order."

*Opinion No. 230*

**Assertion of Retaining Liens; Preservation of Confidences and Secrets of Trust Client in Dispute Between Former Co-trustee and Successor Trust.**

• Effective January, 1991, Rule 1.8(i) prohibits an attorney from asserting a retaining lien as to the property of a client in his possession. An attorney whose client requests return of property in the attorney's possession after January, 1991 must return the property even if the attorney's initial assertion of a retaining lien respecting the property occurred prior to January, 1991 and therefore was proper under the District of Columbia Code of Professional Responsibility.

An attorney to a trust may not disclose confidential communications to a former trustee, over the objection of the current trustees, except as permitted by Rule 1.6.

*Applicable Rules*

• **1.16(d)**(Termination of representation)
• **1.8(i)** (Retention of client files)
• **1.6** (Preservation of client confidences and secrets)

*Inquiry*

In December, 1988, Inquirer was retained by one of two co-trustees ("Trustee A") to represent a trust located outside the District of Columbia. Inquirer served as counsel for the trust at the closing of a sale of real property, and was co-trustee under the promissory note securing the deferred purchase money deed of trust. Inquirer delivered copies of the closing documents, copies of two deferred purchase money promissory notes for $1.5 million and $100,000, and a copy of a $150,000 letter of credit to the Trust settlors and to another co-trustee ("Trustee B") of the trust.

In early 1989, after meeting the trust settlors, Inquirer concluded that he could no longer represent the trust. Inquirer orally advised the trust settlors as well as Trustee A and Trustee B of his intention to withdraw, and confirmed that decision in writing. Inquirer took appropriate steps to withdraw from all matters on behalf of the trust, including petitioning the District of Columbia Superior Court to permit him to withdraw as counsel for the trust in three other pending actions and drafting the papers necessary for his removal as trustee under the note securing the deed of trust in the real estate transaction.

Fees of approximately $14,000 due to the Inquirer remained unpaid by the trust. Inquirer asserted a lien against the client's files, including the original of the promissory notes and the letter of credit, and has refused several requests to turn over the files, pending satisfactory arrangements for payment. The most recent request for the files was made in January, 1992.

In June, 1991, Trustee B sought judicial instructions with respect to payment of $76,624.16 in legal fees due to five law firms, including Inquirer. Settlors of the trust then filed suit against Trustee B, claiming that Trustee B had breached its fiduciary duties, incurred unauthorized legal fees, mismanaged trust assets, and misused trust funds.

Apparently after Trustee B sought instructions from the court as to payment of the legal fees, the settlors terminated the trust and created a second trust, under which Trustee A and the settlors serve as co-trustees. The settlors assigned all of the assets of the initial rust to the successor trust.

Trustee B has advised Inquirer that his deposition may be taken in the pending litigation, and that it believes that information disclosed to Inquirer by Trustee A during the course of the professional relationship is not confidential as against Trustee B. Trustee A disagrees.

*Discussion*

*Retaining lien.*

The first question presented by the inquiry is whether assertion of a retaining lien is proper under the circumstances presented. Until January 1, 1991, the propriety of Inquirer's assertion of a retaining lien under the District of Columbia Code of Professional Responsibility was clear beyond any serious dispute.[1]

The District of Columbia Rules of Professional Conduct are no less clear, but require a contrary conclusion:

"In connection with any termination

[1] *See* Rule 5-103(A), District of Columbia Code of Professional Responsibility; Opinion 59 (undated); Opinion 90 (1980). *See generally* Opinion 107 (Oct. 27, 1981); Opinion 103 (1981). Indeed, the propriety of Inquirer's assertion of a retaining lien under the Code was confirmed by the Vice Chair of this Committee by letter dated September 14, 1989, and again by Assistant Bar Counsel in October 2, 1990, dismissing a complaint filed against the Inquirer in connection with his retention of the files.

of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled,* and refunding any advance payment of fee that has not been earned. *The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i)."*

The inquiry suggests no basis for concluding that the client is not "entitled" to the papers and property in his possession, except his retaining lien arising from the client's failure to pay his fee.[2]

As to retaining liens, Rule 1.8(i) is unequivocal:

> *A lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for.* This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm."

The Comments to Rule 1.8(i) emphasize that it was intended to create only a "narrow exception" to the general rule stated in Rule 1.16(d), which "requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates." Rule 1.8, Comment [8]. "Only the lawyer's own work product -- results of factual investigations, legal research and analysis, and similar materials generated by the lawyer's own effort -- could be retained," Rule 1.8, Comment [9], and then only if the client was able to pay and not facing jail or other serious and irreparable harm, Rule 1.8, Comment [10].[3]

Thus, without questioning the propriety of Inquirer's initial assertion of the retaining lien in accordance with the provisions of the Code, we conclude that the District of Columbia Rules of Professional Conduct, in effect since January 1, 1991, prohibit the refusal to turn over the original promissory notes and letter of credit, as well as any other documents in the file that are not Inquirer's work product, in response to a post-January, 1991 request from the former client. Rule 1.8, Comment [9].[4]

*Client confidences and secrets.*

The second question raised by the inquiry is whether Rule 1.6 precludes the disclosure of communications between Trustee A and Inquirer to Trustee B, over the objection of Trustee B's successor Trustees. Inquirer was counsel to the Trust, and not to the individual Trustees. We presume that the "assets" transferred to the successor trust included the right to assert any claim of privilege. *See generally Commodity Futures Trading Commission v. Weintraub,* 471 U.S. 343, 348-58 (1985). Accordingly, Inquirer's obligations are to the trust, and he can disclose the communications only with the consent of his client or its successor, acting through its authorized agents.

We assume that Trustee B would have been entitled to know what had been said to the Inquirer during the time that Trustee B was a co-trustee of the trust. The settlors terminated the initial Trust, effectively removing Trustee B as a trustee for the trust, and therefore terminated any power Trustee B might otherwise have had to demand disclosure of the privileged communications between Inquirer and the Trust acting through Trustee A.

Without the consent of the successor trust, Inquirer may not disclose the confidences or secrets of his former client, except in the circumstances described in Rule 1.6 (d), none of which appears applicable here.

Inquiry N. 92-6-14
Adopted: September 15, 1992

[2] The order of the District of Columbia Court of Appeals, adopting the Rules of Professional Conduct states "that with respect to conduct occurring before January 1, 1991, the provisions of the Code of Professional Responsibility in effect on the date of the conduct in question are the governing rules of decision for this court, the Board on Professional Responsibility, its hearing committees, and the Bar Counsel." Order No. M-165-88 (Mar. 1, 1990). The "conduct in question" here is the attorney's refusal to turn over the documents in response to his client's post-January, 1991 request. Accordingly, the Code of Professional Responsibility is not applicable.

[3] The so-called Jordan Committee specifically rejected the ABA's proposed Model Rule 1.8(j), which would have continued the general approval of retaining liens expressed in the Model Code, and substituted the language of Rule 1.8(i) described above. Comments [9] and [10], which broadly construe Rule 1.16 and emphasize the limited reach of Rule 1.8(i) were added by the Board of Governors of the District of Columbia.

[4] The inquiry does not suggest any facts indicating that the client is unable to pay, as opposed to simply unwilling. Nor is there anything to suggest that the former client faces any risk of irreparable harm.

*Opinion No. 231*

## Lawyer as Legislator

• A D. C. council member may participate in council consideration of legislation affecting clients of the member's law firm

*Applicable Rules*

- **1.2(b)**(Scope of Representation)
- **1.3(b)(3)**(Diligence and Zeal)
- **1.7(b)(4)**(Conflict of Interest)
- **6.4**(Law Reform Activities)

*Inquiry*

The inquirer is a member of the D.C. Council who is also a member of a law firm. The member's firm limits its practice to personal injury, workers compensation, medical malpractice and construction cases. The member asks whether and how the Rules of Professional Conduct apply to the member's role as a Council member, with particular reference to voting on legislation concerning liability of physicians. There is no suggestion that the legislation would affect any present client of the firm, although that may be a possibility, but it could have an adverse impact on the firm's practice in the future.

*Discussion*

The subject of legal or ethical constraints on the conduct of a practicing lawyer who is also an elected member of a legislative body is addressed specifically and primarily by legislation and regulations.[1] No Rule directly applies to or limits a lawyer's conduct, simultaneously, as a member of a law firm and a member of an elected legislative body. Given the frequency with which lawyers are also legislators, one would expect any additional ethical constraints on such a lawyer's activities or duties to be set forth expressly in the Rules. Accord-

[1] In Interpretative Opinion No. 91-20, dated May 31, 1991, the Director of the District of Columbia Office of Campaign Finance concluded that the member's vote in opposition to a bill limiting liability of physicians in free health care clinics could create the appearance that the member's official position had been used to obtain financial gain for the member's firm, in violation of D.C. Code 91-1461(b), which would require a written statement of potential conflict. The Opinion further found no law mandating recusal of the member. The Opinion noted that there is some question about the application of 18 U.S.C. § 208 to Council members, and requested an opinion from the United States Office of Government Ethics on that issue, but we are advised that no opinion has yet been provided.

ingly, we believe that the sometimes-vague provisions of general rules should not too readily be construed to impose such constraints unless clearly required by their language or purpose.

Rule 1.11, like its counterpart in the ABA Model Rules, applies only to "successive government and private employment." In Opinion No. 31, with reference to Congress, we noted that the former Code of Professional Responsibility applied "only to staff attorneys acting in their capacity as attorneys. It is not within our province to pass upon the propriety of conduct by congressmen, who may or may not be lawyers, but are acting in any event as congressmen."[2]

ABA Informal Opinion 1182 (1971) concluded that "[n]o Disciplinary Rules of the Code of Professional Responsibility contain a provision that will necessarily and always prohibit a lawyer's representing either an individual or an organization that is likely to be affected by the passage or defeat of proposed legislation, even though the lawyer also is a legislator." The Opinion noted that "[o]ur conclusions would be substantially the same under the former Canons. *See* Opinion 306 (1962)."

ABA Formal Opinion 306 (1962) concluded that, under the still-earlier ABA Canons of Ethics, it was permissible for a lawyer to appear before or lobby a legislative body of which a member of the firm was a member, where the applicable law expressly or by necessary implication permitted such action or provided for the member to disqualify himself. The rationale was that the consent needed to permit representation of conflicting interests under Canon 6 had been given. [3]

The Rules do impose specific obligations on a lawyer "representing a client" before a legislative body *(see* Rule 3.9), but they are not implicated here if, as we understand, neither the member nor others in the member's firm are representing clients before the Council concerning the legislation.

The conclusion that the Rules were not generally intended to reach the actions of a lawyer as a legislator is even stronger than under the former Code, in view of other provisions added to the Rules that distinguish between the role of a lawyer in representing clients and the lawyer's role as a citizen. For example, Rule 1.2(b), which had no counterpart in the Disciplinary Rules of the Code, provides that "a lawyer's representation of a client... does not constitute an endorsement of the client's political, economic, social, or moral views or activities." Similarly, Rule 6.4 encourages lawyers to engage in law reform activities, and permits a lawyer to serve a law reform organization even though the reform may affect the interests of a client of the lawyer. However, Comment 2 to Rule 6.4 notes that a lawyer participating in such activities should be mindful of obligations to clients under other rules, particularly 1.7.

Although there was no comparable rule under the Code, similar principles were reflected in EC 8-1, which the Committee addressed in Opinion No. 204, which was also stated to apply to present Rules 1.7 and 6.4 as then proposed. *See id.* n.1. There we concluded that a law firm that represents clients before an agency could in its own name file comments on a proposed rule, unless the comments, if adopted, could adversely affect pending or imminent filings by its clients. As the committee noted, "[l]awyers do not completely sacrifice their First Amendment rights by representing clients... ." *Id.*, p. 5.

Opinion No. 204 also addressed DR 7-101(A)(3) under the Code, which was carried forward (in the D.C. Rules but not the ABA Model Rules) as Rule 1.3(b)(2). It provides that "a lawyer shall not intentionally... (2) prejudice or damage a client during the course of the professional relationship." The Committee found the meaning of "during the course of the professional relationship" clarified by EC 7-17 (*id.*, p. 4, quoting EC 7-17):

> The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client [footnote set forth below]. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of client *in a matter he is then handling*, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client (emphasis added).[4]

As noted, Opinion No. 204 concluded that the law firm could not submit its own comments if, were they adopted, they could prejudice applicants represented by the firm with respect to the subject matter of the comments. There the Committee treated "during the course of the professional relationship" as having only a temporal dimension and as applying to a lawyer's actions taken outside of the professional relationship. Applying the same reading here, there is an additional issue not specifically addressed in Opinion No. 204, *i.e.*, whether a lawyer-legislator's vote on legislation adversely affecting a client's interests can be said to constitute "intentional[ ]... prejudice or damage." Where the prejudice in question results from a lawyer's actions as a legislator, in carrying out the obligations of that office, any such prejudice would seem an incidental consequence of the legislator's exercise of public duties. Accordingly, we would not regard the lawyer as having "intentionally" prejudiced the client, absent evidence of a subjective intent to do so.[5]

There remains the question whether the inquiry is affected by more general constraints of Rule 1.7. Since we understand that neither the Council member nor other members of his firm are "represent[ing] clients" with respect to passage of the legislative proposal, the rules concerning conflicts are implicated primarily with respect to their impact on representation by the member or his firm of clients who might be adversely affected by legislation on which the member may be called to upon to act as a legislator.

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[2] Similarly distinguishing between the roles of lawyers qua lawyers and lawyers in legislatures, the Sims Committee Report on the Rules as proposed by the D.C. Bar concluded that "lawyers employed in the judicial and legislative branches of government...who are in fact employed and functioning as lawyers in the Judicial and Legislative branches should be governed by the same Rules as Executive branch lawyers. D.C. Bar Special Committee, *Report on Government Lawyers and the Model Rules of Professional Conduct* 17 (1988). This opinion addresses only the subject of lawyers who are also legislators.

[3] By contrast, Informal Opinion 1087 (1969) concluded that under Canon 6 neither a lawyer who is a member of the ABA House of Delegates nor a member of his firm could properly represent a client in seeking to influence passage or defeat of a proposal pending before that body, because no rule provided consent and the member was not free to abdicate his functions by not voting.

[4] The footnote to EC 7-17 includes the following explanation:

> No doubt some tax lawyers feel constrained to abstain from activities on behalf of a better tax system because they think that their clients may object. Clients have no right to object if the tax adviser handles their affairs competently and faithfully and independently of his private views as to tax policy.

[5] Opinion No. 204 involved a materially different situation, in which the lawyers had no obligation to participate personally, on their own behalf, in an administrative process that clearly would or could prejudice some of their clients.

Rule 1.7(b)(4) provides that, without the client's informed consent, a lawyer shall not represent a client with respect to a matter if:

> the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property or personal interests.

It is important to note that Rule 1.7(b)(4) does not address a situation where a lawyer's actions as a legislator could adversely affect the interests of a client or potential client. Rather, it only addresses situations where "the lawyer's professional judgment" on the client's behalf in a matter will or may be adversely affected. Even if the lawyer's position or responsibilities as a legislator could be deemed to involve responsibilities to or interests in "a third party" (*e.g.*, constituents, the legislative body), or "the lawyer's own... interests" -- questions we need not decide -- nothing in the facts of the present inquiry suggests any adverse effect on the lawyer's professional judgment in the representation of clients. Accordingly, we find the situation not covered by Rule 1.7(b)(4) and hence that there is no need for client consent.

We conclude that, on the facts posed by the inquiry, no provision of the Rules would require client consent or preclude the Council member from voting on legislation that could affect the future business of the member's law firm, assuming that the member may do so consistently with applicable law, an issue we do not address.

Inquiry No. 91-6-26
Adopted: September 15, 1992

*Opinion No. 232*

**Multiple Clients/Criminal Matter**

• After full disclosure and consent by the client, a lawyer may represent a witness in a criminal matter who desires to assert his Fifth Amendment right not to testify even though a suspect in the criminal matter is being represented in another matter by the same firm. The lawyer may not, however, bargain with the government to obtain a benefit by giving testimony adverse to the firm's client without obtaining the consent of both clients and otherwise complying with Rule 1.7(c).

*Applicable Rules*

- **1.7(b)**(Conflicts of Interest)
- **1.10(a)**(Imputed Disqualification)
- **1.16(a)**(Withdrawal)
- **4.2(a)**(Contact with person represented in a matter by other counsel)

*Inquiry*

The Committee has been asked to decide whether a lawyer may represent a witness in a criminal homicide case, when the inquirer's partner has been representing client one, who is a principal suspect in the killing, in connection with two unrelated weapons possession charges. Client one is represented in the murder case by other counsel. We are told that the inquirer's client, client two, and the murder victim were riding in a car with three others, including client one, when the victim got out of the car, was chased by the car, and was ultimately killed by persons who were in the car.

Client two was originally charged in the homicide case, but the charge against him was dismissed at the initial hearing. The inquirer states that the government has decided not to charge client two because he was an innocent bystander in a murder planned and executed by client one and others. At the time of his arrest, and before client two was represented by counsel, he gave a statement to police which inculpated client one. The inquirer and the prosecutor state that the prosecutor would like to call client two to the grand jury to give testimony against client one. Client two will not testify unless he is given immunity and may not cooperate even then.

The inquirer states that he explained his partner's representation of client one to both client two and his family, and that each wished to proceed with the inquirer notwithstanding the potential conflict. In addition, the inquirer informed the prosecutor of the potential conflict and has kept the fee received from client two in escrow pending resolution of this matter. The inquirer's partner has not communicated with client one, who has been represented for some time by other counsel in the homicide matter and in other unrelated matters. The inquirer states that he and his partner will not share information about their respective clients, and this representation has been made to the prosecutor and to the court.

The inquirer asks three questions: (1) is there a per se conflict of interest which precludes representation of client two; (2) should the inquirer withdraw from the representation of client two and, if so, must his partner withdraw from further representation of client one; and (3) how should client one be contacted for his objection or consent to the inquirer's representation of client two?

*Analysis*

*1. Disqualification from Representation of Client Two*

Rule 1.10(a) of the *District of Columbia Rules of Professional Conduct* prohibits lawyers associated in a firm from representing a client if any lawyer in the firm, practicing alone, would be barred from representing both clients by Rules 1.7, 1.8(b), 1.9, or 2.2. To analyze whether the inquirer has a prohibited conflict, therefore, the inquirer and his partner must be treated as one.[1] *See* Rule 1.10(a); Comment [17] to Rule 1.7.

Rule 1.7(a) creates a nonconsentable conflict where a lawyer (or under Rule 1.10(a), a law firm) seeks to represent two clients taking adverse positions in the same "matter." Rule 1.7(b) creates four consentable conflicts in defined circumstances in which multiple representation may infringe a lawyer's duties of loyalty and zealous representation. Rules 1.7(a) and 1.7(b)(1) each deal with the situation in which a position to be taken for one client is adverse to a position to be taken for another client "in the same matter." They differ in that such a conflict is generally consentable under Rule 1.7(c) if the second client is represented by a different lawyer or firm.[2] Since client one is represented by separate counsel in the homicide case, only Rule 1.7(b)(1) is applicable here.

Applying Rule 1.7(b)(1) requires consideration of whether representation of client two, who is currently dismissed from the murder case, with respect to his

[1] The inquirer and his partner have agreed not to share information relating to their respective clients. However, such an "ethical wall" has only been discussed once in dicta by our Court of Appeals, and any inference that such a wall would lessen the strict imputed disqualification stated in Rule 1.10(a) was removed by the Court when it promulgated Comment [15] to Rule 1.10(a). Thus, the existence of an "ethical wall" does not remove the obstacle of imputed disqualification presented by Rule 1.10(a).

2 Client consent is not effective if the lawyer is not able to comply with other applicable rules. *See* Rule 1.7(c)(2); *see generally* Opinion 217 (1991).

grand jury testimony is (1) adverse to client one and (2) occurs in "the same matter" as the criminal trial against client one.[3] On the first issue, the inquirer states that client two will not testify without immunity (and may not testify then). In addition, client two apparently does not want to haggle with the prosecution to obtain immunity. Since client two's decision to invoke his Fifth Amendment rights is not adverse to client one, there does not at the present appear to be a disqualifying adversity of interests under Rule 1.7(b)(1).

There is always a great risk in criminal matters, however, that positions can change as the prosecutor gathers evidence, winnows witnesses from targets, and selects potential charges.[4] Recognizing this, we note that should client two later decide that it is in his interest to bargain his testimony against client one for some advantage, then there would be sufficient adversity between client two and client one to require disqualification of the inquirer and his firm, absent consent under Rule 1.7(c), if such bargaining would occur "in the same matter."

The term "matter" is not precisely defined in the Rules. Outside of an "on-the-record adversary proceeding," the bounds of a "matter" become difficult to discern. *See* Comment [3] to Rule 1.7. The bounds given to the concept of a "matter" should, we believe, be informed by the purpose to be achieved by Rule 1.7. Comment [3] to Rule 1.7 implies that the problem to be avoided under the Rule is "seeking a result to which another client is opposed" from the same decision-maker. *See id.* Accordingly, where counsel seeks to gain an advantage for one client by offering to trade testimony inculpating a second client in the same criminal episode, such bargaining seeks, or at least facilitates, "a result to which [the second] client is opposed," and such bargaining should be considered to occur in a "matter" common to both clients. Should such bargaining take place, therefore, the inquirer and his firm would be disqualified from representing client two absent the consent of both clients one and two under Rule 1.7(c).[5]

Rule 1.7(b)(2) is also implicated by the facts of this inquiry. That rule prohibits representation of a client when such "representation will be or is likely to be adversely affected by representation of another client." When one lawyer represents multiple clients who may be able to inculpate each other in the same criminal episode, the government has frequently moved for disqualification on the ground that such representation creates two distinct conflicts. First, the lawyer's concern for one client may lead him to counsel a second to refuse to testify in circumstances where such refusal is not warranted by the Fifth Amendment (or otherwise) and may cause the second client to be held in contempt.[6] Second, the lawyer in such a situation is disqualified from bargaining for any one of his clients, which may be adverse to the best interests of clients who could exculpate themselves by inculpating others.[7] Although we are told it is not the case here, it could be argued that the inquirer's firm has an interest in protecting client one, even though they do not represent him in the homicide matter, which would cause them to counsel client two not to cooperate with the prosecutor to client two's detriment.

In any case, the inquirer is not disqualified under Rule 1.7(b)(2) so long as the inquirer can obtain client two's consent under Rule 1.7(c). While the inquirer states that he has spoken with client two and his family about the multiple representation situation and they still wish to go forward with the inquirer, it is not clear from the inquiry whether there has been full compliance with Rule 1.7(c). Rule 1.7(c) requires full disclosure of the possible adverse consequences of multiple representation. *See, e.g.*, Opinion 217 (1991). In particular, the inquirer should advise client two that if circumstances change, the inquirer could be disqualified from continuing the representation unless client one gives consent as required by Rule 1.7(c).

*2. Withdrawal*

The inquirer and his firm are not currently disqualified from representing client two and client one simultaneously, and need not withdraw from either representation. Should circumstances change so that Rule 1.7(b)(1) comes into play, and consent under Rule 1.7(c) cannot be obtained from both client two and client one, then the inquirer would have to withdraw from the representation of client two. *See* Rule 1.16(a). Even if the inquirer were to withdraw from the representation of client two, we do not see any reason for the inquirer's partner to withdraw from the representation of client one in the unrelated weapons possession cases.[8]

*3. Contact with Client one*

If the inquirer decides to seek client one's consent to the representation of client two, the inquirer should seek that consent through client one's counsel in the homicide case. As discussed above, in those circumstances in which the interests of client two and client one could be adverse, client two and client one should be considered to be parties to the same "matter." Rule 4.2(a),[9] therefore, prohibits contact with client one on client two's behalf except through counsel representing client one in the homicide matter.[10]

Inquiry No. 92-9-31
Adopted: October 20, 1992

*Opinion No. 233*

**Payment of "Success Fees" to Nonlawyer Consultants**

• A law firm may agree with its clients that, depending on the outcome of a particular matter, a "success fee" will be

[3] The weapons possession charges against client one are clearly not the same matter as the murder charges at issue here.

[4] For example, the prosecutor has written the Committee that "it may be necessary to negotiate with [client two] regarding immunity and other sensitive issues." This suggests that the prosecutor has not made a final decision on whether to grant immunity to client two or whether to charge him with some crime.

[5] Even with consent, Rule 1.7(c)(2) requires withdrawal unless counsel can "comply with all other applicable rules with respect to such representation." On the facts provided to the Commmittee, we see no "other applicable rules" which would be violated by the proposed representation.

[6] See, for example, *United States v. Dowdy*, 440 F. Supp. 894 (W.D. Va. 1977) and *In re Investigative Gran Jury Proceedings*, 432 F. Supp. 50 (W.D. Va. 1977).

[7] See cases cited in footnote 6.

[8] This is not, for example, a situation in which confidences of client two would be used or revealed in the defense of client one on the weapons charges.

[9] This Rule states:

"During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter..."

[10] While Rule 4.2(a) speaks of "parties" to a matter, it also applies to contacts with "any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in questions." Comment [4] to Rule 4.2.

paid to both the law firm and a consulting firm of nonlawyer experts retained by the law firm to assist it in connection with the matter. The fact that the portion of the "success fee" payable to the nonlawyer consultants flows from the client through the law firm does not result in a "sharing" by the law firm of legal fees with a nonlawyer proscribed by Rule 5.4.

**Applicable Rule**

• **Rule 5.4** (Professional Independence of a Lawyer)

*Inquiry*

The inquirer, a District of Columbia law firm, has developed a practice representing clients in connection with the litigation, arbitration and mediation of contract and other disputes in connection with international construction projects. In that connection, the law firm has built a close relationship with a consulting firm of professional engineers and other nonlawyer specialists who provide expert advice and opinions relating to analysis of construction delays, damage calculations, etc.

While the consulting firm occasionally is retained directly by the law firm's client, the more common arrangement is for the law firm to retain the consulting firm, compensating it on the basis of hourly rates. The law firm's own work for its clients in this area is typically charged on an hourly-rate basis, but with a "success payment" to the law firm in the event of a successful result.

The law firm wants to enter into a contractual arrangement with the consulting company pursuant to which the consulting company not only would be compensated by the law firm on an hourly basis, but also would participate in any "success fees" received by the law firm from its clients on the construction projects. The "success fees" would be shared with the consulting company in any given case only with the prior knowledge and consent of the law firm's client.

*Discussion*

The questions posed are (1) whether the law firm's proposed fee arrangement with its clients and the consulting firm constitute a sharing of legal fees by the law firm and the nonlawyer consultants that is proscribed by Rule 5.4(a); and (2) if so, whether the fee arrangement is removed from that general proscription if the consulting firm agrees to abide by the conditions set forth in Rule 5.4(b)(1)-(4).

The Committee does not reach the second question because we conclude that, so long as the client is fully informed and gives prior consent to the fee agreement in a particular matter, the payment of a success fee by the client to the law firm and, through the law firm, to the consulting firm does not constitute a sharing of legal fees proscribed by Rule 5.4(a).

The bans on fee-sharing and partnerships with nonlawyers have long been a feature of codes of legal ethics. They were motivated by a number of concerns, chiefly that nonlawyers might through such arrangements engage in the unauthorized practice of law, that client confidences might be compromised, and that nonlawyers might control the activities of lawyers and interfere with the lawyers' independent professional judgment. Opinion No. 146.

The Kutak Commission of the American Bar Association, which drafted the ABA Model Rules of Professional Conduct, proposed a dramatically different approach that would have allowed a wide range of business associations between lawyers and nonlawyers. The Kutak Commission thus recognized the important and integral role that a variety of types of nonlawyers -- from paralegals to economists, social workers and accountants -- have come to play in modern law practice. Compare Opinion No. 93, in which this Committee in 1980 similarly recognized the increasing role of nonlawyers in law practice. The ABA's House of Delegates, however, rejected the Kutak Commission proposal and adopted, in Rule 5.4 of the Model Rules, general bans on sharing of legal fees with nonlawyers and on partnerships with nonlawyers paralleling those contained in Disciplinary Rules 3-102 and 3-103 of the old ABA Model Code of Professional Responsibility.

The Rules of Professional Conduct adopted in the District of Columbia, effective January 1, 1991, contain a version of Rule 5.4 that, like the Kutak Commission proposal, reflects a more liberal approach to the subject of fee-sharing and association of nonlawyers in the legal practice. Rule 5.4(a), the general ban on fee-sharing, contains not only the traditional exceptions for payments to a deceased lawyer's estate and inclusion of nonlawyer employees in a retirement plan based on profit-sharing, but also, in Rule 5.4(a)(4) and 5.4(b), an exception permitting the sharing of fees in partnerships or other organizations in which nonlawyers have an interest, provided that certain safeguards are observed.[1]

We believe that the more liberal approach embodied in the D.C. Rules, together with a recognition of the vital role that nonlawyer experts from many disciplines play today in assisting lawyers in providing legal services to their clients, counsels against a broad reading of the Rule 5.4 proscription of fee-sharing with nonlawyers in this context. We also think that the present inquiry must be viewed in the light of several propositions that, it seems to us, are incontestable. First, nothing in the Rules of Professional Conduct would prohibit a direct arrangement between the law firm's client and the consulting firm for the payment of a "success fee" to the consulting firm. Second, it is commonplace for lawyers to retain and pay outside consultants directly and to pass on their charges as an expense in billing their clients; no-one suggests that this constitutes the "sharing" by the lawyer of a fee with the nonlawyer consultant. Third, Comment 8 to Rule 3.4, reflecting another liberalization of the traditional approach in the District of Columbia, permits payments of contingent fees to expert witnesses so long as they are not based on a percentage of the recovery.

With these considerations in mind, the Committee concludes that, so long as the client is fully informed and consents to

[1] Rule 5.4 provides, in pertinent part:

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

* * *

(4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b).

(b) A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if: (1) the partnership or organization has as its sole purpose providing legal services to clients; (2) all persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct; (3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; (4) the foregoing conditions are set forth in writing.

the arrangement, a success fee of the kind contemplated by the inquiring firm does not constitute a sharing of legal fees with nonlawyers proscribed by Rule 5.4.[2] The client would be agreeing at the outset of a matter that a success fee will be paid to both the law firm and the consulting firm. This is different from a situation in which the client pays a fee to a lawyer, unaware of the fact that the lawyer is obligated to share that fee with a nonlawyer.

The fact that the client's payment of the consulting firm's portion of the success fee flows through the law firm does not transform the payment into a legal fee being "shared" by the consulting firm any more than does the more typical arrangement in which a client reimburses a law firm for consulting fees paid by the law firm to a consultant. In substance, the transaction that results in a payment to the nonlawyer consulting firm is between the client and the consulting firm; the fact that the money passes through the hands of the law firm is a formality of no consequence for purposes of Rule 5.4.

Because of our disposition of this question, we have no occasion to decide whether the inquiring law firm's contractual arrangement with the consulting firm could qualify as a "partnership or other form of organization" within the meaning of Rule 5.4(a)(4) and 5.4(b).

Inquiry No. 92-9-30
Adopted: January 26, 1993

*Opinion No. 234*

## Defense Counsel's Duties When Client Insists On Testifying Falsely

• Rule 3.3(a) prohibits the use of false testimony at trial. Rule 3.3(b) excepts from this prohibition false testimony offered by a criminal defendant so long as defense counsel seeks first to dissuade the client from testifying falsely and, failing in this, seeks to withdraw when this can be done without harm to the client. Where a defendant has been incarcerated before trial and a continuance on the eve of trial would cause an extended delay of trial, the obligation to withdraw is removed. Instead, defense counsel may call the client to testify in narrative form, but may not assist the client in framing the client's false testimony. Nor may defense counsel argue a perjurious client's credibility in closing unless the client has given at least some truthful, relevant evidence.

### Applicable Rule

• **Rule 3.3** (Candor Toward the Tribunal)

*The Inquiry*

A lawyer requests an opinion concerning his ethical responsibilities as defense counsel in a criminal case in which his client wants to present false testimony in support of a mistaken identity defense.

At the defendant's initial court appearance, the lawyer had taken written notes of the client's physical appearance, including a clothing description. After the hearing, the defendant was detained on bond and remained incarcerated until trial. On the eve of trial, the defendant told his attorney that he wished to present a mistaken identity defense and told him the location of the clothing worn at the time of arrest, which the jail had mailed to an address provided by the defendant. Upon examining the clothing, the lawyer became convinced that the clothing was not the same that his client had worn at the client's first appearance.

After the lawyer confronted his client with his guess that the defendant had switched clothing with someone in the jail, the defendant confirmed the attorney's suspicion but reiterated his desire to present testimony in support of a mistaken identity defense. Counsel attempted to dissuade the client from pursuing this course of action and advised him that he could not assist the defendant in presenting false testimony to the court. He also advised him that the testimony could be easily contradicted by police officers. The defendant remained set on presenting the testimony. The lawyer sought informal guidance from this Committee, but the case resolved itself before such guidance was given. Because District of Columbia Rule 3.3 differs from similar rules in most other jurisdictions, the Committee has decided to respond to the inquiry by full opinion.

This inquiry considers three related issues: (1) whether the lawyer should have moved to withdraw on the eve of trial; (2) what steps, if any, the lawyer might have taken to assist his client to prepare to testify before the jury; and (3) what could the lawyer have said in closing argument.

*Discussion*

The obligations of an advocate faced with a threat of perjured testimony by a criminal defendant have been hotly debated for decades. In the District of Columbia, this issue has been resolved by the promulgation of Rule 3.3 of the Rules of Professional Conduct.[1]

The District of Columbia rule evolved out of earlier ABA ethics principles. In 1969, the ABA adopted Disciplinary Rule 7-102[2] in its Model Code of Professional Responsibility ("Model Code"), which as amended in 1974, provided that a criminal defense attorney faced with the prospect of his client testifying falsely had to (1) withdraw in advance of the perjured testimony, or (2) report to

[1] Rule 3.3 provides in relevant part:

(a) A lawyer shall not knowingly:

(2) counsel or assist a client to engage in conduct that the lawyer knows is criminal or fraudulent, * * * ·

* * * *

(4) offer evidence that the lawyer knows to be false, except as provided in paragraph (b).

(b) When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

[2] DR 7-102(A) provided that "a lawyer shall not . . . (4) Knowingly use perjured testimony or false evidence. . . . (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false. . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. . . ."

After a 1974 amendment, DR 7-102(B) provided that "a lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication. . . . "

[2] In cases in which a member of the consulting firm will testify as an expert witness, the inquiring law firm should bear in mind that while the D.C. Rules permit payment of fees to expert witnesses contingent on the outcome of the litigation, such fees may not be based on a percentage of the recovery in the case. Rule 3.4, Comment [8].

the court the falsity of the testimony if the client insisted on so testifying.[3] *See generally* ABA Informal Opinion 1314 (Mar. 25, 1975).

At the time DR 7-102 was adopted, the ABA had under consideration draft Standards Relating to the Administration of Criminal Justice. In 1971 an ABA Advisory Committee on the Prosecution and Defense Functions submitted a tentative draft which offered new direction to the defense attorney faced with his client's intent to commit perjury. That solution, commonly referred to as the "narrative approach," sought to give more protection to the attorney-client privilege, while limiting the damage to the tribunal caused by perjured testimony. The narrative approach was embodied in Defense Function Standard 7.7:

> (c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, * * * the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

The narrative approach subsequently enjoyed judicial acceptance, although critics charged that this approach compromised all the important policies at issue. "The lawyer [is] sufficiently involved to be morally culpable, yet the sudden switch of tactics in mid-examination [is] tantamount to blowing the whistle on the client."[4]

In drafting Rule 3.3 of the Model Rules of Professional Responsibility,[5] however, the ABA, agreeing with the critics of the narrative approach, *see* Comment [9] to Model Rule 3.3, returned to the approach of DR7-102, requiring a lawyer to reveal the client's perjury if necessary to rectify the situation. *See id.* Comment [10]. In so holding, the ABA also rejected the "full advocacy" approach, promoted primarily by Professor Monroe Freedman,[6] under which a lawyer, to protect client confidences, may knowingly present perjured testimony if the lawyer cannot dissuade his client from committing perjury. *See id.* Comment [9].

In the District of Columbia, however, the Jordan Committee and the Board of Governors of the Bar rejected the ABA approach, opting instead for a rule similar to that advocated by Professor Freedman:

> If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may, among other things, go forward with the examination of the client and closing argument in the ordinary manner.

Submission of the Board of Governors of the District of Columbia Bar to the District of Columbia Court of Appeals 138 (November 19, 1986). Comment [9] to the proposed draft made it clear, however, that withdrawal was the preferred course and that only truly exigent circumstances would warrant the presentation of perjured testimony. *Id.* at 141. The Bar opted for this position because it felt that the ABA approach put too much strain on the attorney-client relationship in the criminal setting and would be detrimental to the effective representation of criminal defendants in the long run. *Id.* at 142-143. It rejected the narrative approach because the use of narrative had long been seen to be tantamount to disclosure. *Id.* at 142.

The recommendation of the Bar on this point was not, however, accepted by the Court of Appeals. Instead, the Court rejected both the ABA approach and the Jordan Committee approach, and opted instead for the present language of Rule 3.3, which implements the "narrative approach." *See* Proposed Rules of Professional Conduct and Related Comments 33 (September 1, 1988);[7] D.C. Rule 3.3(b). In addition, the Court struck comments 12 through 15A, which had explained the approach of the Jordan Committee, and amended comment 8 to make it clear that false testimony would seldom be condoned and, equally important, that the manner of its presentation would be solely by the narrative approach:

> [8] Paragraph (b) allows the lawyer to ~~offer the false testimony of~~ permit a client who is the accused in a criminal case to present false testimony in very narrowly circumscribed circumstances and in a very limited manner.

*Id.*, at 34 (underlining shows Court's additions).

In response to the Proposed Rule, the Litigation Section of the Bar endorsed

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[3] For a full discussion of the evolution of the ABA's position, *see* 1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §§ 3.3:100-3.3:220 (2d ed. 1991 Supp.).

[4] G. Hazard & W. Hodes, *supra*, § 3.3:215, at 602; *see also* Charles W. Wolfram, *Modern Legal Ethics* § 12.5.4 (1986) (criticizing the narrative approach).

[5] Model Rule 3.3 provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal;
>
> (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
>
> * * * * *
>
> (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
>
> (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, *and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.* (Emphasis added).

[6] *See* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[7] Proposed Rule 3.3 showed the following changes to the draft submitted by the Bar:

> (b) WHEN THE WITNESS WHO INTENDS TO GIVE EVIDENCE THAT THE LAWYER KNOWS TO BE FALSE IS THE LAWYER'S CLIENT AND IS THE ACCUSED IN A CRIMINAL CASE, THE LAWYER SHALL FIRST MAKE A GOOD FAITH EFFORT TO DISSUADE THE CLIENT FROM PRESENTING THE FALSE EVIDENCE; IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT, THE LAWYER SHALL SEEK LEAVE OF THE TRIBUNAL TO WITHDRAW;. ~~IF WITHDRAWAL CAN BE ACCOMPLISHED WITHOUT SERIOUS HARM TO THE CLIENT.~~ IF THE LAWYER IS UNABLE TO DISSUADE THE CLIENT OR TO WITHDRAW WITHOUT SERIOUSLY HARMING THE CLIENT, ~~THE LAWYER MAY, AMONG OTHER THINGS, GO FORWARD WITH THE EXAMINATION OF THE CLIENT AND CLOSING ARGUMENT IN THE ORDINARY MANNER.~~ THE LAWYER MAY PUT THE CLIENT ON THE STAND TO TESTIFY IN A NARRATIVE FASHION, BUT THE LAWYER SHALL NOT EXAMINE THE CLIENT IN SUCH MANNER AS TO ELICIT TESTIMONY WHICH THE LAWYER KNOWS TO BE FALSE, AND SHALL NOT ARGUE THE PROBATIVE VALUE OF THE CLIENT'S TESTIMONY IN CLOSING ARGUMENT.
>
> (Additions are underscored).

the position taken by the Court, but the majority of the Courts/Lawyers Section urged a return to the approach recommended by the Board of Governors. See generally Robert E. Jordan, III, Analysis of Comments Submitted to the District of Columbia Court of Appeals in Response to the Court's Order of September 1, 1988, at 59-60 (May 3, 1989). The final version of Rule 3.3 was not changed in response to these comments.

*Application of the Rule to the Present Inquiry*

With the history of D.C. Rule 3.3 in mind, its application to the inquiry at hand is not in doubt.

First, Rule 3.3(b) comes into play when a lawyer "knows" that his client, the accused in a criminal case, intends to testify falsely. That requirement is met here, as the attorney's own investigation was confirmed by his client's admission.[8]

Second, once the Rule comes into play, the lawyer must make a good-faith effort to dissuade the client from testifying falsely. This was done here, but to no avail.

Third, if the lawyer is unable to dissuade the client from giving false testimony, he must seek leave of the tribunal to withdraw unless withdrawal would seriously harm the client. Comment [8] to D.C. Rule 3.3 makes clear that withdrawal is strongly preferred to the presentation of false testimony, and must be attempted absent serious prejudice to the client. Here, the case settled prior to the filing of a motion to withdraw. We are asked, however, to render an opinion on whether such a motion should have been filed.

The facts here are close, but are sufficient to discharge a lawyer from attempting to withdraw. At the time the perjury issue surfaced, it was only a few days before trial, the client was incarcerated, unable to make bail, and had been incarcerated for some time. It was clear that withdrawal would have caused a delay and during the delay the continued incarceration of the client. While pretrial incarceration in and of itself is a hardship, it is not clear that it amounts to the sort of legal prejudice whose existence would excuse the obligation to withdraw.[9] Nonetheless, Comment [8] to Rule 3.3 does appear to contemplate that counsel need not move to withdraw on the eve of trial.[10]

Fourth, where counsel remains in the case, Rule 3.3(b) permits counsel to call the client to testify but such testimony must be solely in a narrative fashion with respect to any testimony that is false. Counsel may not examine his client in such a way as to elicit testimony the lawyer knows to be false, nor may he argue the probative value of the client's false testimony in closing argument. However, Rule 3.3(b) does not prevent the lawyer from engaging in normal examination -- question and answer style -- on subjects where the lawyer believes the client will testify truthfully.[11]

The inquirer asks whether he could assist the client in preparing the narrative statement he would make to the jury containing the perjurious testimony. The inquirer fears that refusal to assist defendant's preparation of the statement would impair the attorney-client relationship. Rules 3.3(a)(2) and 1.2(e) clearly prohibit such assistance, however. Both rules forbid a lawyer from assisting a client to engage in conduct that the lawyer knows is criminal or fraudulent. To aid the defendant in preparing a statement containing false testimony would be assisting him to do just that. Indeed, we reached the same result under the Code of Professional Conduct. Our Opinion No. 79 (Dec. 18, 1979), which was based on DR 7-102(4),(6), and (7), held:

> a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may——indeed, should——do whatever is feasible to prepare his or witnesses for examination.

The prohibition on assisting a client to commit perjury does not, of course, prevent counsel from discussing the legal consequences of the client's proposed course of action. *See* Rule 3.3(a)(2). Moreover, the lawyer can ask the client a general question on direct examination which would elicit the perjurious narrative statement.

Finally, the inquirer asks about the scope of restrictions on his ability to argue his client's case to the jury. Rule 3.3(b) states that the attorney shall not argue the probative value of the client's testimony in closing argument. From the context of this provision, it is apparent that the attorney is prohibited only from arguing the *false* testimony to the jury.[12]

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[8] Courts have required a substantial level of knowledge before the attorney may take steps to avoid or remedy the purportedly false testimony. *See, e.g., United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3rd Cir. 1977) (requiring a "firm factual basis"); *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989) (requiring knowledge "beyond a reasonable doubt" that client will commit or has committed perjury).

[9] In this regard, Comment [8] states:

> Serious harm to the client sufficient to prevent the lawyer's withdrawal entails more than the usual inconveniences that necessarily result from withdrawal, such as delay in concluding the client's case or an increase in the costs of concluding the case. The term should be construed narrowly to preclude withdrawal only where the special circumstances of the case are such that the client would be significantly prejudiced, *such as by express or implied divulgence of information otherwise protected by Rule 1.6.* If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. * * * In those rare circumstances in which withdrawal without such serious harm to the client is impossible, the lawyer may go forward with the examination of the client and closing argument subject to the limitations of paragraph (b).
>
> (emphasis added).

[10] Comment [8] provides in this respect:

> Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

It is unclear whether the Comment simply makes the factual statement that many courts will not let counsel withdraw on the eve of trial or whether delay on the eve of trial is a harm sufficient to excuse a request to withdraw. If there is such harm, it is perhaps caused by the need for counsel seeking to withdraw on the eve of trial to give justification for such a motion, since justification sufficient to obtain a continuance from judges not prone to grant motions causing last minute trial delays, may itself risk improper disclosure of confidential information. *See* Rules 1.6 and 3.3(d). Indeed, a last minute motion accompanied by silence might well be tantamount to a statement that the client wishes to put on perjured testimony.

[11] ABA Proposed Standard 4-7.7(c) permitted the lawyer to identify his client as the defendant and to ask appropriate questions when counsel believed that the defendant's answers would not be perjurious. From an advocacy standpoint, the attorney may wish to ask specific questions on safe subjects both at the outset and conclusion of the testimony, sandwiching the narrative testimony in between, so as to avoid calling undue attention to the change in style. *See generally People v. Lowery*, 366 N.E. 2d 155, 158 (Ill. App. 1977) (holding that the defendant was not prejudiced by giving narrative testimony where counsel asked specific preliminary and concluding questions.)

[12] Proposed ABA Standard 4-7.7(c) provided that a lawyer may not "argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument."

Since, according to the inquirer, the false testimony would have constituted only a small portion of the defense, the attorney could argue the weight of the non-perjurious portion of the testimony to the jury. In addition, defense counsel can always argue that the government has not sustained its burden of proving the defendant guilty beyond a reasonable doubt.

The inquirer also asks whether it would be appropriate to say in closing argument: "You heard him [the defendant] say the police arrested the wrong man" or "If you believe the defendant you should vote not guilty." Whether such statements are permissible depends upon the remainder of the defendant's testimony, information this Committee lacks. If the defendant's testimony would have consisted *solely* of false statements regarding his clothing, then for counsel to argue for the client's credibility would be tantamount to an impermissible argument for the truth of the perjured testimony. If, on the other hand, the defendant offers some truthful testimony in his or her defense, counsel could argue the credibility of that testimony in closing even though to urge the defendant's credibility when some testimony is false is to some extent to further the client's perjury.

Inquiry No. 91-6-30
March 8, 1993

*Opinion No. 235*

**Registered Limited Liability Partnership/Limited Liability Company**

• Members of the District of Columbia Bar may practice in the District of Columbia as partners and associates of a law firm headquartered outside the District that is organized under the law of a state as a "registered limited liability partnership" or as a "limited liability company." In any such case the formal name under which the law firm's District of Columbia office practices must include the words "registered limited liability partnership" or "limited liability company," as the case may be, not merely the abbreviation "L.L.P." or "L.L.C.," as the case may be, as the last words of its name.

**Applicable Rules**

• **Rule 1.4(b)**(Communication)
• **Rule 1.8(g)**(Prospective Limitation of Liability)
• **Rule 5.4(b)**(Professional Independence of a Lawyer)
• **Rule 7.1(a)**(Communications Concerning a Lawyer's Services)
• **Rule 7.5(b)**(Firm Names and Letterheads)

*Inquiry*

In this Opinion we deal with two similar inquiries.

One of the inquirers is a Texas-based law firm (the "Texas Firm"), which is currently organized as a general partnership under the Texas Uniform Partnership Act (the "Texas Act"). The Texas Firm has offices in the District of Columbia and other locations. The Texas Firm is contemplating registering under Texas law as a "registered limited liability partnership" pursuant to recently amended provisions of the Texas Act. Under the Texas Act as amended, the Texas Firm would continue to be a general partnership. For our purposes the significant consequence of the Texas Firm's registration as a "registered limited liability partnership" is that the Texas Act as amended purports to limit in certain material respects the personal liability of a partner for legal malpractice committed by another partner or employee of the Texas Firm. Specifically, amended section 15 of the Texas Act includes new paragraphs (2), (3) and (4), which read in their entirety as follows:

> "(2) A partner in a registered limited liability partnership is not individually liable for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed in the course of the partnership business by another partner or a representative of the partnership not working under the supervision or direction of the first partner at the time the errors, omissions, negligence, incompetence or malfeasance occurred, unless the first partner:
>
> (a) was directly involved in the specific activity in which the errors, omissions, negligence, incompetence or malfeasance were committed by the other partner or representative; or
>
> (b) had notice or knowledge of the errors, omissions, negligence, incompetence or malfeasance by the other partner or representative at the time of occurrence.
>
> (3) Paragraph (2) does not affect the joint and several liability of a partner for debts and obligations of the partnership arising from any cause other than those specified in Paragraph (2).
>
> (4) Paragraph (2) does not affect the liability of partnership assets for partnership debts and obligations."

In summary, the above-quoted provisions of the Texas Act purport to absolve a partner (the "First Partner") from personal liability for the legal malpractice of another partner or employee of the Texas Firm if the First Partner:

> (a) was not the supervisor of the person who committed the malpractice;
>
> (b) was not directly involved in the activity in which the malpractice was committed by the other person; and
>
> (c) was not aware of the malpractice at the time it was committed.

As indicated by Paragraph (4) of section 15 of the amended Texas Act quoted above, the Texas Firm as an entity remains fully liable, and all of the assets of the Texas Firm (capital, billed and unbilled receivables from clients, malpractice insurance proceeds, etc.) are available without limitation to satisfy any liability for legal malpractice.

The Texas Act as amended requires that a registered limited liability partnership's name must contain the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name. The Texas Act also requires that such partnerships "must carry, if reasonably available, at least $100,000 of liability insurance of a kind that is designed to cover" the type of liability described in the new paragraph (2) of section 15 quoted above.

The Texas Firm inquires whether, if it becomes a "registered limited liability partnership" under the Texas Act, it is permitted to practice through its District of Columbia office under its current firm name, followed by the words "registered limited liability partnership" or the abbreviation "L.L.P." as the last words or letters of its name.

The other inquirer is a Colorado-based law firm ("the Colorado Firm") that proposes to reorganize itself as a "limited liability company" under the law of Delaware. The Colorado Firm advises us that Delaware and several other states have recently enacted legislation permitting a law firm or other professional firm to practice as a "limited liability company." We are advised that under those newly enacted state laws a limited liability com-

pany is not a corporate entity but is in substance a partnership having personal liability limitation features that are substantially the same as the personal liability limitations in those states' existing professional corporation statutes. Typically these limited liability company statutes require that a law firm's name include the words "limited liability company" or the abbreviation "L.L.C." as the last words or letters of its name.

The Colorado Firm inquires whether, if it becomes a "limited liability company" under Delaware law, it is permitted to practice through its District of Columbia office under its current firm name, followed by the words "limited liability company" or the abbreviation "L.L.C." as the last words or letters of its name.

Our research discloses that there are certain differences throughout the country between and among the various "limited liability partnership" statutes and the various "limited liability company" statutes (enacted and proposed, including a proposed "limited liability partnership" law that was under consideration by the District of Columbia Council on the date this Opinion was approved). Therefore, in the interests of clarity and simplicity, we shall address the issues by reference to the Texas Firm and the Texas Act, with the understanding that the guidelines contained herein will have general applicability, and may be relied upon by other similarly-situated law firms organized pursuant to a state law outside the District of Columbia, thus largely obviating the need for further Opinions of this Committee on this subject.

*Discussion*

As we have often observed, this Committee's jurisdiction extends only to matters of legal ethics. We therefore express no opinion on important questions of general law that are necessarily implicated in this inquiry (e.g., whether courts in the District of Columbia or elsewhere would give extraterritorial effect to the liability limitation contained in the Texas Act, or what force and effect the Texas courts themselves might accord to such limitation of liability provisions).

We hold that as a matter of legal ethics it is permissible for the Texas Firm to practice through its District of Columbia office under its current firm name, provided that the firm name is followed by the words "registered limited liability partnership," not merely the abbreviation "L.L.P.," as the last words of its name.

Basically, the limitation of liability for legal malpractice contained in the amended Texas Act is in substance the same as the limitation of liability that has been common, and has become accepted by the legal profession and the public, in many professional corporation statutes throughout the country, including the District of Columbia. Indeed, the Texas Act's limitation of liability is slightly narrower than the limitation of liability contained in section 11 of the District of Columbia Professional Corporation Act (see D.C. Code § 29-611) and in many other professional corporation statutes throughout the country in that mere knowledge of the malpractice of another is not a basis for personal liability under those statutes, whereas under the Texas Act it is.

As the movement toward incorporation of law firms, and the consequent diminution in partners' (or, more precisely, stockholders') personal liability, developed in the 1970's, the guiding principles remained those originally established in Formal Opinion 303 (November 27, 1961) of the ABA Standing Committee on Ethics and Professional Responsibility: the practice of law in corporate form was ethically permissible provided:

> "(1) The lawyer or lawyers rendering the legal services to the client must be personally responsible to the client.
>
> (2) Restrictions on liability as to other lawyers in the organization must be made apparent to the client."

Typically both of the foregoing legal ethics requirements have been codified by explicit provisions in the various state professional corporation statutes. In particular, those statutes (including the District of Columbia Act) virtually without exception do not absolve a lawyer from personal liability for his or her own malpractice, and require that the name of an incorporated law firm include the words "professional corporation" or "professional association" or the abbreviations "P.C." or "P.A." or some similar indication of a law firm's corporate status. Consistent therewith, DR 2-102(B) of the District of Columbia Code of Professional Responsibility, which was in effect through December 31, 1990, provided that the name of a professional corporation or professional association could contain the abbreviation "P.C." or "P.A."

There is no literally exact successor to the previous DR 2-102(B) in the District of Columbia Rules of Professional Conduct, but Rule 5.4(b) expressly reconfirms the now well-settled and accepted principle that "[a] lawyer may practice law in a partnership or other form of organization . . . ." The Terminology section of the Rules defines a law firm "partner" as a member of a partnership or a shareholder in a professional corporation.

Thus, it is now beyond doubt that D.C. Rules 1.4(b) and 7.1(a) are satisfied by use of the abbreviation "P.C." or "P.A." in the case of an incorporated law firm. Further, D.C. Rule 1.8(g) (which proscribes prospective limitation of malpractice liability) is not violated if the individual lawyer who committed the malpractice remains personally liable to the client in all events, and if the client is made aware of the limitation of personal liability of the other lawyers in the law firm who were not involved in the malpractice. The Texas Act satisfies those conditions.

In summary, we conclude that it is ethically permissible for the District of Columbia office of the Texas Firm to practice as partners and associates of a Texas "registered limited liability partnership" because the limitation of liability under the Texas Act in substance is not broader than the limitation of liability contained in section 11 of the District of Columbia Professional Corporation Act:

> "An individual shall be personally liable and accountable only for any negligent or wrongful acts or misconduct committed by him, or by any individual under his supervision and control . . . ." (D.C. Code § 29-611 (1981 ed.))

The Texas Firm has advised us that, as permitted by the Texas Act, it intends to use merely the "L.L.P." abbreviation in Texas, and inquires whether the use of the initials "L.L.P." is permissible in the District of Columbia, or whether the somewhat more descriptive "registered limited liability partnership" is ethically required.

We conclude that, at least for the time being, the abbreviation "L.L.P." is not sufficient, and that the Texas Firm's name must include the words "registered limited liability partnership" as part of its name so that clients will be more likely to be alerted to and comprehend the limited liability features of that form of organization. The concept of a "registered

limited liability partnership" (as well as the concept of a "limited liability company") is unfamiliar to citizens of the District of Columbia, including many experienced lawyers in the District of Columbia. There may come a time in the not too distant future when, either by District of Columbia Council action, or otherwise, the implications of the abbreviation "L.L.P." will be as well understood as the implications of the historically more common abbreviations "P.C." or "P.A.," but until that time comes we are not disposed to approve the use in the District of Columbia of the abbreviation. (We note that the abbreviations "L.L.P." and "L.L.C." are especially infelicitous in that they closely resemble the abbreviation "L.L.B.," which for decades until the 1970's the public and clients understood to be the description of a person who possessed a law degree).

We are not unmindful of District of Columbia Rule 7.5(b), which provides that "a law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, . . . ." Nevertheless, we hold that this technical Rule was not intended to apply where there is a risk that District of Columbia clients will be misled or harmed.

The foregoing holding applies to the identification of the Texas Firm on whatever written material emanates from its District of Columbia office and/or from its lawyers who are based in the District of Columbia office: for example, but not by way of limitation, stationery, envelopes, The Legal Register, Martindale-Hubbell, business cards, professional announcements, brochures, and media advertisements. The only exceptions to the foregoing are the unpaid line item listings in the white and yellow telephone books, where because of space limitations and format we believe the use of the initials "L.L.P." is tolerable.

Further, when faced with the inevitable inquiries from clients, the Texas Firm must provide either orally or in writing a plain-English summary of the limitation of liability features of the Texas Act. We believe that for this purpose it would suffice to describe the limited liability features of the Texas Act in substantially the form set forth above in this Opinion immediately following the quoted provisions of amended section 15 of the Texas Act.

As indicated above, the fundamental principle on which this Opinion rests is that the limitation of liability under the Texas Act in substance is not broader than the limitation of liability that currently appears in section 11 of the District of Columbia Professional Corporation Act. We believe that in some states it is not completely clear on the face of the particular state's limited liability partnership statute or the state's limited liability company statute whether the limitation of liability in those statutes in substance is not broader than the District of Columbia Professional Corporation Act limitation of liability. It is not this Committee's function to interpret the numerous state laws that might be relevant as various law firms analyze and attempt to comply with this Opinion. We suggest that, if a relevant state statute is not clear on its face, a law firm would be well advised to seek an opinion from local counsel on the issue whether the limitation of liability in the jurisdiction is in substance not broader than the District of Columbia limitation of liability, and if necessary in appropriate cases clarify and confirm in the organic documents (certificate of partnership, statement of organization, etc.) precisely the circumstances under which the personal liability of individual members of the law firm is limited.

Inquiry Nos. 92-9-32 and 92-11-47
Approved: February 16, 1993

*Opinion No. 236*

**Divulging Client Confidences And Secrets In A Bankruptcy Proceeding In Order To Collect Fees Is Permitted In Limited Circumstances**

- An attorney may divulge client confidences and secrets in order to collect fees but only where such disclosure is made in the course of a legal proceeding, is as narrow as possible and there is a good-faith expectation of more than a *de minimis* recovery.

**Applicable Rule**

- **Rule 1.6 (d)(5)** (Divulging Client Confidences And Secrets)

*Inquiry*

The inquirer presents the following situation. His firm was retained by a California resident for whom it provided services and by whom it is owed fees. Upon threat of a collection action, the client began to make monthly payments. The client subsequently filed a petition for bankruptcy seeking to discharge, among other debts, the debt to the inquiring law firm. This petition has pre-empted any effort by the firm to collect the fees which it is owed. The bankruptcy is being treated as a "no asset" proceeding. The inquiring firm has been instructed not to file a proof of claim with the trustee and it is quite unlikely, if the proceeding continues in this form, that the firm will recover any of its fee which is still outstanding.

As a result of its representation of the client, the firm has reason to believe that the client's representations to the bankruptcy court regarding the nature of her assets and liabilities may not be accurate or complete. This information is based on information supplied during the course of the representation although some of the information is also a matter of public record. The inquirer asks whether, as part of an effort to collect its fees, it is permissible to disclose through proceedings available in the bankruptcy court, the information in the firm's possession regarding the client's assets.

*Discussion*

Rule 1.6(d)(5) provides that:

> A lawyer may use or reveal client confidences or secrets . . . to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee.

This stands as a limited but well-recognized exception to the general rule regarding the confidentiality of client information. It is based on "the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." Rule 1.6, Comment [24].[1] The exception has been applied to bankruptcy proceedings. For example, the Maryland Bar has construed the corresponding code section to permit an attorney to pursue an Application for Allowance of Fees and Disbursements to be paid by the bankruptcy estate under the provisions of the Bankruptcy Code

[1] *See also Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1120 (7th Cir. 1976)(permits fee collection action to proceed based on this exception to attorney-client privilege); *Nakasian v. Incontrade, Inc.*, 409 F. Supp. 1220, 1224 (S.D.N.Y. 1976)(attachment of client funds facilitated by use of confidential information permissible); ABA Center for Prof. Resp., Anno. Model Rules of Prof. Conduct (1991) at 88 ("A lawyer entitled to a fee is permitted. . .to prove the services rendered in an action to collect it") and at 96 (citing *Cannon v. U.S. Acoustics Corp*).

which could involve client confidences and secrets. Committee On Ethics of the Maryland State Bar Association Opinion 83-19 (9/27/82). The Los Angeles County Bar Association has determined that a lawyer who had represented a client in a bankruptcy case and was discharged by the client may file a claim for fees in the bankruptcy court as well as proceedings to have his debt declared non-dischargeable. Ethics Committee of the Los Angeles County Bar Association Opinion 452 (11/21/88).

The comments to Rule 1.6 emphasize that any disclosure should be as narrow as possible and that the lawyer should seek the use of John Doe pleadings, in camera proceedings, and/or protective orders where possible to avoid the unnecessary disclosure of information. *Id. See also* "Annotated Model Rules of Professional Conduct" at 88 (". . . the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.") Moreover, disclosure is not permitted in non-fee proceedings. *See Florida Bar v. Ball*, 406 So. 2d 459 (Fla. 1981)(lawyer suspended for disclosing to adoption agency that clients had not paid the lawyer's fee and thus might be a financial risk); *Matter of Nelson*, 327 N.W. 2d 576, 578-79 (Minn. 1982)(ethical violation where attorney, following fee dispute, reported client's alleged tax violations to state authorities).

The course of action proposed by the inquirer regarding the collection of his fees[2] is permitted under the governing Rule assuming several conditions are met.[3] First, so long as the proposed disclosure is made by the lawyer in a proceeding initiated by the attorney or otherwise in the context of an ongoing legal proceeding, it is properly considered to be part of an "action instituted by the lawyer." In the absence of any specific authority to the contrary, it is the view of the Committee that this language limits only disclosures made out of the context of formal proceedings.[4] Second, the proposed disclosure to the bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to protect the identity and interests of the client.

Finally, the inquirer must have a good faith expectation of recovering more than a *de minimis* amount of the outstanding fee. It must be emphasized that the exception in the Rule only goes to an attempt to "establish or collect" a fee. It does not permit the disclosure of client confidences or secrets for any other reason. This includes an effort to bring a potential fraud to the attention of the court, salutary as the underlying policy concern may be. *Cf. Matter of Nelson, supra.* As a result, if, for whatever reason, the lawyer does not have a reasonable expectation of more than a *de minimis* recovery, the disclosure would violate the rule.

In sum, the well-established but narrow exception to the general rule against revealing client confidences and secrets based in Rule 1.6(d)(5) permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances.

Inquiry No. 92-10-36
Adopted: February 9, 1993

*Opinion No. 237*

**Conflict of Interests: Previous Representation of Witness in Unrelated Matter**

• An attorney may represent a defendant in a criminal case, even though another attorney in his or her office formerly represented an individual who is now a witness in that case if (1) the agency's representation of the person who is the witness was in an unrelated case; (2) the attorney involved in the current case does not actually possess any confidences or secrets of the former client; and (3) the agency takes adequate steps to screen that attorney from any such confidences and secrets.

**Applicable Rules**

• **Rule 1.6** (Confidentiality of Information)
• **Rule 1.7** (Conflict of Interest: General Rule)
• **Rule 1.9** (Conflict of Interest: Former Client)
• **Rule 1.10** (Imputed Disqualification)

*Inquiry*

The Public Defender Service (PDS) has requested an opinion about the responsibilities of its attorneys in the following situation: PDS Attorney #1 represented Client #1, who was a defendant in a Burglary case. This case is now closed. PDS Attorney #2 is appointed to represent Client #2 in a separate Assault case. Attorney #2 discovers that Client #1 is the complainant or an essential government witness. Attorney #2 learned about this possible conflict in a way other than through discussions with Attorney #1 (*e.g.*, by checking the court file or from discussions with the U.S. Attorney or with witnesses).

PDS has represented that if Attorney #2 is allowed to continue to represent Client #2, it will screen Attorney #2 from any information about Client #1 by preventing him or her from having access to Client #1's files and from discussing the case with Attorney #1.

*Discussion*

The Public Defender Service's inquiry raises the issues of: (1) whether there is a conflict of interest between the representation of the former client and the new client; and (2) the extent to which an attorney representing a new client will be subject to imputed disqualification because another attorney in the same office represented the former client.

Since the inquiry presumes the involvement of two attorneys, the analysis of the issues raised must begin with an understanding of the requirements of Rule 1.10. In general, this Rule prohibits one attorney in a "firm" from undertaking any matter for which any other member of the firm would be disqualified. The Commentary to Rule 1.10 states that the term "firm" encompasses legal services agencies. *See* Comment 1.[1] Assuming

[2] Neither the inquiry nor this opinion directly addresses the nature of client confidences and secrets that may be disclosed in order to establish a fee.

[3] This Committee does not decide factual questions; we therefore express no opinion regarding the underlying facts here.

[4] The earlier version of Rule 1.6(d)(5), which is found in DR 4-101(C)(4), permitted a lawyer to reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." The history of Rule 1.6 does not explain this change in language.

[1] Although the Commentary also notes that "whether the lawyers should be treated as associ-

that the attorneys at PDS are the equivalent of "lawyers [who] are associated in a firm," Rule 1.10(a) specifies that none of the agency's attorneys "shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(b), 1.9, or 2.3."

Because the issue in this case is whether there is a conflict of interest involving a former client, Rule 1.9 applies. This Rule states:

> 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 interest are materially adverse to the interest of the former client unless the former client consents after consultation.

Thus, Attorney #2 cannot represent Client #2 if his or her case is the "same" or "substantially related" to the case in which Attorney #1 represented Client #1. Under the facts set forth by PDS here, however, the representation of Client #1 was in Client #1's own case -- not as a participant in case #2. These two representations are clearly not in the "same matter."[2]

The more difficult question is whether the two representations are in "substantially related" matters. The Rules do not define "substantially related," other than to note that Rule 1.9 was "intended to incorporate federal case law" that defines the term. Rule 1.9, Comment 2. For guidance, the commentary points to *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953), *aff'd*, 216 F.2d 920 (2d Cir. 1954), and "its progeny."

The difficulty with this direction, however, is that the definition provided by this case law is still uncertain.

In *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984), the Court of Appeals indicated that the methodology to be used "for determining whether two matters are substantially related" begins with an analysis of the facts and legal issues to determine, in the first instance, whether the factual contexts of the two matters overlap. If they do, further analysis is required. 486 A.2d at 49; *see also Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978).

In the facts as set forth by PDS, the subject matter of the two representations are not the same or substantially related. Thus, under Rule 1.9, Attorney #2 should be able to continue to represent Client #2.

Even if Rule 1.9 is satisfied, however, Rule 1.6 may prohibit the subsequent representation of Client #2 if Attorney #2's representation would violate any of Client #1's confidences or secrets. Rule 1.6 prohibits a lawyer from knowingly "us[ing] a confidence or secret of the lawyer's client to the disadvantage of the client . . . [or] for the advantage of the lawyer or of [another]."

Under the facts here, in all likelihood, Attorney #1 possesses confidences or secrets of Client #1 that might be helpful to Client #2, but Attorney #2 does not personally possess such information. Unlike the proscriptions of Rule 1.9, Rule 1.10 does not impute a disqualification to Attorney #2 based on Rule 1.6.

Comment 11 to Rule 1.10 explains that preserving confidentiality turns on the issue of whether there has been "an access to information" about a specific client. This issue, in turn, depends on the "fact[s] in particular circumstances." The commentary notes that some lawyers have general access to the files of all clients in the firm, and some do not. It concludes that "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 and not those of other clients." *See also Brown*, 486 A.2d at 42, n. 5.

In this case, Attorney #2 has not received any confidential information from Attorney #1 or Client #1's confidential files. The Public Defender Service has represented that when one of its attorneys learns that a past client may be a witness against a current client, an attorney supervisor will take custody of the past client's files and secure them in a locked file cabinet to which Attorney #2 does not have access. Both Attorneys #1 and #2 are instructed that they may not discuss their cases or clients with each other or in each other's presence. These efforts are consistent with the proscriptions of ABA Formal Opinion 342 (1975) and *Brown*, 486 A.2d at 42. Thus, Rule 1.6 will not serve to disqualify Attorney #2 since he or she has not actually gained confidential information nor will he or she be exposed to it.

Consistent with Rule 1.4, Client #2 should be informed about the fact that PDS represented the witness against him at an earlier point and the limitations on Attorney #2's ability to use any of Client #1's confidences or secrets that the office might have in its possession.[3]

Inquiry No. 91-6-28
November 17, 1992

*Opinion No. 238*

**Written Fee Agreements**

- When a written fee agreement is required, the agreement must adequately inform the client of the basis or rate of the fee. In addition, fixed fee agreements must cover all reasonably foreseeable services necessary to provide competent representation.

**Applicable Rules**

- **Rule 1.1** (Competent Representation)
- **Rule 1.4(a)** (Communication Between Attorney and Client)
- **Rule 1.5(b)** (Written Fee Agreement Requirement for New Clients)

*Inquiry*

The inquiring attorney handles cases on what he describes as a "flat fee" basis for enumerated services. The retainer agreement at issue, which involves an immigration representation, states that the client is "entitled" to one "office visit, telephone conference, or other consultation with staff members." It further states that "additional office visits and/or telephone consultations not spe-

ated with each other can depend on the particular rule that is involved, and on the specific facts of the situation" (*see* Comment 3), in the circumstances presented in this case, the result will be the same whether or not the Public Defender Service is treated as a "firm".

[2] Clearly, an attorney could not represent Client #2 if he or she represented #1 in his capacity as a witness in the Assault case. *See* Opinion No. 232.

[3] There may be some who may detect "an appearance of impropriety" in the public defender service's attempt to impeach a former client. This standard is no longer found in the Rules of Professional Conduct. Rather, the Rules specify what conduct is allowed and what is not. Moreover, even if this standard still existed, it is "too slender a reed" to require disqualification. "*United States v. Judge*, 625 F. Supp. 901, 903 (D. Hawaii 1986).

cifically mentioned will be charged at specified hourly rates. A dispute has arisen between the inquirer and a client regarding the appropriate charges for additional consultations.

While the retainer agreement states that only one consultation is included in the "flat fee," the inquirer's letter to the Committee states that he will not make an additional charge if "we contact the client to perform those services [specified in the retainer agreement] or if the client contacts us when we would need that contact in an effort to perform the specific services for which we are retained." A third version of the operative rule appears in a letter from the inquirer to a second attorney who became involved in the fee dispute. This letter states that there is no charge when a client calls to get updated status information from a paralegal, nor is there a charge for a consultation when "milestones" in a case are reached.

*Discussion*

Fixed fee agreements serve the important purpose of making legal services available to persons who might otherwise not be able to afford an attorney. However, such agreements cannot be used to circumvent basic principles governing the relationships between attorneys and clients. This inquiry presents two issues, both of first impression. The first addresses the requirement, new in the Rules of Professional Conduct, that fee agreements must be reduced to writing. The second is whether, when a fixed fee agreement is entered into, there are certain services which must be covered by the fixed fee and not subject to additional charges.

*1. When a Written Fee Agreement is Required, the Agreement Must Inform the Client of the Basis or Rate of the Fee*

For clients "not regularly represented" by the lawyer, Rule 1.5(b) requires the lawyer to communicate to them, in writing the "basis or rate of the fee." The comments to Rule 1.5(b) explain that the requirement has been introduced in order to establish "an understanding as to the fee," Comment [1] and to reduce "the possibility of misunderstanding." Comment [2]. The Rule recognizes that "[i]t 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." Comment [1]. The comments specifically recognize that fixed fee schedules may meet the requirement of the Rule, so long as the schedule "adequately informs the client of the charges to be imposed." Comment [3].

The facts presented by this inquiry amply demonstrate the importance of this Rule. In this case, it is simply not possible to discern how charges are assessed for consultations beyond the one consultation enumerated in the fee agreement. Indeed, it appears that the assessment of such fees is purely at the attorney's discretion. This has led to a breakdown of the attorney-client relationship, the introduction of a second attorney into the dispute, and a letter of inquiry to this Committee. While there is a written retainer agreement, it is more than apparent that such writing does not adequately explain the "basis or rate" of the fee. It is the Committee's view that the fee agreement at issue does not comport with the requirements of Rule 1.5.

*2. Fixed Fee Agreements Must Cover, as Part of the Fixed Fee, Those Reasonably Foreseeable Services That are Necessary to Provide Competent Representation*

The second question involves the extent to which services covered by a fixed fee may be limited. As with the agreement that is the subject of this inquiry, it is apparently common for fixed fee agreements to include certain services in the fixed fee and then to provide for further services at an additional hourly rate. It is the view of the Committee that the fixed fee must include those reasonably foreseeable services that are necessary to provide competent representation. *See* Rule 1.1(a) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

A fixed fee agreement is attractive precisely because it offers a predictable and affordable fee, typically for a routine legal matter. As Comment [3] to Rule 1.5 states, "[s]uch services as routine real estate transactions, uncontested divorces, or preparation of simple wills, for example, may be suitable for description in . . . a fixed fee schedule." If necessary services are billed at hourly rates in addition to the fixed fee, clients may not be able to afford such services or may choose to forego necessary legal services in order to achieve savings. Moreover, lawyers may not provide additional necessary services based on a concern that their clients may not be able to pay for them.

Comment [5] to Rule 1.5 explains that it is improper to enter into a fee agreement that might lead to the curtailment of necessary legal services. It states, in pertinent part:

> 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 fixed fee agreement that does not provide for foreseeably necessary services runs afoul of this principle.

The Committee does not intend to suggest by this opinion that a lawyer is required to consult with a client at the client's whim or to provide services that are not reasonably necessary to the competent provision of the agreed-upon representation. *See* Rule 1.2(c) regarding permissible limitations on the scope of representation. However, the lawyer does have the responsibility, in drafting a fixed fee agreement, to anticipate those services that will be reasonably necessary to competently carry out the agreed-upon representation. Complications and unforeseeable events will occur in certain representations, and a lawyer is not precluded from making additional charges in such circumstances. The test is whether such events are reasonably foreseeable at the outset of the representation. If so, attendant legal services must be covered by the fixed fee.

We recognize that this opinion may result in increases in fixed fees charged for the provision of certain legal services. However, this result is preferable to the enticement of clients with an unreasonably low fee schedule and leaving them in mid-representation with unanticipated -- and possibly unaffordable -- legal fees.

Regarding the pending inquiry, the Committee is not a finder of facts and is not in a position to render an opinion as to whether limiting a client to a single consultation during the course of the particular representation is reasonable. We do note that the requirement in Rule

1.4(a) that "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information," suggests that such a limitation may not be reasonable. Indeed, the lawyer's obligation in this regard is underscored in Comment [2] to Rule 1.4 which states that, "[a] client is entitled to whatever information the client wishes about all aspects of the subject matters of the representation unless the client expressly consents not to have certain information passed on." Moreover, "the lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." *Id.*

Of course, a lawyer is not limited to a single model for the required consultation and may, in appropriate circumstances, rely on paralegal or other staff members to communicate with the client rather than devote more costly attorney time. This may be particularly true in connection with those routine legal matters that are likely to be the subject of fixed fee agreements. *See* comment [4] to Rule 1.4 ("[w]here many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.")

In sum, a written fee agreement, when required, must adequately inform the client of the basis or rate of the fee to be charged. In addition, fixed fee agreements must include, as part of the fixed fee, those reasonably foreseeable services that are necessary to provide competent representation.

Inquiry No. 91-9-36
Adopted: June 15, 1993

*Opinion No. 239*

## Attorney-Client Relationship Between a Lawyer and Her Firm; Reporting of Professional Misconduct

• In preparing memoranda concerning her law firm's claim under a fee agreement with a client, at the request of the firm, a lawyer stands in an attorney-client relationship with the firm for purposes of the firm's fee claim. She therefore is prohibited by Rule 1.9 from subsequently representing the client against the firm in connection with that claim. She also may be precluded by Rule 1.6 from acting as a witness or otherwise assisting the client in the matter, if doing so would require her to disclose confidences or secrets gained in the course of her representation of the firm.

A lawyer is not required by Rule 8.3 to report to disciplinary authorities or to a client mere suspicions that another lawyer has engaged in unethical conduct.

### Applicable Rules

• **Rule 1.6** (Confidentiality of Information)
• **Rule 1.9** (Conflict of Interest: Former Client)
• **Rule 8.3(a)** (Reporting Professional Misconduct)

*Inquiry*

The inquirer formerly worked as an associate at a D.C. law firm. The matter that occasioned her inquiry involves a possible claim for attorneys fees by her former law firm under a fee agreement with a client originally brought by her to the firm. First, she asks whether either her work as an associate at the firm on the matter governed by the fee agreement, or her subsequent preparation of memoranda to be used by the firm in support of its claim against the client under that agreement, disqualifies her from appearing as a witness for the client or otherwise assisting him in the event he becomes involved in a dispute on the fee with her former firm. She also wishes advice as to her obligation under Rule 8.3(a) to report to bar disciplinary authorities certain activity by lawyers in her former firm.

*1. Attorney-Client Relationship Between a Lawyer and her Firm - Conflict of Interest in Subsequent Representation*

It is the Committee's view that, in preparing the memoranda on the law firm's claim under the fee agreement, at its request, the attorney was representing the law firm with respect to this matter, and stood in an attorney-client relationship with the firm. Rule 1.9 of the D.C. Rules of Professional Conduct provides that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same matter where that person's interests are adverse to those of the former client unless the former client consents after consultation. Accordingly, in these circumstances, the inquirer is prohibited from representing the client with respect to the firm's fee claim without the firm's consent.

The prohibition of Rule 1.9 is grounded in the lawyer's obligation under Rule 1.6 to protect confidences and secrets acquired in the attorney-client relationship, and this obligation continues after termination of the lawyer's employment. The lawyer's obligation to her former law firm under Rule 1.6 may thus also preclude her acting as a witness for or otherwise assisting the client in connection with the fee claim, if such assistance would entail disclosure of any confidences or secrets acquired in the course of performing work on the fee claim for the firm.

The inquirer makes no reference to any employment agreement she may have had with the firm, and the Committee expresses no views as to whether she may have some obligations in that context as well.

*2. Reporting of Professional Misconduct*

The lawyer also wishes to know whether she has an affirmative duty to report, to bar counsel or to the client, her belief that her former firm may have destroyed documents that would support the client's defense to a fee action brought by the firm. She does not specify what documents these might be, or when or how such destruction may have taken place; indeed, she specifically states that she is "not certain" that the destruction did in fact occur. She also asks whether she has a duty to report to bar counsel or to the client that one of the partners in her former firm may have used a recording device on his office telephone to record conversations with clients without their knowledge.

Rule 8.3(a) requires a lawyer to report to bar counsel if he or she has "knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects . . . ." A failure to report where there is a duty to do so may itself be grounds for discipline. While Rule 8.3(a) has not been the subject of interpretation in this jurisdiction, it has been interpreted in other jurisdictions to require reporting only where there is "specific knowledge" of a "clear violation" of the ethics rules; "mere suspicions" of misconduct or unethical behavior need not be reported. See *e.g.*, New York City Ethics Opinion 1990-3; *Williamson* v. *Council of North Carolina Bar*, 46 N.C. App. 824, 266 S.E. 2d 391 (1980). Moreover, Rule 8.3(a) has been

interpreted not to require reporting of all misconduct, but only that which raises "a substantial question" as to the other lawyer's honesty, trustworthiness or fitness.

Based on inquirer's description of the conduct at issue, the Committee cannot conclude that there is any duty on the lawyer's part under Rule 8.3(a) to report to bar counsel. The lawyer does not indicate specific knowledge of any facts that would make either the destruction of documents or the undisclosed tape recording a violation of any particular ethical rule. Indeed, by her own account she is not even certain that either activity in fact occurred. Moreover, even assuming that some documents were destroyed and some conversations surreptitiously tape recorded in violation of the ethics rules, we are not in a position, based on the limited facts before us, to say whether any resulting violation of the rules would present a "substantial question" about another lawyer's honesty, trustworthiness, or fitness. Finally, neither Rule 8.3(a) nor any other ethical rule would put the attorney under an obligation to report to the client.

Inquiry No. 91-6-24
Adopted: June 16, 1993

*Opinion No. 240*

**Ethical Obligations of D.C. Corporation Counsel Attorneys Representing Custodial Parents in Social Security Act Title IV-D Cases**

• Under Title IV of the Social Security Act of 1975, the District of Columbia Corporation Counsel provides legal assistance for the Child Support Enforcement Program mandated by Congress. Pursuant to this statute, D.C. Corporation Counsel represents both individual petitioners and the Government in actions against non-supporting spouses. (The Government becomes involved when it has been assigned a custodial parent's right to receive child support as a condition of the custodial parent's receiving benefits under the Aid to Families with Dependent Children program.)

In response to an inquiry by D.C. Corporation Counsel, this opinion examines the various potential ethical conflicts that can arise during such representations. In particular, D.C. Corporation Counsel should be concerned with several possible ethical difficulties. First, Corporation Counsel should make sure each petitioner knows both when he or she is, or is not, a client and what the consequences of not being a client are. Second, when Corporation Counsel discovers that it is representing two petitioners against the same respondent, it is advisable under Rule 1.7 to have two different lawyers represent the two petitioners and to take measures to keep the two attorneys from sharing information. Third, when shifts in child custody occur, care must be taken to analyze who was the client, who is now the client, and whether waivers must be obtained under Rule 1.9. In general, given the complexities involved in this form of representation, it is desirable for Corporation Counsel to assign someone to be "Ethics Advisor" to advise the IV-D lawyers of the various ethical dilemmas that may arise in representing IV-D petitioners and to attempt to minimize potential conflicts.

**Applicable Rules**

- **Rule 1.6** (Confidentiality of Information)
- **Rule 1.7** (Conflict of Interest: General Rule)
- **Rule 1.9** (Conflict of Interest: Former Client)
- **Rule 1.10** (Imputed Disqualification)
- **Rule 4.3** (Dealing with Unrepresented Persons)

*Inquiry*

Under Title IV-D of the Social Security Act of 1975, the states, including the District of Columbia, are required to provide child support enforcement services to complement their Aid to Families with Dependent Children (AFDC) program.[1] Specifically, the states are required to maintain a child support program that provides four basic services: (1) locating absent parents, (2) establishing paternity, (3) obtaining child support orders, and (4) enforcing support obligations owed by absent parents to their children and (if applicable) former spouse. These services are provided free of charge to AFDC recipients, who must assign their child support rights to the welfare agency and must agree to cooperate with the agency.[2] For a nominal fee, these services must also be made available to custodial parents who are not eligible for AFDC.[3] In the District, the fee is $5.00.[4]

The current inquiry comes from the Office of the Corporation Counsel, Civil Division, Child Support Section, which provides the legal assistance required for the child support enforcement program.[5] The concern of the inquirer relates to the ethical obligations owed by its attorneys. Specifically, who is the client of a IV-D attorney, what obligations are owed to non-clients, and how can conflicts of interest be avoided? Answers to these questions require an understanding of the interactions among IV-D attorneys, the IV-D agency, and custodial parents (hereinafter referred to as "petitioners").

In general, three types of IV-D cases may arise.[6] In the first case, a custodial parent is an AFDC recipient and has assigned the right to receive child support to the state. In this category, the first $50.00 received goes to the petitioner and the balance -- up to the amount awarded as AFDC aid -- goes to reimburse the government. Any moneys received beyond go to the petitioner and may remove her from eligibility for AFDC aid. The second category includes custodial parents who are former AFDC recipients, now no longer need that aid, but for whom arrears are still owed to the state. Arrears accrue when support payments are insufficient to recompense the state for the AFDC payments laid out to the petitioner. The law provides that any moneys received go first to the petitioner for present support; the remainder, if any,

[1] 42 U.S.C. § 651 *et seq.* (1988).

[2] The assignment is required by statute, 42 U.S.C. § 602(a)(26)(A). The statute also requires the custodial parent, after the assignment of support claims, to cooperate with the IV-D office in establishing and enforcing the claims. 42 U.S.C. § 602(a)(26)(B). Aid recipients are required "to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency ...." *Id.*

[3] 42 U.S.C. § 654(6) provides that the "child support or paternity determination services established . . .shall be made available to any individual not otherwise eligible for such services."

[4] Letter from Arlene Robinson to Thomas Flynn, June 28, 1990. Reconfirmed via phone conversation with Arlene Robinson on March 1, 1993.

[5] The Child Support Section has recently been moved out to the Civil Division and relocated in the Family Service Division.

[6] Roberts, *Child Support Enforcement in 1989*, 23 Clearinghouse Rev. 1101 (Jan. 1990).

goes to repay the state.[7] The third category includes custodial parents who are not AFDC recipients and either have never received such aid or have received aid but for whom no child support arrears are owed.

A IV-D attorney may be assigned to handle any of these types of cases. Each situation may raise difficult questions as to the duties and responsibilities of a IV-D attorney vis a vis his employer (the government), the petitioner, and the noncustodial parent. The types of complexities that may arise include, *inter alia*, (1) the possibility of one IV-D attorney representing two petitioners against the same noncustodial parent; (2) a IV-D attorney representing a former obligor against a former aid recipient after custody has switched; and (3) a IV-D attorney representing a current AFDC recipient who previously utilized the agency's services as a non-AFDC recipient and vice-versa.

Addressing the various potential ethical issues that may arise requires an answer to the question: "Who is the client?" Generally, the Rules of Professional Conduct do not define who is the client and rely on outside substantive law to determine whether a client-lawyer relationship exists.[8] The one exception is Rule 1.6(i) which provides that the "client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order." Comment 36, however, recognizes that there may be situations in which government lawyers are assigned to provide counsel to individuals in such a way as to make it clear that an obligation of confidentiality runs directly to the individual.

Recognizing the various categories that can arise with IV-D actions, the Office of Corporation Counsel has attempted to answer "who is the client" in a policy statement entitled "Policy Statement No. 1":

> The client is the petitioner in all non-AFDC cases. The client is the Department of Human Services in all AFDC cases. If a non-AFDC client becomes a recipient of public assistance, the client becomes the Department of Human Services; if an AFDC recipient is removed from public assistance, the Department of Human Services remains the client until all arrears are paid to the Department; after full payment, the custodian of the minor child/ren becomes the client.[9]

For purposes of this opinion, we accept the Corporation Counsel's definition.[10]

Given this definition, we must now address the various potential ethical issues that can arise. Since it is neither possible nor practical to anticipate and answer all conceivable ethical problems that can occur, this opinion will try to address the most common and most difficult.

*Discussion*

Before we examine the various fact patterns that may develop, we note that it is our understanding that at present the Government maintains the Policy Statement simply as an internal document that is not discussed with or distributed to petitioners. In particular, the Government does not make clear to the petitioner whom it regards as the client. To the extent this is still the practice, we believe that it is a mistake; in particular, it does not assure compliance wit the Rules of Professional Conduct. As the following discussion will indicate, the IV-D attorney must make sure that, in all situations, the petitioner knows whether or not she [or he] is being considered the client.[11]

*A. Confidential Information*

(1) AFDC Recipient

Under the Policy Statement, the client in this situation is the Department of Human Services. The problem is that the petitioner may not know this. Thus, it is possible that the petitioner, thinking that the IV-D Attorney is her attorney, may reveal confidences concerning other sources of income. She may believe that the confidence is protected by the attorney-client privilege. In reality, however, she is simply an unrepresented person.

What can and should a IV-D lawyer do to avoid misleading a petitioner? The attorney must make it clear that he or she represents the government and not the petitioner. Rule 4.3(a) requires that an attorney not give advice to an unrepresented person if that person's interests might conflict with the interests of the attorney's clients.[12] Rule 4.3(b) requires that an attorney not state or imply to an unrepresented person that the attorney is disinterested even when the unrepresented person has no interest in conflict with the attorney's client.[13] Furthermore, it requires that when a 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." Hence, even where an aid recipient or former recipient has no actual conflict with the AFDC agency, a IV-D attorney is still obliged to inform the petitioner that the attorney represents only the interests of the state, not the custodial parent.

Giving the Policy Statement to the petitioner is therefore essential. But it is only a minimum. The IV-D attorney must make sure the petitioner understands the potential consequences of not being the client. Failure to fully apprise the petitioner may require that the communication be treated as if a client-lawyer relationship existed.[14]

(2) Non-AFDC Petitioner

[7] 42 U.S.C. § 657(c); 45 C.F.R. § 302.51; 50 Fed. Reg. 19642 (1985).

[8] *See* Rule 1.6, comment [7].

[9] Hereinafter "Policy Statement." This Policy Statement is an internal document given to the attorneys but not to the petitioners. As we noted below, we believe the statement should be made available to all petitioners.

[10] We note that it is consistent with the sparse case law on point. *See, e.g., Gibson v. Johnson*, 35 Ore. Ap. 493 (1978).

[11] Obviously a petitioner may be either male or female and, to be accurate, one should continuously use "he or she" in the discussion. However, in the interest of readability and in light of the fact that most petitioners are women, "she" will generally be used.

[12] Rule 4.3(a) states that a lawyer shall not "give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

[13] Rule 4.3(b) states that a lawyer shall not "state or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client 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."

[14] *See e.g.*, A.B.A. Informal Opinion No. 89-1528 (June 5, 1989):

> If a client-lawyer relationship exists, information received by the lawyer from the client is protected by Model Rule 1.6 and may not be disclosed to the Director of the IV-D office. If there is no client-lawyer relationship, the information may be disclosed unless the lawyer has failed to make reasonable efforts to correct any misunderstanding on the part of the custodial parent that a client-lawyer relationship existed, as required by Rule 4.3 . . . .

Here there should be no problem with confidential information. The Corporation Counsel says that in this context the petitioner is the client. Thus, there is attorney-client privilege. There is no question that the attorney must competently represent the petitioner and protect all confidences.

(3) Former AFDC Recipient--Now Off AFDC But Still in Arrears

In this category, the Policy Statement says that the Department of Human Services is the client. Thus, the analysis here is the same as in the first category, an AFDC petitioner. The critical question is whether the petitioner understands that this lawyer is not her lawyer and any confidences she reveals may be disclosed.

*B. Two Petitioners Seeking Support From Same Respondent*[15]

(1) Both are Non-AFDC Recipients

Here both petitioners are clients of Corporation Counsel and having one lawyer represent both may present a conflict under Rule 1.7. Rule 1.7(a), where applicable, is an absolute bar, prohibiting a lawyer from representing a client with respect to a position "if that position is adverse to a position taken in the same matter by another client represented with respect to that position taken by the same lawyer."[16] It is not clear whether the actions of two petitioners against the same respondent are "the same matter." The fundamental questions in each proceeding -- whether this respondent is the parent of each of the children, what are the financial needs of each child -- are different. But there may well be common issues such as the financial resources available to the respondent. Moveover, given the practice of scheduling such matters jointly before the same Hearing Commissioner, it is certainly arguable that the two actions may appropriately be labelled "the same matter." If that is the case, Rule 1.7(a) prohibits one lawyer from representing two petitioners against the same respondent, if the representation requires the lawyer to take adverse positions for each petitioner.

But even if one concludes that the actions of the two petitioners against the same respondent are not "the same matter" and that the more discretionary rule of 1.7(b) is applicable, the committee believes that, in general, it will be very difficult for one lawyer to adequately represent two petitioners against the same respondent. Rule 1.7(b) is not an absolute bar.[17] It is waivable provided that the conditions of 1.7(c) are met. Rule 1.7(c) provides:

> A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if: (1) each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and (2) the lawyer is able to comply with all other applicable rules with respect to such representation.

Current agency practice, once it becomes known that Corporation Counsel is representing two petitioners against the same respondent, is to inform both petitioners and to have them sign a form entitled "Conflict of Interest Waiver." See Appendix I. We do not believe this waiver is sufficient to satisfy the requirements of Rule 1.7(c). At a minimum, Corporation Counsel should inform the petitioners of the risk of having one lawyer represent two potentially adverse petitioners. In addition, Corporation Counsel should also inform the petitioners of the right, described below, to have another IV-D attorney from the Corporation Counsel as their representative. Finally, someone in the office of Corporation Counsel, such as a specially designated Ethics Advisor, should examine the situation to insure that if the petitioners do want to waive their rights, the lawyer can, in fact, comply with "all other applicable rules" if he or she represents two different petitioners against the same parent.

As suggested above, the Committee believes that it is unlikely that one attorney will be able to adequately represent two petitioners against the same respondent. As noted, the practice is to schedule all cases against one respondent together. If, in that hearing, it is necessary for the lawyer representing petitioner A to make arguments that are adverse to the interests of petitioner B, we believe that it will be virtually impossible for the lawyer to comply with Rule 1.7(c)'s requirement that the lawyer be able to comply with all applicable rules of representation. If, for example, petitioner A argues that the respondent (the alleged father) is not the father of petitioner B's child, we do not see how one lawyer can represent both petitioners "zealously and diligently."

But this does not mean that the petitioners must then be deprived of representation or forced to pay significant fees for legal services. As suggested *supra,* even if one attorney cannot adequately represent two different petitioners against the same parent, it is possible that another attorney in the Office of Corporation Counsel may be able to represent the second petitioner. The question is whether, under the Rules, the disqualification of one attorney vicariously disqualifies all the attorneys in the Office of Corporation Counsel.

Rule 1.10 provides for imputed disqualification in a variety of circumstances but Comment 1 says that the Rule does not apply to a government agency.[18]

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[15] This was the type of problem that concerned one of the Hearing Commissioners and prompted the present inquiry. An Assistant Corporation Counsel was representing a non-AFDC petitioner and had refused to request an amount of support greater than the amount specified in the Child Support Guidelines. The Commissioner questioned whether the attorney was providing the zealous representation owed his client. Once convinced that the refusal was based on an assessment that the "law and facts did not permit a good faith argument for the [petitioner] to seek an order in excess of the Child Support Guidelines," the inquiry before Bar Counsel was apparently dropped. Conversation with Acting Chief of the Child Support Section of the Office of Corporation Counsel, Sylvia Larrabee, June 1991. As a result of the inquiry, however, Ms. Robinson, then the Head of the Child Support Section, initiated her request to this committee.

[16] Rule 1.7(a)

[17] Rule 1.7(b) provides:

> Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: (1) a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter; (2) such representation will be or is likely to be adversely affected by representation of another client; (3) representation of another client will be or is likely to be adversely affected by such representation; or (4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibility to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

[18] Comment 1 provides: "For purposes of [these rules], the term 'firm' does not include a government agency or other government entity." This comment was added because of a recommendation in the Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct, known as the "Sims Report." The committee "concluded that government agencies should be specifically excluded from the definition of 'firm' in the Comment, because of the potentially harsh result which would occur if all lawyers in a government lawyer's agency were disqualified under Rule 1.10." Sims Report, at 23.

Thus, when two petitioners cannot or do not waive their right to separate counsel, the comment suggests that they may be represented by two different attorneys in the same office. So long as Corporation Counsel makes sure that the second attorney does not talk to the first and does not have access to the first attorney's files, we believe there is nothing prohibiting the second attorney from representing the second petitioner.[19]

(2) Both Petitioners are AFDC Recipients

In this category, the client is the Department, not either of the petitioners. Thus, while there may appear to be a conflict, in fact there is none and Corporation Counsel need do nothing special in this case.

(3) One Petitioner is AFDC and the Other is Not

Here the Corporation Counsel is representing the private petitioner in the one case and the Department of Human Services in the other. There is some danger that the lawyer will favor the Department over the petitioner. The applicable rule is 1.7(b) and that provides that the attorney may proceed if he or she gets the consent of both the petitioner and the Department. Rule 1.7(c) defines the nature of the consent required. If the nonAFDC petitioner does not consent, it may be possible under Rule 1.10, comment 1, for two different attorneys in the Office to represent the two petitioners, as discussed above.

*C. Custody Switches -- Former Obligor Obtains Custody Of The Child And Seeks Child Support From Former Petitioner Who Had Had Custody But Has Lost It*

(1) Both are AFDC Recipients

In this category, the Department starts out as the client and remains the client even when custody of the child switches. Again, the critical issue is that the two people understand that (a) at no time is either one the client and (b) communications are not privileged.

(2) Neither is an AFDC Recipient

In this situation, the first petitioner was the client. Once he or she lost custody and the other parent sought help, the other parent would become the client. In general, the Ethical Rules would give the first client the right to veto the representation of the second petitioner. Rule 1.9 provides that "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 interest of the former client unless the former client consents after consultation." Thus, it would seem that, unless the first petitioner consents, the same attorney should not represent the other parent. But does that mean that all the attorneys in the Corporation Counsel are vicariously disqualified? As noted above, Rule 1.10 does not apply to government agencies. The rationale for the exemption seems to be that such disqualifications would cripple the government. Therefore, we believe the Rules permit Corporation Counsel to represent the second parent, provided no exchange of information occurs between the two attorneys.

(3) One is an AFDC recipient and the Other is Not

If the initial petitioner was not on AFDC, then that petitioner was a client of the IV-D attorney. Once that person is no longer the custodial parent and a IV-D petitioner, and the other parent, on AFDC, becomes the IV-D petitioner, the Department becomes the client. In this situation, Rule 1.9 seems to give the first petitioner the right to veto the attorney's representation of the Department. Therefore in this situation as well as the previous one, we believe that, if the first petitioner does not agree to the attorney's representing the Department, the Rules require that Corporation Counsel provide the Department with another attorney.

If the initial petitioner was on AFDC, then he or she was not the client. Under Rule 1.9, there is no veto right for the first petitioner. Thus, it would appear that Corporation Counsel can represent the other parent, at least if the first petitioner was aware that she or he was never the client.

*D. Department Seeking Money For Petitioner And Arrears For Itself*

A potential conflict can arise here between the Department's interest in obtaining the arrears it is owed and the petitioner's interest in obtaining her money. Since the government does not get its money until the present needs of the petitioner are met,[20] the government has an incentive to seek at least enough money to cover both the petitioner's needs and the arrearage. But it is possible that the government might not have an incentive to seek more than that. The Policy Statement provides that in this category, the Department of Human Services is the client. The problem, however, is that the petitioner may not realize that and may not understand that if she wants to seek additional moneys she may have to go outside the system. So long as she is apprised of that, however, the potential conflict seems to be avoided.

*E. IV-D Attorney Representing a Current AFDC Recipient Who Previously Utilized the Agency's Services as a Non-AFDC Recipient and Vice-Versa.*

When a petitioner goes from being an AFDC recipient to a non-AFDC petitioner with no arrears owed, the petitioner moves from not being a client to being a client. Movement in that direction seems to raise no new ethical dilemmas.

But movement in the other direction – from client to non-client – may present problems. Here the attorney moves from representing the petitioner to representing the government. This suggests the relevance of Rule 1.9. Does that mean that the petitioner would acquire the power to veto the attorney's representation of the government? It seems that Rule 1.9, read in conjunction with Rule 1.10, requires only that a new, different lawyer in the Corporation Counsel represent the government. If, however, the former client consents under Rule 1.9, the same IV-D lawyer can represent the government.

*Conclusion*

The foregoing is not an exhaustive discussion of all the conceivable ethical dilemmas that can arise. It is not possible to anticipate all such dilemmas. The discussion should, however, suggest the ap-

[19] We leave it to Corporation Counsel to decide how to assign attorneys in these cases. In making this decision, we recommend that Corporation Counsel consider the working and supervisory relationships within the sections in the Family Services Division which may preclude assigning two attorneys from the same section. These include the small size of the section and the likelihood that confidential information might be shared with a common supervisor.

[20] 45 C.F.R. § 302.51(f)(4)(1989).

proach we believe appropriate for these issues.

The ethical questions that this program generates are difficult. There is ambiguity as to who is the client; moreover, the roles and relationships are complex and constantly changing. It would certainly be easier if every time a potential conflict arises, the petitioner or would-be petitioner would be told to hire another lawyer. But that is unrealistic. Hiring private practitioners is not a viable alternative for most IV-D petitioners. Thus, we must assess these issues with that reality in mind. At the same time, it is essential to realize that the petitioners are frequently not very sophisticated and care must be taken to make sure they are not misled or deceived. Not only must IV-D attorneys make sure that petitioners understand whether or not they are a client with client's privileges; they must also make sure that the petitioners understand what not being a client means.

To assist Corporation Counsel in its commendable effort to walk carefully through this thicket, the Ethics Committee has a suggestion. We believe that it would be helpful if the Office designated a person or persons, such as an Ethics Advisor, to be responsible for handling inquiries concerning ethics from both IV-D attorneys and petitioners. We believe that many of the potential problems discussed herein can be avoided and/or resolved in if someone within the Office of Corporation Counsel were responsible for 1) alerting lawyers to the ethical complexities that may arise; 2) advising individual lawyers who have questions about their obligations in a particular situation; 3) helping lawyers to provide adequate disclosure to avoid creating de facto lawyer-client relationships as discussed *supra* in section A(1); 4) screening cases initially to try to avoid having one lawyer represent two petitioners against the same respondent; 5) advising petitioners who are being asked whether they wish to waive their rights under 1.7(b) and insuring that different counsel are assigned in situations where the conditions of 1.7(c) cannot be met, many of the potential problems discussed herein can be avoided and/or resolved.

Inquiry No. 90-7-35
Adopted: June 15, 1993

*Opinion No. 241*

## Financial Penalty Imposed on Departing Lawyer Who Engages in Legal Practice in D.C. Area

• A partnership agreement imposes a delay of up to five years in paying out funds from a partner's capital financial account where the partner leaves the partnership and engages in the practice of law in the Washington area. Such an agreement violates Rule 5.6(a) in imposing a penalty for opening a potentially competing practice.

### Applicable Rule

• **Rule 5.6(a)** (Restrictions on Right to Practice Law)

*Inquiry*

Inquirer seeks an opinion concerning the propriety of delay in paying funds from a partner's capital financial account where the partner leaves the partnership and engages in the practice of law in the District of Columbia metropolitan area.

The partnership agreement provides that a withdrawn partner is entitled to payments from his capital financial account over a five year period without interest beginning on the last day of the first fiscal quarter of the year following the date of withdrawal. It limits payments, however, in the following circumstances:

> If a Withdrawn Partner who is otherwise entitled to receive payments prior to age 65 pursuant to the section of this Agreement captioned "Payments for Withdrawn Partners" engages in the private practice of law in the metropolitan District of Columbia area, such payments shall be delayed until the earlier of (i) the date such Terminated Partner attains age 65, (ii) the date such Terminated Partner ceases to engage in the private practice of law as aforesaid or (iii) five years after the date such payments were otherwise scheduled to commence pursuant to the section of this Agreement captioned "Payments for Withdrawn Partners."

Inquirer seeks an opinion whether this provision violates Rule 5.6(a).

*Discussion*

Rule 5.6 provides:

> A lawyer shall not participate in offering or making
>
> (a) A partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; . . .

The operative language of Rule 5.6 – "restricts the right of a lawyer to practice" – is identical to the language of the predecessor Code provision, DR 2-108(A).

The Committee has frequently been asked to define the scope of firms' authority to limit, through partnership or employment agreements, competition by lawyers who depart the firm. In Opinion 181, the Committee engaged in a thorough review of the purposes of the former Code provision, analyzing the case law, ABA opinions and prior Committee decisions. It concluded that these decisions "demonstrate a general hostility toward restrictive [employment] agreements and persuade this Committee that it should carefully examine any such agreements that come before it." The reasons are twofold: to protect the ability of clients to obtain lawyers of their own choosing and to enable lawyers to advance their careers. The changing nature of the bar and the practice of law in the District of Columbia, which is characterized by significant growth in the size of the bar, the opening of branches of out-of-town firms and relaxation of rules concerning solicitation and advertising, all reinforce the need for limiting restrictions on lawyer mobility.

The Committee has twice before held that employment and partnership agreements imposing direct financial penalties for practicing in a competing or potentially competing firm amount to forbidden restrictions on the right to practice. In Opinion 65, the Committee held that former DR 2-108(A) prohibited an employment agreement requiring that, for two years after departure, the departed lawyer pay to the former firm 40% of net billings deriving from clients previously represented by the firm. And in Opinion 194, the Committee found impermissible a provision that reduced by half the payment of unrealized accounts receivable if the departing partner opened any competitive practice within twelve months. These decisions are consistent with *Gray v. Martin*, 663 P.2d 1285 (Or. 1983), twice cited by the Committee (Opinions 181 and 194), where the court refused to enforce a clause in the partnership agreement eliminating the payments a partner was otherwise entitled to receive if the

lawyer practiced in any of three designated counties.

By contrast, financial arrangements that do not penalize a lawyer for competing do not run afoul of Rule 5.6. In Opinion 221, the Committee considered an agreement used by a firm engaged in plaintiff personal injury litigation that specified the division of potential contingent fees in cases unresolved at the time of an attorney's departure from the firm.[1] The Committee held that to the extent the arrangement was simply an effort to establish a fair split based on work performed, the agreement was permissible; an excessive share to the firm would, however, amount to a restriction on the right to practice.

The Committee has upheld only one sort of restriction on the right to practice. These are reasonable -- not absolute -- limitations on the departing lawyer's solicitation of clients of the departing firm. In Opinions 77 and 97, the Committee upheld employment agreements prohibiting an associate leaving a firm from seeking to solicit business from clients of the firm, where the associate was free to mail announcements short of direct solicitation. The Committee recognized that the rule in each instance did constitute a restriction on the former associate's ability to obtain clients, but believed that solicitation of current clients raises special concerns that warranted at least regulation of the manner of such solicitations. As the Committee has often determined, however (see, e.g., Opinions 181 and 221), even in the case of direct solicitation of a firm's clients, where problems of interference in ongoing relationships are most sensitive, a firm may impose only the most narrow of restrictions.

The agreement here violates Rule 5.6. The financial penalties imposed on a departing lawyer serve no other purpose than restricting practice and insulating the firm from potential competition. The agreement plainly discourages a partner from competing against the former firm, or even representing clients at all, by forcing the partner to forego the payments otherwise payable for up to five years if the partner practices law in the Washington area.

One might argue that here the agreement provides for delay in payment rather than its elimination or diminution, so is not nearly so onerous as in other cases. Even putting aside the possibly significant sums at stake and the cost to the lawyer of the delay, the provision's broad application undoubtedly serves as a deterrent to opening a competing practice. It thus represents a restriction on the right to practice to limit competition even as to potential future clients of the firm. The fact that the restriction ends automatically if the terminated partner ceases the private practice of law reinforces this conclusion.

The Committee concludes that a partnership agreement that delays for five years payments otherwise due a departing partner from the partner's capital financial account if the partner engages in the practice of law in the Washington area is prohibited by Rule 5.6.

Inquiry No. 92-7-20
Adopted: September 21, 1993

*Opinion No. 242*

**Ethical Obligations of Attorney Holding Documents Provided by Client That May Be Property of Third Party**

• An attorney whose client provides documents that may be the property of the client's former employer should, upon the client's request, return the documents to the client if the client has a plausible claim to ownership of them. As to documents with respect to which the client has no such claim, the attorney should return them to the employer unless to do so would reveal confidences protected by Rule 1.6, in which event the attorney must preserve the documents and may not permit them to be used inconsistently with the attorney's fiduciary duty to the owner with respect to such property.

**Applicable Rules**

- **Rule 1.15** (Safekeeping Property)
- **Rule 1.2(e)**(Scope of Representation)
- **Rule 1.6** (Confidentiality of Information)
- **Rule 3.4(a)** (Fairness to Opposing Party and Counsel)

*Inquiry*

Inquirer has custody of certain documents provided by the client, including internal company records of Client's former employer. Some of the documents are originals and some are copies, and at least some of the documents in both categories (originals and copies) do not arguably belong to the Client, while some of the copies may. The Company knows generally that Client or Inquirer has some documents, but not their identity; it claims they belong to it and wants them back. Client asserts that some are his and has asked Inquirer to return them to Client, not the Company. Client also wants access to all of the documents that Client provided to Inquirer so that Client can use them in writing a book about the Company, apparently one the Company would not welcome. The questions are whether Inquirer can return the documents to the Client, must turn them over to the Company, or should keep them in Inquirer's files, and, if Inquirer must keep the papers, whether Inquirer could permit the Client to have access so he can use the documents to write his book.

*Discussion*

Inquirer's obligations depend initially upon whether Client has any legitimate claim to custody or use of the documents, an issue of fact and law beyond the Committee's power to resolve.

In general, Rule 1.15 obliges a lawyer to return a client's property to the client upon the client's request. Rule 3.4(a) also provides that a lawyer shall not:

> (a) Obstruct another party's access to evidence or alter, destroy or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. *Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person. If the evidence received by the lawyer belongs to anyone other than the client, the lawyer shall make a good faith effort to preserve it and return it to the owner, subject to Rule 1.6. . . .*(emphasis added)[1]

[1] For example, the agreement provided that if the client had retained the firm two years before the lawyer's departure and resolved within a year of departure, the firm would receive 75% of the fee. If the firm had been retained only a year before the lawyer's departure and the case was not resolved for two to three years thereafter, the firm would receive 55% of the fee.

[1] Rule 3.4(a) is based generally on Rule 3.4(a) of the ABA Model Rules, which provides:

> 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

The Rules do not address the lawyer's obligations when it is unclear to whom the evidence "belongs." The comments refer generally to "the requirements of paragraph (a) with respect to return of property to its rightful owner ... ." Rule 3.4 Comment [3].

Comment [7] adds that:

> . . . if it is reasonably apparent that the evidence is not the client's property the lawyer may not retain the evidence or return it to the client. Instead, the lawyer must, under paragraph (a), make a good faith effort to return the evidence to its owner.

However, Comment [5] adds:

> Because the duty of confidentiality under Rule 1.6, the lawyer is generally forbidden to volunteer information about physical evidence received from a client without the client's consent after consultation. In some cases, the Office of Bar Counsel will accept physical evidence from a lawyer and then turn it over to the appropriate persons; in those cases this procedure is usually the best means of delivering evidence to the proper authorities without disclosing the client's confidences. . . .[2]

On the facts stated, we assume that disclosure of the copies to the Company would constitute disclosure of a confidence or secret of the Client within the broad definition of those terms in Rule 1.6, which includes "[i]nformation gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."[3] If Rule 1.6 and the need for client consent preclude referral of the copies to Bar Counsel, and given Client's assertion of rights to the papers, we believe the obligations of Rules 1.6 and 1.15 require the lawyer to comply with the Client's request to return the papers to the Client insofar as the Client has a plausible claim to ownership of them. Although here it appears that Client desires to preserve the papers, rather than destroy them, the lawyer should appropriately advise as to Client's legal obligations concerning preservation, disclosure, and use of the copies, in view of the competing claims of the Company.[4]

As to papers for which the Client has no plausible claim of ownership, while Rule 1.6 may preclude return of the documents to the company, it would not preclude the Inquirer from "preserv[ing]" them. Accordingly, retaining custody would be the proper course of conduct, with future disposition to be governed or directed by a court order or by some agreement of the parties.

Where the lawyer retains custody of the documents, other rules are implicated. Rule 1.15(a) obliges a lawyer who is in possession of property of a client or a third person to hold it separately from the lawyer's property. Rule 1.15(b) further provides:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

It is unclear how Rule 1.15 should apply here, if at all. Comment [7] states: "With respect to property that constitutes evidence, such as the instruments or proceeds of crime, see Rule 3.4(a)." This suggests that Rule 3.4 should govern when the property consists of "evidence," at least in the event of a conflict with Rule 1.15. In this case, however, it is not clear whether all of the documents in question would be deemed "evidence" under Rule 3.4, rather than mere third-party property under Rule 1.15. To the extent that there is a difference between the categories and rules, it would seem to relate more to the obligations the Inquirer has to the government or the court with respect to "evidence," while the obligations to third persons to whom the property belongs may be deemed essentially the same whether or not it is also "evidence."

The final clause, subjecting the obligations of Rule 1.15 to Rule 1.6, literally applies only to the delivery and accounting duties not to the notice duty in the first sentence. In this case it may be that Inquirer could comply with a generalized notice obligation without breaching Rule 1.6, so long as Inquirer is not obliged to identify the particular documents. As previously noted, the Client's former employer is aware that Client or Inquirer has some documents, but not which or how many, so that giving general notice might not itself require a disclosure contrary to Rule 1.6. This is a question of fact that we cannot resolve.

The requirements of Rule 1.15(b) to "promptly deliver" to a third person any "funds or other property" that the third person "is entitled to receive," and upon request of that person to "promptly render a full account," are both subject to Rule 1.6. To the extent that such an accounting would require disclosure of information protected by Rule 1.6, those requirements need not be satisfied, for the reasons noted in connection with the discussion of Rule 3.4 and its similar reference to Rule 1.6

Rule 1.15 and its comments shed light on the question whether Inquirer can keep custody of the documents belonging to the Company but give the Client access to the documents for use in writing his book. Comment [1] begins: "A lawyer should hold property of others with the care required of a professional fiduciary." Comment [4] elaborates:

> 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.

In addition, under Rule 1.2(e), if a lawyer knows that what the client proposes to do is "criminal or fraudulent," the lawyer may not "assist" the client.

Permitting the Client to use Company documents in Inquirer's custody for a book about the Company might well breach Inquirer's fiduciary duty. Similarly, Inquirer's cooperation with the Cli-

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such act . . . .

As the italicized provision of D.C. Rule 3.4(a) is not contained in the ABA Model Rules, they and opinions construing them provide little guidance here.

[2] The additional comments are directed primarily to concerns about alteration, destruction or concealment of evidence in the face of pending or imminent process, rather than competing claims of ownership or rights to use and disclose.

[3] *Cf. Dean v. Dean*, 607 So.2d 494 (Fla. Dist. Ct. App. 1992).

[4] We need not address the situation that would be presented if the lawyer had obtained the copies form a person other than a client. Compare *In re Shell Oil Ref.*, 143 F.R.D. 105 (E.D. La.), *as amended*, 144 F.R.D. 73 (E.D. La. 1992).

ent could subject the Inquirer to claims of wrongful interference, or participation in the Client's possible breach of fiduciary obligations, and possible tort liability. However, these are legal rather than ethical questions, and hence are beyond the Committee's jurisdiction.

Inquiry No. 92-10-38
Adopted: September 21, 1993

*Opinion No. 243*

**Joint Representation In Divorce Cases**

- A lawyer may not jointly represent a divorcing husband and wife who seek assistance in reaching agreement as to the terms of their divorce.

**Applicable Rules**

- **Rule 1.7(a)** (Simultaneous representation of clients with adverse interests)
- **Rule 2.2** (Intermediary)

*Inquiry*

The inquiring lawyer, who is both a practicing lawyer and an ordained minister, has been working as a mediator in domestic relations for the Multi-Door Dispute Resolution Division of the Superior Court and as an arbitrator for the Attorney-Client Arbitration Board of the D.C. Bar. She proposes starting a private law practice that would in several respects go beyond her current mediation work. Under her proposal, she would establish a client-lawyer relationship with both spouses. As part of undertaking joint representation, the inquirer would provide legal information and limited legal advice to both spouses. At the same time, she intends to play an active role in helping the parties reach a detailed divorce agreement, which would cover such issues as property distribution, spousal support, child custody, and child support. Her role would include proposing solutions designed to advance the mutual interests of both parties, as she currently does in her mediation work. The inquirer further proposes drafting and filing the necessary agreements and representing both spouses before the Court.

The inquirer states that she would carry out the joint representation under the safeguards of Rule 2.2 of the D.C. Rules of Professional Conduct and the guidelines set forth in our Opinion No. 143 (1984), in the following manner. She would represent these clients solely in connection with the mediated divorce. She would undertake joint representation only after determining that each spouse is capable of making adequately informed decisions and that the matter can be resolved on terms compatible with the best interests of both clients. After providing the clients with a written explanation of the risks of joint representation and of the circumstances that might later cause separate representation to be necessary or desirable, she would obtain their informed written consent. The inquirer would withdraw from the representation if any of the above conditions ceased to be satisfied or if either client requested her to do so. Thereafter, she would not represent either of the clients in connection with the divorce or any other matter. At all times the clients would retain the right to seek their own private attorney to review the agreement.

*Discussion*

Opinion No. 143, decided under the former D.C. Code of Professional Responsibility, represents the only time this Committee has directly considered the issue of joint representation in divorce. In that opinion, we stated that "[a]s a general rule joint representation of a couple seeking a divorce is not ethically permissible," but nevertheless held that it was permissible under the limited and specific facts presented in that inquiry. The specific facts in that inquiry involved a divorce where the spouses had comparable employment status, salaries, and educational backgrounds; where no children were involved; and where the parties had already agreed upon a division of property and "all other substantial settlement terms *before retaining counsel.*" (emphasis added). Assistance of counsel was sought solely for the purpose of implementing the couple's preexisting agreement.[1]

In several respects, the current proposal goes well beyond the joint representation permitted under Opinion No. 143. First, although the lawyer intends to represent only couples "contemplating a non-contested divorce," she does not intend to restrict her practice to couples who have already agreed upon a division of property and all other substantial issues before retaining her. Second, she seeks to represent couples with children as well as those without children. Third, she does not intend automatically to decline representation when the spouses have disparate employment status, salaries, and educational backgrounds, so long as both are able to make adequately informed decisions. In short, she proposes to undertake joint representation whenever the parties, despite different interests and views, seek to arrive at a non-contested divorce settlement.

Although Opinion No. 143 never stated that joint representation was unethical whenever the circumstances depart from the specific facts outlined in that inquiry, the opinion certainly suggests that joint representation in divorce cases is usually impermissible. We think that the Opinion's reasoning clearly precludes joint representation of husband and wife in the broad range of circumstances envisioned by the inquiry. We turn our attention, then, to whether the D.C. Rules of Professional Conduct -- in particular Rule 2.2, a new rule on intermediation that had no counterpart in the Code -- so significantly change the governing law as to permit joint representation of husband and wife in divorce cases in the broad range of circumstances she contemplates. For the reasons stated below, we hold that they do not.

It must be emphasized at the outset that the Rules of Professional Conduct preserve and reinforce basic ethical standards about representation of parties with adverse interests. Rule 1.7(a) bars absolutely a lawyer's representation of clients with respect to adverse positions in the same matter.[2] On its face, the Rule would appear to prevent joint representation of a divorcing husband and wife who seek assistance in reconciling their differing interests and positions. And Comment [6] to Rule 1.7, noting that the absolute bar of Rule 1.7(a) applies only where there is an actual, as opposed to a nominal, adversity in the positions of the clients, cites Opinion No. 143 as setting forth "the limited circum-

[5] *Cf. GTE Prods. Corp. v. Steward*, 414 Mass. 721, 610 N.E. 2d 892 (1993).

[1] In applying the Code, some other jurisdictions have permitted joint representation under similarly limited circumstances. *See e.g.*, Kentucky Bar Association Opinion E-290 (1984); Oregon Bar Opinion No. 515 (1988).

[2] Rule 1.7(a) provides that "A lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer."

stances" in which Rule 1.7(a) "would not preclude the representation of both parties in an uncontested divorce proceeding."

To be sure, Comment [6] to Rule 1.7 does not refer explicitly to Rule 2.2. And Rule 2.2 envisions a lawyer, in appropriate circumstance, acting as an intermediary between two clients with potentially conflicting interests.[3] *See* Comment [1]. Where this is the case, Rule 2.2 permits common representation if the lawyer "reasonably believes" that she can represent both clients "impartially" and that their potentially conflicting interests can be resolved on terms compatible with both clients' best interests. In making this determination, the lawyer may proceed if all clients, after being fully informed, believe that they will secure greater overall benefit by choosing to develop mutual interests (perhaps at the cost of not exercising all their legal rights to the fullest) and if the lawyer reasonably believes that common representation will be successful in accomplishing this goal.

There are substantial reasons for caution, however, in approaching the question of whether Rule 2.2 permits joint representation in divorce cases in a broader range of circumstances than allowed in Opinion No. 143.

First, as already noted, the D.C. Court of Appeals, in Comment [6] to Rule 1.7(a), emphasized the "limited circumstances," described in that Opinion, in which Rule 1.7(a) permits joint representation in an uncontested divorce. Whether, as a matter of law, that Comment forecloses an interpretation of Rule 2.2 as permitting joint representation of a divorcing husband and wife in any set of circumstances beyond that set forth in Opinion No. 143 is a difficult question we need not resolve in the context of this Inquiry.

Second, we believe that Rule 2.2 was not drafted with divorce cases in mind. The Comment to the Rule never mentions divorce as an example of the situations in which the Rule might apply. Moreover, although the language of the Comment is not entirely free of ambiguity, we think that the Rule's approach to common representation is basically designed for "joint venture"-type situations. Several paragraphs of the Comment support this view. Comment [3] states that the Rule does not apply at all when the lawyer acts as a mediator between non-clients. Where mediation takes place outside the context of a client-lawyer relationship, the lawyer's conduct may be subject to other codes of ethics, but it is not subject to Rule 2.2.

Comment [6] states that the appropriateness of intermediation -- that is, the standard that must be met before a lawyer can act as intermediary under Rule 2.2 -- depends on the form that intermediation takes. The Comment thus draws a distinction between arbitration and mediation on the one hand and common representation on the other. In the former, the lawyer may be called upon to help resolve a dispute between existing clients without representing them and advising them with respect to the subject matter at issue. In arbitration, the lawyer may even decide the outcome after each client presents its case to the lawyer. In common representation, however, the lawyer represents the clients with respect to the subject matter at issue and thus has a wider range of duties to the clients. In particular, a lawyer commonly representing multiple clients still has a duty to be an advocate and advisor for each client. As stated in Comment [8], a lawyer jointly representing two clients has a duty both to keep each client adequately informed and to maintain confidentiality of information relating to the representation.

Because potential conflicts pose problems most acutely for the lawyer attempting common representation, the Comment to Rule 2.2 suggests that this form of intermediation should only be undertaken for clients whose mutual interests predominate over any apparent divergence of interests. Comment [6], for instance, indicates that the interests of commonly represented clients must be substantially compatible. Comment [7] voices a particular caution against common representation where the impartiality of the lawyer might be questioned. Comment [4] cites as examples several "joint venture"-type situations involving clients who have embarked upon a common goal, such as establishment of a new business or a financial organization. Although Comment 4 does refer to "mediating a dispute between clients," in context we think that this refers to disputes between *pre-existing* clients within the context of a joint venture of some type.

Third, it is important to remember that the Rules, like the Code, give expression to certain essential features of the client-lawyer relationship that cannot be dispensed with, even with a client's informed consent. As the Comment to Rule 2.2 reflects, a lawyer jointly representing divorcing spouses may not play an active role in the resolution of issues between them without running a high risk of failing to live up to the responsibilities the lawyer has to both clients -- to advise each of them, to represent their individual interests, and to preserve their confidences. As Comment [8] states, fulfilling these duties while acting as an intermediary requires a delicate balance and can be extremely difficult, even where the clients have reached substantial agreement on all material issues before retaining the lawyer.

These considerations lead us to the conclusion that -- at least in the case of divorce -- Rule 2.2 does not carve out any significant exception to Rule 1.7. Whether it enlarges the scope for joint representation in divorces at all beyond the "limited circumstances" of Opinion No. 143 is a difficult question we need not resolve here. For there can be no doubt, in our view, that Rule 2.2 does not permit the type of practice that is the subject of this Inquiry -- i.e., the joint representation of a divorcing husband and wife who seek assistance in resolving their disagreement as to the terms of the dissolution of their marriage. We believe that such joint representation would place too great a strain on the fundamental duty of loyalty to individual clients that undergirds our ethical rules. Whatever discretion Rule 1.2 gives clients to define the objectives of representation, it does not include the discretion to retain a lawyer under circumstances likely to cause the lawyer to act in ways (or to be perceived to act in ways) detrimental to the client-lawyer relationship.

We emphasize again, however, that a lawyer may act as a mediator for spouses seeking a divorce so long as no client-lawyer relationship is established. Such mediation is not governed by the Rules of Professional Conduct but may be subject to other relevant codes of ethics for mediators or arbitrators. In these circumstances, the lawyer has a duty at the outset to inform all parties that he or she is not establishing a client-lawyer relationship, and consequently that the parties may not assume that the lawyer is under the customary duty to protect their re-

[3] The full text of Rule 2.2 is set forth in the Appendix to this Opinion.

spective individual interests, to preserve their secrets and confidences, and to inform them of all information that may advance their objectives.

*Appendix*

**Rule 2.2 Intermediary**

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

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

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter, and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

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

(b) A lawyer should, except in unusual circumstances that may make it infeasible, provide both clients with an explanation in writing of the risks involved in the common representation and of the circumstances that may cause separate representation later to be necessary or desirable. The consent of the clients shall also be in writing.

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

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

Inquiry No. 92-4-11
Adopted: October 19, 1993

*Opinion No. 244*

**Inclusion of Name of Nonlawyer Partner in Firm Name**

• Assuming compliance with the requirements of Rule 5.4(b), the name of a nonlawyer partner may be included in the name of a law firm. However, the firm must make clear on firm stationery, business cards and professional listings that the nonlawyer partner is not a lawyer.

**Applicable Rules**

• **Rule 5.4(b)** (Practice with Nonlawyers)
• **Rule 7.5** (Firm Names and Letterhead)

*Inquiry*

The inquiring lawyer, whom we will refer to as Smith, is a sole practitioner in the District of Columbia. He proposes to form a partnership with a nonlawyer, whom we will refer to as Jones, to provide legal services to clients in personal injury and property damage cases. Jones, an experienced investigator, will provide various investigative services such as photographs of accident scenes and interviews of clients and witnesses. He will also perform nonlegal research and provide administrative assistance in preparation of cases for trial and settlement negotiations. These support services will be related solely to Smith's practice of law. Smith and Jones will enter into a written agreement that will specify that the sole purpose of the partnership is the provision of legal services to clients; that Jones will abide by the Rules of Professional Conduct; and that Smith will undertake to be responsible for Jones's compliance.

The proposed partnership will be called "Smith & Jones" or "Smith & Jones Associates." Alternatively, Smith may form a professional corporation, which would be called "Smith & Jones, P.A." Such a professional corporation would be owned by Smith, and Jones would contract with the corporate entity, as well as Smith individually, for the provision of his nonlegal services in return for a share of fees. Jones would be designated as "Chief Administrator" of the corporate entity.

*Discussion*

The questions posed by the inquiry are (1) whether the proposed arrangement comports with Rule 5.4(b); (2) whether the name of Jones, the nonlawyer, may be included in the firm name; and if so, (3) whether the firm must take affirmative steps to make clear to clients and prospective clients that Jones is not a lawyer.

First, we find that the proposed arrangement comports with Rule 5.4 (b), which provides:

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) all persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;

(3) the lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;

(4) the foregoing conditions are set forth in writing.

This rule, unique to the District of Columbia, permits lawyers to form partnerships or other organizations in which nonlawyers have a financial interest -- as partners or otherwise -- so long as the specified conditions are met. On the basis of the representations made by the inquiring lawyer, it appears that those conditions are met in this case. The business of Smith & Jones will be limited to the provision of legal services to clients; Jones will undertake to comply with the Rules of Professional Conduct; Smith will undertake to assure that compliance; and these undertakings will be set forth in writing.

The next question is whether Jones's name may appear in the firm name. Nothing in Rule 5.4 or the Comment to the Rule suggests that the name of a nonlawyer partner may not be included in a firm name. The question remains, however, whether the inclusion of the name of a nonlawyer in the name of a partnership or other organization devoted to the provision of legal services is inherently misleading. Rule 7.5(a) provides that "a

lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1." Rule 7.1(a), in turn, provides in pertinent part that "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: (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

In Opinion No. 45 (1978), issued under the former Code of Professional Responsibility, we held that the name of a nonlawyer could not appear in a law firm name. However, that opinion was based on a construction of DR 2-102(B) as explicitly limiting firm names to those of "lawyers in the firm."[1] And it was also influenced by the explicit prohibition of DR 3-103(A), which provided that "a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law."

Under the Rules of Professional Conduct now in effect, however, the situation is quite different. The traditional bar against partnerships with nonlawyers has been eliminated by Rule 5.4(b). And the detailed restrictions of the Code of Professional Responsibility with respect to names of firms have been replaced in Rule 7.1 with the general injunction not to mislead. In light of these changes, we believe that it is no longer misleading to include the name of a nonlawyer partner in the firm name of a partnership that is devoted to the provision of legal services to clients and that complies in all other respects with Rule 5.4(b). The firm name of a law firm constitutes an implicit representation that the firm is engaging in legal services, but, given Rule 5.4(b), it does not inherently constitute a representation that every partner in the firm is a lawyer.

Nonetheless, we believe that if the name of a nonlawyer partner is included in the firm name, there is some possibility of misunderstanding unless an appropriate disclosure is made. In such a case the firm must make an appropriate disclosure, on firm letterhead, business cards, and professional listings, that the firm includes a nonlawyer partner. If individual names are *not* listed on the letterhead, the fact that a nonlawyer is a name partner must be indicated in some fashion -- e.g., by adding the phrase "a partnership including a nonlawyer" after the firm name.[2] Of course, in any case, if individual names *are* listed on the letterhead, business card or firm listing, any listed nonlawyer partner should be identified in an appropriate manner -- e.g., "investigator," "firm administrator," "economist" -- that makes clear that he or she is not a lawyer. *See* Opinion No. 38 (July 19, 1977) (nonlawyer patent agent employed by law firm may be listed on firm letterhead followed by the designation "patent agent"); ABA Informal Opinion 89-1527 (Feb. 22, 1989) (nonlawyer executive director may be listed on firm letterhead and business cards, so long as listing makes clear that person is a nonlawyer or responsible only for administration of the office).

Inquiry No. 92-11-46
Adopted: November 23, 1993

*Opinion No. 245*

**Payment of Referral Fee to a Lawyer For Recommendation of Registered Agent**

• A lawyer may not retain a referral fee or commission for referring corporate clients to a firm that provides services as a statutory registered agent. Any payment offered to the lawyer for a referral of client's business must be disclosed to the client. The client must consent to the payment. The payment must be turned over to the client.

**Applicable Rule**

• **Rule 1.7(b)(4)** (Lawyer's professional judgment on behalf of the client shall not be affected by the lawyer's personal interest).

*Inquiry*

The inquirer is president of a company that offers services as a statutory registered agent for corporations in the District of Columbia. The inquirer wishes to solicit D.C. Bar members and offer a commission for listing his company as registered agent in articles of incorporation or in applications for certificates of authority for foreign corporations to transact business in the District. The inquirer asks if it is unethical for a D.C. bar member to accept such commissions.

*Discussion*

D.C. Rule 1.7(b)(4) forbids a lawyer from representing a client when the

> lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Prior to adoption of the Rules, DR 5-101(A) stated the same rule.

In representing a client, a lawyer often may have reason to retain a third party to provide necessary services that will be paid by the client or recommend a third party to the client for the client to engage directly. Examples include title insurance companies, bonding companies, printers, court reporters, and expert witnesses.

In engaging or recommending such services, the lawyer must have paramount concern for the client's interests--a good product for the client at a fair price. The lawyer's judgment cannot be influenced by a promised payment to the lawyer from the third party.

This Committee has not considered previously an inquiry involving a commission or referral fee from a third party to a lawyer for referral or placement of a client's business. In Opinion 138, however, the Committee considered whether a lawyer could refer a client to a particular bank for a loan to cover legal services. The lawyer was to receive no payment from the bank. Rather the lawyer would pay the bank $25 for each client referred. The lawyer, however, benefitted from the arrangement because the $25 fee provided speedy processing of the client's loan request and the bank's agreement to notify the lawyer if the agreement was rejected. The Committee permitted the arrangement but said that the lawyer could have no interest in the bank, and the lawyer "must be satisfied that the credit arrangements are fair and in the client's interest."

[1] DR 2-102(B) at the time provided, in pertinent part, that "a lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the *lawyers* in the firm." (emphasis added).

[2] We do not reach the question of what disclosure, if any, need be made in the case of a firm in which a nonlawyer is a partner but is not included in the firm name and is not listed on the letterhead.

In Informal Opinion 1020 (February 9, 1968), the American Bar Association forbade a lawyer from accepting remuneration for referrals of inventor clients to an investment company. The Committee rejected permitting the remuneration even with full disclosure to the client and consent. The Committee cited with approval unpublished Informal Opinion 278 which provided:

> A lawyer may not accept a gratuity from anyone without his client's knowledge and consent, and if he does so the gratuity really belongs to the client, who, of course, may make the attorney's fee more generous by reason of it, but is not bound to do so.

Philadelphia Bar Association Ethics Opinion 91-28 (1991) forbade a lawyer's acceptance of a referral fee from an expert witness because it might divert the lawyer from making the selection solely on who would do the best job for the client (as well as the possible impact on witness' credibility if the arrangement were revealed). Florida Ethics Opinion 70-13 (1970) holds the client, rather than the lawyer, must receive the benefit of a finder's fee for placing a client's investments. New Jersey Ethics Opinion 416 (1979) holds that a commission from a referral fee from a real estate company for listings obtained must be disclosed to the client. The client must consent, and the referral fee must be credited to the client.

We find that a lawyer may not retain a referral fee or commission from a third party for referring legal clients. Any payment offered to the lawyer for referral of a client's business must be disclosed to the client. The client must consent to the payment, and the payment must be turned over to the client directly or as a credit to the bill for legal services. A lawyer's judgment in referring a client for services from third parties must be based on assessment of the quality of the third party's services and fairness of the price, not on a potential financial benefit to the lawyer.

Inquiry No. 93-4-9
Adopted: November 23, 1993

*Opinion No. 246*
*(Revised)*

## A Lawyer's Obligation to Report Another Lawyer's Misconduct

- A lawyer suing another lawyer for malpractice on behalf of a client is required by Rule 8.3 to report to bar disciplinary authorities the conduct that is the subject of the malpractice action, if she has sufficient knowledge of the pertinent facts, if her knowledge is not protected as a client confidence or secret, and if the conduct of the other lawyer both constitutes a violation of an ethical rule and raises a substantial question as to the lawyer's honesty, trustworthiness or fitness in other respects.

Where a lawyer learns of another lawyer's misconduct in the course of representing her client, and the information about the misconduct constitutes a confidence or secret within the meaning of Rule 1.6, that Rule prohibits her reporting it without the client's consent. If, after having been made fully aware of any possible adverse consequences for his ultimate recovery, the client does consent, then neither Rule 1.6 nor Rule 1.3(b)(2) bars reporting. On the facts of this case, the Committee is unable to conclude that the misconduct at issue (failure to comply with the statute of limitations and representation of conflicting interests) gives rise to an obligation under Rule 8.3 to report.

### Applicable Rules

- **Rule 1.3(b)(2)** (Diligence and Zeal)
- **Rule 1.6** (Confidentiality of Information)
- **Rule 8.3** (Reporting Professional Misconduct)

*Inquiry*

The inquirer represents a client in his malpractice claim against another D.C. lawyer, arising out of the latter's representation of him in connection with a 1990 automobile accident. The malpractice claim is based on the lawyer's failure to file suit within the applicable two-year limitations period, and also on a putative conflict of interest in the lawyer's simultaneous representation in the same matter of certain members of the client's immediate family. The inquirer wishes to know whether the conduct that is the subject of the malpractice action gives rise to an obligation on her part under Rule 8.3 to report the lawyer to bar disciplinary authorities in the District. The inquirer expresses some concern that subjecting the other lawyer to disciplinary prosecution could limit his ability to pay any judgment that may ultimately be obtained against him in the malpractice action. On the facts presented, we cannot conclude that the inquirer has an obligation to report under Rule 8.3.

*Procedural History*

The Committee originally approved an opinion in response to this inquiry in April 1994. Subsequently, Bar Counsel raised certain questions relating to the interaction of Rules 8.3 and 1.6, particularly with respect to what information should be regarded as "secret" under Rule 1.6(b). After further deliberation, the Committee has concluded that its initial resolution of the apparent conflict between the two Rules in question is compelled by their language. Accordingly, notwithstanding the legitimate policy concerns raised by Bar Counsel, we are constrained to reaffirm the conclusions of the earlier opinion. This revised opinion elaborates further on the issues raised by Bar Counsel.

*Discussion*

A lawyer's obligation to report misconduct by another lawyer arises under Rule 8.3(a) when the lawyer "h[as] knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. . . ." If the Rule applies, then failure to report would itself be an ethical violation.

A 1992 opinion of the New York State Bar Association's Committee on Professional Ethics, Opinion No. 635 ("New York State Bar Opinion"), outlines the following four step process for determining whether mandatory reporting is required, which we adopt.

*1. "Knowledge"*

Consistent with the interpretation given the reporting requirement in other jurisdictions, we believe Rule 8.3(a) should be read to require a lawyer to report misconduct only if she has a clear belief that misconduct has occurred, and possesses actual knowledge of the pertinent facts.

> Although absolute certainty is not required, *see* Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 Ill. L. Rev. 977, 986, a mere suspicion that misconduct has occurred does not give rise to an obligation to report.

New York State Bar Opinion, *id. at 4. See also* New York City Ethics Op. 1990-3; Alabama Ethics Op. 85-95; Arizona Op. 90-13; Nebraska Op. 89-4; *Williamson v. Council of North Carolina*

*Bar,* 46 N.C. App. 824, 266 S.E. 2d 391 (1980). *See also Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir. 1988).[1]

*2. Client Confidences or Secrets*

Next, the lawyer must consider whether the knowledge of misconduct she possesses is a client "confidence" or "secret" as those terms are defined in Rule 1.6.[2] If information is protected by Rule 1.6, it is specifically exempted from the mandatory reporting requirement of Rule 8.3(a). *See* Rule 8.3(c).[3] We believe the exemption in Rule 8.3(c), read together with Rule 1.6 itself, means that a lawyer *may not* report misconduct where this would entail a disclosure of information protected by Rule 1.6.[4] Rule 1.3(b)(2) may also preclude reporting if it would "prejudice" or "damage" the client, even if the client does not object.[5]

Under Rule 1.6, information gained by a lawyer "in the professional relationship," even if not privileged, may be protected as a "secret," in which case it may not be disclosed without the client's consent. *See* note 2, *supra*. Comment [6] of Rule 1.6 confirms that the Rule's protection extends "not merely to matters communicated in confidence by the client (i.e., confidences) but also to all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client (i.e., secrets)." Comment [6] goes on to explain:

> This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of the information *or the fact that others share the knowledge.* It reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client. (Emphasis added.)

In the instant case, because the information about the other lawyer's failure to file within the limitations period and his possible conflict of interest came to the lawyer "in the course of the professional relationship," it falls within the definition of a "secret" under Rule 1.6 *either* if the client requests that it be "held inviolate" *or* if its disclosure would be "likely to be detrimental to the client." As Comment [6] makes clear, the information does not lose its protected status as a "secret" simply because "others share the knowledge."

Even if it could be argued that the client's direction to disclose the information in public court filings removes it from the Rule's definition of information "that the client has requested be held inviolate," the information still may be entitled to protection as a client "secret" if its disclosure would be "detrimental to the client," without regard to its already having been made public. Thus, if reporting the other lawyer's misconduct to disciplinary authorities may lessen the client's ultimate chances of recovery, the lawyer may be constrained by Rule 1.6 from doing so.

We have considered an argument that the client waived any expectation of confidentiality under Rule 1.6 respecting the other lawyer's misconduct when he authorized his lawyer to file a lawsuit about it, because he had in effect consented to disclosure, at least to the extent that the facts had been made a matter of public record in the court filings. *See* Rule 1.6(d)(1). We believe, however, that the mere fact that certain information has in this fashion been made a matter of public record by the lawyer at the client's direction does not permit the lawyer to disregard altogether her confidentiality obligations to the client under Rule 1.6 where disclosure in another forum is at issue. In a word, we believe that a client's consent to disclosure under Rule 1.6(d) may be a limited one, and that the client retains the option, even where information has been disclosed for one purpose at his own direction, to limit whether and to what extent his lawyer otherwise discloses it.[6] This construction of Rule 1.6 is confirmed by Comment [6], which points out that the Rule reflects "not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client." Thus, even if the client has authorized the lawyer to file a lawsuit charging another lawyer with malprac-

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[1] In *Doe*, the court of appeals, in analyzing the analogous disclosure obligation under Rule 3.3(b) to reveal fraud to a tribunal, stated that a lawyer must disclose information he "reasonably knows to be a fact" and which "clearly establishes" the existence of a fraud. The court stated that "proof beyond a moral certainty" is not required, but that a lawyer "must clearly know, rather than suspect, that a fraud on the court has been committed before he brings this knowledge to the court's attention." 847 F. 2d at 62.

[2] Rule 1.6 defines client "confidences" and "secrets" as follows:

> 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

[3] Rule 8.3(c) provides:

> This rule does not require disclosure of information otherwise protected by Rule 1.6.

[4] A similar conclusion respecting the interaction of Rules 1.6 and 8.3(a) has been reached in several other jurisdictions. *See, e.g., In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317 (R.I., 1993) (lawyer prohibited by Rule 1.6 from reporting fact that client's former lawyer had embezzled and subsequently repaid a substantial amount of his client's money); Ariz. Bar Ass'n Ethics Op. No. 90-13(1990) (information about a client's rape by another lawyer may not be disclosed in the face of the client's explicit instruction not to report); Md. State Bar Ass'n Comm. on Ethics, Op. No. 89-46 (1989) (client instruction not to report breach of fiduciary duty precludes reporting); Conn. Bar Ass'n Comm. on Professional Ethics, Informal Op. 89-14(1989)(in-house corporate lawyer may not disclose other corporate lawyer's misconduct if disclosure could be adverse to corporation's interests); Wis. State Bar Comm. on Professional Ethics, Formal Op. E-89-12, (1989)(disclosure prohibited if it would entail revelation of any client information, whether or not it would prejudice client). *But see In re Himmel*, 533 N.E. 2d 70 (Ill. 1989) (lawyer's failure to report another lawyer's embezzlement of client funds was grounds for suspension even though his knowledge of the embezzlement may have been protected as a client "secret"; reporting rule exempted only "privileged information"); Md. State Bar Ass'n Comm. on Ethics, Op. No., 89-36 (Feb. 14, 1989) (lawyer representing other lawyers must report their misconduct if he has actual knowledge thereof which has already been revealed to a court and, therefore, is a matter of public record); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 83-23 (1988), (lawyer who receives communication directly from another party to a pending litigation alleging unethical conduct by that party's lawyer must report the information to the disciplinary board of the Pennsylvania Supreme Court. Confidentiality does not apply, as the information came from another party to the litigation, not from the lawyer's client.).

[5] Rule 1.3(b) states:

> A lawyer shall not intentionally:
>
> ***
>
> (2) prejudice or damage a client during the course of the professional relationship.

[6] We recognize that there is some support in the case law for an argument that a client waives his right to assert attorney/client privilege to the limited extent that specific facts are disclosed in public pleadings, filed by his lawyer at his direction. *See, e.g., Industrial Clearinghouse, Inc. v. Browning Mfg. Div. of Emerson Elec. Corp.*, 953 F. 2d 1004 (5th Cir. 1992). However, we do not believe the case law interpreting the attorney/client privilege controls an attorney's ethical obligation to report another lawyer to disciplinary authorities against her client's wishes, since, as is made clear by Comment [6] to Rule 1.6, the protection afforded a client's confidences by Rule 1.6 is broader than that accorded by the evidentiary privilege, and "reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client."

tice, this does not mean that the client cannot expect the lawyer to keep the matter confidential for other purposes.

In the instant context, our conclusion respecting the interaction of Rules 1.6 and 8.3 means that a client may ask his lawyer not to file a misconduct charge with disciplinary authorities where doing so would require the lawyer to disclose information gained in the professional relationship, even though he has previously authorized the lawyer to file a malpractice action based on that same conduct, and the lawyer has done so. Under these circumstances, the lawyer is under no obligation under Rule 8.3(a) to report the other lawyer and indeed would be precluded from doing so by Rule 1.6.[7]

Of course, if the client consents to disclosure, Rule 1.6 would pose no bar to reporting. And, in this regard, we note that the commentary to Rule 8.3 states that a lawyer should "encourage" a client to consent to disclosure, unless this would "substantially prejudice" the client's interests. *See also* Rule 1.3(b)(2), *supra* note 5. Accordingly, before seeking the client's consent, the lawyer has an obligation to disclose to the client her concerns about the effect reporting may have on his chances of ultimate recovery. The possibility that reporting would prejudice the client's case should be brought to his attention in seeking his consent to disclosure. If the client does consent, after having been made fully aware of the possible adverse consequences for his ultimate recovery, neither Rule 1.6 nor Rule 1.3(b)(2) bars reporting under Rule 8.3(a).

[7] We express no views on the desirability of this outcome as a matter of policy, although we appreciate the concerns expressed by Bar Counsel noted earlier in this opinion. *See* Procedural History, *supra at 62.* These same concerns were expressed by the Rhode Island Supreme Court in *In re Ethics Advisory Panel Opinion No. 92-1, supra,* 627 A. 2d at 323 (allowing Rule 1.6 to "trump" the obligation to report misconduct represents "a failure of the legal profession to regulate itself effectively," and "fuels the perception that . . . the legal profession is engaged in a coverup of attorney misconduct."). *See also* Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough,* 31 Ariz. L. Rev. 657, 675 (1989). We are aware that some jurisdictions have promulgated a confidentiality rule that allows disclosure in a broader set of circumstances than is permitted under the District of Columbia's version of Rule 1.6. *See* 2 Hazard & Hodes, *The Law of Lawyering,* §§ AP4:103-AP4:105 at 1259-1266. However, given the broad protection afforded client confidences under the District's Rule 1.6, we feel constrained here to conclude as we do. The same result would appear to obtain under the ABA Model Rules, notwithstanding the different wording of Model Rule 1.6.

*3. Violation of a Disciplinary Rule*

Once the lawyer has concluded that she "knows" the relevant facts, and that her reporting will not require disclosure of information protected by Rule 1.6, she must satisfy herself that the conduct in question rises to the level of a disciplinary violation. Here, for example, the inquirer must believe that the other lawyer engaged in conduct clearly violative of her ethical obligation to represent a client competently and diligently, as required by Rules 1.1 and 1.3. Willful or unexcused failure to file within the applicable limitations period may well constitute a basis for sanctioning a lawyer for incompetence or neglect, or for prejudicing the client during the course of the professional relationship. So may representation without regard to or in spite of conflicts of interest among her clients. On the other hand, conduct that is merely negligent may not involve an ethical violation, particularly if there are circumstances that would excuse or explain the negligence. If the inquirer has doubts as to whether a disciplinary rule has been violated by the other lawyer, apart from the alleged malpractice claim, she probably does not have the requisite degree of certainty to activate her own ethical obligation to report under Rule 8.3(a).

*4. "Substantial Question" as to Honesty, Trustworthiness or Fitness to Practice Law*

Finally, even if a lawyer concludes that she has the requisite knowledge of another lawyer's clear violation of the Disciplinary Rules, and that she may reveal that knowledge without violating Rule 1.6, she is required by Rule 8.3(a) to do so only if the violation "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. . . ." This "significant limitation" on the reporting requirement means that "not all violations of the disciplinary rules must be reported, only the most serious ones." New York State Bar Opinion, *supra* at 8. The commentary to the Rule further explicates the basis for this limitation:

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

Whether a particular violation of the disciplinary rules meets the "substantial question" test must be determined on a case-by-case basis, using "a measure of judgment" rather than a clear litmus test. Advisory opinions from other jurisdictions are somewhat helpful in this regard but suggest no bright line test. *Compare* Arizona Op. 87-26 (failure to file tax returns should have been reported), Alabama Op. 90-97 (same for misappropriation of escrow funds), and New Mexico Op. 1988-8 (same for attempt to bribe witnesses); *with* Illinois Op. 90-36 (threats to bring criminal charges to gain advantage in a civil suit need not be reported), Virginia Op. 962 (1987) (same for attempt to persuade clients to change wills to detriment of Society for the Prevention of Cruelty to Animals), and Pennsylvania Op. 88-225 (same for failure to comply with statute of limitations).

It would seem reasonable to conclude that a one-time negligent failure to comply with a limitation period, without more, would not evidence a lack of fitness to practice law. Similarly, simultaneous representation of several family members with arguably conflicting interests in a personal injury context would not seem on its face necessarily to present a clear and serious violation of the disciplinary rules. In the end, however, it is for the inquiring lawyer to determine, in light of all the facts of the situation as she knows them, whether in her judgment a particular disciplinary violation raises a "substantial question" about another lawyer's fitness, so as to trigger her own ethical obligation to report it. It is and should be a solemn and unenviable task.

We note that the mere filing of the malpractice lawsuit does not relieve the inquirer from any independent obligation she may have under Rule 8.3(a) to report the conduct at issue to bar disciplinary authorities. This obligation is not satisfied by whatever public notice may be implied from filing suit in court. On the other hand, as noted previously, the fact that the lawyer has filed a lawsuit over another lawyer's misconduct does not relieve her of her obligations to keep client confidences under Rule 1.6, and in these circumstances the client's wishes still control.

*Conclusion*

On the facts outlined in the instant in-

quiry, we cannot determine conclusively whether all or indeed any of the four elements necessary to trigger the reporting requirement under Rule 8.3(a) are present in this case. The inquirer must herself decide, based upon the guidance herein provided, whether she has sufficient knowledge of the other lawyer's misconduct, whether that knowledge may be disclosed consistent with Rule 1.6 and Rule 1.3(b)(2), and whether the conduct at issue in the malpractice action also constitutes a clear violation of the ethics rules. Finally, assuming the inquirer concludes that a violation of the Rules has occurred, she must also decide whether the violation is sufficiently serious as to raise a substantial question about the other lawyer's fitness to practice law.

We stress that Rule 8.3(a) deals only with situations in which a lawyer is *obligated* to report another lawyer's misconduct, so that her failure to report will itself violate the Rules of Professional Conduct and subject her to disciplinary action. The Rule neither limits the circumstances in which a lawyer is permitted to make such a report (except where Rule 1.6 precludes disclosure), nor defines those situations in which reporting might be appropriate if not mandatory. In this regard, the New York State Bar Opinion, *supra* at 4, notes:

> A lawyer is always free to report evidence of what might constitute improper conduct by another attorney, subject to the obligations to protect client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report.

It should go without saying, of course, that it would be improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so, or solely to gain a tactical advantage in a matter. *See* D.C. Bar Op. 220 (1991) (threats to file disciplinary charges solely to gain advantage in a civil matter violate Rule 8.4(g)). The inquirer did not ask the Committee's views about whether or not it would be permissible or appropriate in these circumstances for her to report the other lawyer's conduct, and we express none.

Inquiry No. 92-6-15
Adopted: April 19, 1994
Revised: October 18, 1994

*Opinion No. 247*

**Whether Settlement Lawyer Selected by Real Estate Purchaser has a Sufficient Lawyer-Client Relationship with Seller to Warrant Disqualification; Conflict of Interest if Adverse Party Formerly was Represented by a Firm to Whom Lawyer Is "Of Counsel"**

• When a lawyer who performed some services for both seller and purchaser in a residential real estate transaction did not notify the seller that he represented only the purchaser and did not specify his relationship to the seller, the lawyer should not represent the purchaser against the seller in a subsequent dispute concerning the sale. This disqualification is imputed to a lawyer who listed himself as "of counsel" to the real estate lawyer at the time of the transaction.

**Applicable Rules**

- **Rule 1.7**(Conflict of Interest: General Rule)
- **Rule 1.9(a)**(Conflict of Interest: Former Client)
- **Rule 1.10**(Conflict of Interest: Imputed Disqualification: General Rule)
- **Rule 2.2**(Lawyer as Intermediary)
- **Rule 4.3**(Dealing with Unrepresented Persons)

*Inquiry*

The Inquirer's firm shares office space with Lawyer A and Inquirer is listed on Lawyer A's letterhead as "of counsel" to Lawyer A's firm. The Inquirer has been asked to represent the purchaser of a house in a potential lawsuit against the seller. Lawyer A conducted the settlement of the house in question in 1983.

The standard form real estate contract used in the transaction gave purchasers the opportunity to select the real estate lawyer. At settlement, the sellers paid $100 of Lawyer A's "closing fee" and the purchasers paid $125. The purchasers also paid $100 to Lawyer A for a title examination. The sellers paid $90 to Lawyer A for notes and deeds of trust drafted for two $9000 trusts taken back on the property. The purchasers also paid $75 for the title abstract to the title insurance company. Lawyer A was the only lawyer involved in the transaction.

The "of counsel" designation and shared space arrangements between Lawyer A and the Inquirer have been in place from prior to 1983 through the time of the Inquiry. The Inquirer says that his relationship with Lawyer A always has been to render occasional advice on matters outside real estate practice and that he had no knowledge of the 1983 real estate transaction in question.

Lawyer A employs the receptionist in the office suite, and the Inquirer contributes a percentage of her salary. The single receptionist greets guests to the office and directs Inquirer's clients to him or to his secretary. She takes phone messages for the Inquirer and his partners in the secretary's absence. She answers Inquirer's phone number with the name of Inquirer's firm. She answers Lawyer A's separate phone lines as "Law Offices." She sorts mail and leaves it unopened for the Inquirer's secretary. The receptionist is the only employee of Lawyer A who does any work for the Inquirer or his firm. (In 1983, the receptionist was employed by the Inquirer's firm with a salary contribution from Lawyer A, but the office procedure was the same.)

Files are kept completely separate. The two firms are on different computer systems that are not compatible. The firms have different phone numbers but share a common fax machine. No fees are shared between the firms. The two firms have had tenant and subtenant arrangements on the lease as well as being joint tenants on the current sublease. The relationship has been solely legal advice on cases when useful and case referrals. At the beginning of the relationship, Lawyer A was a solo practitioner, and the three partners in Inquirer's firm were all "of counsel" to him. Today, Lawyer A has four associated lawyers, and Inquirer's firm has two lawyers after one's retirement.

In 1993, the purchasers in the 1983 transaction retained the Inquirer in a claim for damages against the sellers in the 1983 transaction alleging latent defects in the property. Lawyer A had referred them to the Inquirer on a zoning matter a couple of years after the 1983 closing. Inquirer had done a couple of hours work for the purchasers then. When the current dispute arose, Lawyer A again suggested that purchasers consult the Inquirer.

Inquirer's letter is accompanied by a letter from Lawyer A that recounts the following additional information. Before the purchasers retained the Inquirer, one

of the sellers called Lawyer A and asked some questions. After some conversation, Lawyer A asked whom the transaction involved. When he was told, Lawyer A said that he remembered settling the property and still knew the purchasers. He said he would not discuss the matter further in any detail with the seller in that there was a dispute between the parties. He said that he assured the seller that he would not discuss his comments with the purchasers and would not represent them. He says he took this position because he preferred to err on the side of caution although he was not sure that he was disqualified from representing the purchasers based on the conversation or the past representation.

Lawyer A says that, in his opinion, he did not enter into a lawyer-client relationship with the Sellers that would have disqualified him from representing the purchasers. He characterizes his relationship to the sellers as "the fiduciary relationship to properly record documents of record and to disburse funds from escrow exactly as indicated in the contract and on the agreed-upon Settlement Statement." In a subsequent conversation, Lawyer A says that, as a settlement lawyer, he considers himself to represent the purchaser up through closing. Up to that time, he will act for the purchaser in a manner that might be adverse to the interests of other parties, e.g., advising them on how to break the contract. He says that he informs the purchaser that, once the point of closing is reached, he undertakes a fiduciary obligation to the other parties as well which requires him to prepare and record documents and other things necessary to properly effect the agreements. He says his relationship to purchasers never involves asking them for information or otherwise acquiring confidential information nor the provision of legal advice. He does not use informed consent waivers with real estate settlement clients nor distribute any type of written notice on his role and relationship to the parties.

The seller has challenged the Inquirer's representation. Inquirer asks if his "of counsel" relationship is sufficient to impute disqualification to the Inquirer from representing the purchasers in the 1983 transaction. In the alternative, he asks whether Lawyer A's relationship to the 1983 sellers was sufficient to create a disqualification of Lawyer A that could be so imputed.

*Discussion*

The inquiry raises four possible issues:

1. Does Lawyer A's relationship with the sellers in the 1983 real estate closing create a conflict such that he would be barred from representing the purchasers in the subsequent dispute over latent defects in the property?

2. If such a conflict exists for Lawyer A, should this conflict be imputed to the Inquirer who is listed as "of counsel" to Lawyer A's firm and shares space with Lawyer A?

3. Even if Lawyer A were not barred from representing the purchasers under the previous analysis, would he be barred because of the seller's 1993 phone call to Lawyer A?

4. If Lawyer A were barred because of the phone call, would this bar be imputed to the Inquirer?

*Issue #1.*

Numerous bar associations have opined on representation of multiple interests (buyer, seller, mortgagor, title insurance company) in real estate transactions, but our Committee has not commented previously. Some of these opinions from other jurisdictions also address representation if a subsequent dispute arises among the parties to the transaction.[1]

Representation in real estate transactions also has been discussed in cases concerning whether real estate closings conducted by settlement companies or other non-lawyers are the unauthorized practice of law. *See In re First Escrow, Inc., In re Best Escrow, Inc.*, __ Mo. __, 840 S.W.2d 839 (1992), reviewing case law in multiple jurisdictions. In addition to reviewing these two lines of authority, the Committee heard from several lawyers experienced in residential real estate closings as part of its deliberation.

[1] *See* Ala. Op. 86-106 (11/6/86); Ill. Op. 86-15 (5/13/87) and Op. 90-3 (11/6/90); Mass. Op. 1990-3 (undated); N.H. Op. 1989-90/1 (6/21/90); New York City Op. 1990-1 (undated); N.Y. State Op. 576 (6/5/86) and Op. 611 (6/20/90); Pa. Op. 88-95 (undated); Philadelphia, Op.86-46 (4/10/86) and Op. 89-16 (6/16/89); S.C. Op. 86-9 (undated); Suffolk County, New York Op. 88-6 (undated); Tex. Op. 448 (9/11/87); Va. Op. 824 (10/9/86), Op. 1000 (11/12/87), Op. 1089 (6/8/88), and Op. 1149 (12/19/88); W.Va. , Op. 89-1 (undated).

There is debate about how the role of a single lawyer at closing should be characterized. 1. The lawyer is performing activities that are not the practice of law since the functions are also performed by non-lawyers. 2. The lawyer represents multiple clients (buyer, seller, and lender) with potentially differing interests. 3. The lawyer represents only one party (usually the buyer who has the contractual option to elect counsel) with fiduciary obligations that arise to the other parties at closing. These fiduciary obligations require that certain actions be taken, e.g., recording of documents, distribution of funds, but do not constitute a lawyer-client relationship with those other parties. 4. The lawyer functions as an intermediary between clients.

Lawyer A uses the third characterization to describe the 1983 representation. The seller disagrees and would choose the second characterization to describe the representation.

This inquiry does not ask for guidance on how lawyers in residential real estate closing should deal with the multiple parties involved. The Committee does not think it wise to address that question in an inquiry in which the matter comes up only indirectly. We do not reach a conclusion on which characterization(s) of the lawyer role in a residential closing are permissible and which should apply to the 1983 transaction involved here.

Without choosing among competing characterizations, we direct attention to provisions of Rules 2.2 (lawyer as intermediary for common clients) and 4.3 (lawyer who deals with an unrepresented person on behalf of a client). Both rules emphasize the importance of making the lawyer's role, duties, and non-duties clear when those matters could be misunderstood by multiple participants in a matter.

In this case, we understand that Lawyer A gave no oral or written notice that explicitly stated to the seller the lawyer's view that he represented the purchasers, not the sellers, and only had fiduciary obligations for completing the transaction to the seller. Lawyer A points out that the seller who has questioned the representation also is a lawyer. Lawyer A says that, when the second trust was needed, he asked the seller whether he wished to draft the trust himself, use another lawyer, or have Lawyer A produce one (for which he used a standard form from the federal insurer).

We do not speculate what the seller understood or should have understood about this matter, given his legal training. This opinion considers the relationship of the attorney to the parties in the 1983 transaction solely to determine whether under Rule 1.9 Lawyer A may represent the purchasers against the sellers in a substantially related matter. On that issue, we hold that, in the absence of a clear contemporaneous statement that Lawyer A represented only the purchasers and not the sellers, Lawyer A may not represent the purchasers against the sellers in a subsequent substantially related matter. Whether such an omission would be sufficient to impose duties on Lawyer A to the sellers in the 1983 transaction under other Rules will depend on the policies underlying those Rules. We express no opinion on such issues that may arise in future inquiries.

The Committee's consultation with residential real estate lawyers suggested that some lawyers routinely provide a written notice to parties explaining the lawyer's scope of representation, obligations, non-obligations, and course that will be followed if a dispute arises among the parties. This seems wise no matter which characterization of the relationship to multiple parties a lawyer assumes or which characterization a court might find to exist as a matter of law.

*Issue #2.*

Having decided that Lawyer A should not represent the 1983 purchaser against the seller in a substantially related matter, we reach the question of whether the Inquirer who is "of counsel" to Lawyer A also is disqualified.

Rule 1.10(a) says that

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

In the previous section, we declined to decide whether a single lawyer in a residential real estate closing should be characterized as representing multiple clients with potentially different interests governed by Rule 1.7, an intermediary among clients governed by Rule 2.2, or two other possibilities. We held that the lack of notice clarifying the lawyer's role with respect to the seller allowed sufficient ambiguity that Lawyer A should not later take on an adverse representation in a substantially related matter over the seller's objection. The relationship between lawyer and seller was sufficient to result in a disqualification under Rule 1.9. Since the relationship to the seller, absent clarifying notice, was sufficient to trigger a disqualification of Lawyer A, it is also sufficient to disqualify a lawyer "associated in a firm" under Rule 1.10.

We now turn to whether Lawyer A and the Inquirer should be considered "associated in a firm" within the meaning of Rule 1.10(a). Until now, Opinion 151 (1985) on fee splitting was our only statement on the implications of the term "of counsel." Opinion 151 held an of counsel relationship could be sufficiently like that of a partner or associate to permit fee splitting limited to "partners" and "associates" under the language of DR 2-107(A).

Here we consider whether lawyers who hold themselves out to the public as "of counsel" could be found to have a sufficiently distant relationship to avoid imputed disqualification under Rule 1.10(a). As Opinion 151 mentions, the imputed disqualification rule then in effect (DR 5-105(D)) explicitly extended imputed disqualification beyond partners and associates to "any other lawyer affiliated with him or his firm." Rule 1.10(a) hinges disqualification on whether lawyers are "associated in a firm."

Opinion 192 (1988) considers whether members of "associated" or "correspondent" firms should be disqualified for conflicts on this basis. The Committee held that these terms foster an impression of an "ongoing and regular relationship" and create the "reasonable impression attorneys in the firms will not represent conflicting interests."

ABA Formal Opinion 90-357 (1990) reasons likewise that the term "of counsel" holds out to the public a "close, regular, personal relationship" among the lawyers that is a "general and continuing" one. It holds that there "can be no doubt" that an of counsel lawyer or firm is "associated" for purposes of imputed disqualification under Model Rule 1.10 (as well as 1.11 (a) and 1.12 (c)).

Comment [1] to Rule 1.10 says that two practitioners who share space and occasionally consult will be regarded as a firm for purposes of the Rules if they hold themselves out to the public in a manner that suggests they are a firm. The previously cited sections of Opinion 192 and ABA Opinion 90-357 are consistent with our holding that an "of counsel" designation gives a public impression of a sufficiently close relationship among lawyers that they should be treated as if they were in the same firm for imputed disqualification analysis under Rule 1.10(a).[2]

*Issues #3 and #4.*

Having reached the previous conclusions on Issues #1 and #2, we do not reach Issue #3. As to Issue #4, if Lawyer A were disqualified on Issue #3 (the 1993 phone call with seller), the Inquirer would have been disqualified on the same reasoning on the "of counsel" designation discussed in Issue #2.

Inquiry No. 93-11-31
Adopted: May 24, 1994

*Opinion No. 248*

## Whether Lawyer May Represent Multiple Plaintiffs Claiming Employment Discrimination in Selection of Other Person for Position They Sought

• A lawyer is not necessarily precluded from representing multiple candidates for the same position who claim that the selection of another was tainted by unlawful discrimination, provided that, after consultation about the other serious risks in such representation, the clients consent to any necessary limitation on the scope of the representation and the potential future need for separate representation, and that the lawyer will be able to zealously represent each client.

[2] This opinion imputes disqualification to attorneys sharing space because of their repesentations to the public. ABA Formal Op. 90-357 disapproves the use of the term "of counsel" for relationships involving an individual case, a forwarder or receiver of legal business, occasional collaborative efforts among otherwise unrelated lawyers or firms, or the relationship of an outside consultant. It lists four other situations where it deems the term to be properly applied. It does not discuss lawyers who call themselves of counsel on the basis of sharing space alone, but the implication is that would be considered ethically impermissible.

D.C. Op. 151 refers to the definition of "of counsel" as an "evolving concept." It cites, as one possibility, an of counsel lawyer who merely shares office space and other facilities. We do not reach whether Op. 151's approval of the term" of counsel" to describe an arrangement to share space should be reconsidered.

**Applicable Rules**

- **Rule 1.2** (Scope of Representation)
- **Rule 1.3** (Diligence and Zeal)
- **Rule 1.7** (Conflict of Interest: General Rule)

*Inquiry*

Lawyer has been approached by two people who applied for, but did not get, a job and who believe that the selection was based on prohibited discriminatory practices. In asking whether he can represent both plaintiffs, Lawyer states that to establish liability he need only prove that each plaintiff was better qualified than the person selected;[1] he does not address the subject of relief.

*Discussion*

The principal standard governing conflict of interest is Rule 1.7, which provides:

> (a) A lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer.
>
> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
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> (1) a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter;
>
> (2) such representation will be or is likely to be adversely affected by representation of another client;
>
> (3) representation of another client will be or reasonably may be adversely affected by the representation of another client;
>
> (4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibility to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Rule 1.7(c) permits representation under Rule 1.7(b) if:

> (1) each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) the lawyer is able to comply with all other applicable rules with respect to such representation.

"Full disclosure" requires "a detailed explanation of the risks and disadvantages to the client." *In re James*, 452 A.2d 163, 167 (D.C. App. 1982), *cert. denied,* 460 U.S. 1038 (1983). Comment [12] to Rule 1.7 addresses the disclosure needed for consent:

> Adequate disclosure requires such disclosure of the parties and their interests in positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. If a lawyer's obligation to one or another client . . . precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue. Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation.

In addition, Rule 1.2(c) provides:

> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.[2]

As the Court of Appeals recently explained, "Rule 1.7(a) mandates an absolute prohibition of dual or multiple representation when the lawyer would represent clients with 'adverse' 'position[s]' in the 'same matter.' Client consent cannot cure such a conflict." *Griva v. Davison*, No. 92-CV-992 (D.C. Ct. App. Feb. 10, 1994), 122 Wash. D.L. Rep. 441, *pet. reh. pending.*

However, Rule 1.7(b) outlines another category of cases in which dual representation is not absolutely forbidden. Comment [4] to Rule 1.7 elaborates, stating that under paragraph (b), if a lawyer would not be required to take adverse positions for two clients in the "liability phase" of a case, but might in the damages phase, the lawyer could agree to represent both in the liability phase and then one or the other in the damages phase.[3] However, Comment [5] cautions that the ability to continue to represent either party may be limited because the lawyer learns confidences or secrets protected by Rule 1.6, absent consent of the party who confidences or secrets are implicated.

The inquiry raises questions similar to those the Committee addressed in D.C. Bar Op. No. 131, concerning the prior Disciplinary Rules. There the Committee concluded that a firm representing a plaintiff class in a discrimination action against a federal agency could not also represent an employee-grievant at that agency in an unrelated administrative action to remove certain performance evaluations in the employee's file, including some prepared by a supervisor who was a class member in the other action. In ruling that such representation constituted a non-waivable conflict in violation of DR 5-105, the Committee concluded that success in representing the employee would amount to a successful attack on the supervisor/class member's judgment, and such a ruling could be used to deny the supervisor relief. Among the Committee's reasons were "the very real possibility that in representing the employee-grievant, the firm might (indeed, should) be reluctant to do what is necessary to succeed; that is, attack the judgment and actions of one of its clients, the unnamed class member." A further concern was "a very real danger that the inquiring firm may make disclosures of confidences of the employee-grievant in the course of representing the appraising official with respect to indi-

[1] We do not address the legal question whether Lawyer is correct in this premise.

[2] The Terminology section of the Rules defines "consent" as denoting "uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question," and defines "consultation" as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

[3] Comment [4] states in part:

> The absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions in the same matter. It is for this reason that paragraph (a) refers to adversity with respect to a "position taken or to be taken" in a matter rather than adversity with respect to the matter or the entire representation. This approach is intended to reduce the costs of litigation in other representations where parties have common, nonadverse (or contingently or possibly adverse) positions with respect to other issues. If, for example, a lawyer would not be required to take adverse positions in providing point representation of two clients in the liability phase of a case, it would be permissible to undertaken such a limited representation. Then after completion of the liability phase, and upon satisfying the requirements of paragraph (c) of this Rule, the lawyer could represent either one of those parties as to the damages phase of the case, even though the other, represented by separate counsel as to damages, might have an adverse position as to that phase of the case.

vidual relief for her in the class action. . . Although the grievant could consent to disclosure of confidential information, the grievant would have little incentive to do so."[4]

Comment [4] to Rule 1.7 posits a clear bifurcation of proceedings into liability and damages phases which may or may not occur. While such a division has been common in employment discrimination cases in the past, the recent amendments to the Civil Rights Act permitting jury trials and compensatory damages create the prospect that one side or the other may benefit from and be entitled to insist on a unified trial of all issues, covering liability and relief.

The inquirer has not addressed the possibility that the clients' interests would be adverse as to relief. For example, the defendant might argue that, since there was only one opening and only one of the plaintiffs could have been selected, even if there were a violation only one plaintiff can be held entitled to the job or to back pay and damages. With or without bifurcation, moreover, the relief issues are likely to arise at any stage of the case in the context of settlement discussions, *e.g.,* with respect to either compensation or an offer of a position.

Lawyer could not represent both plaintiffs under circumstances where it might be in the interests of each plaintiff to show that he or she rather than the other plaintiff would have been selected. Moreover, there is a substantial likelihood that, when issues requiring separate representation arise, Lawyer would have obtained information as to each client protected by Rule 1.6. It is thus difficult to see how Lawyer could conclude that representation of one client would not be "likely to be adversely affected by" representation of the other, or that the lawyer's professional judgment on behalf of one client might not "be adversely affected by the Lawyer's responsibilities to . . . a third party," *i.e.,* the other client. It also seems quite possible that Lawyer will end up having to take "adverse positions" for the two clients in the same matter (*e.g.,* as to their relative qualifications). It is difficult to expect that, if any such potentially disqualifying conditions existed and were understood, the clients would provide informed consent to permit the same lawyer to represent their differing, competing interests as to relief. An alternative might be for Lawyer and the clients to limit the objectives of the representation to establishing liability, as permitted by Rule 1.2(c), but it is problematic whether that would often be feasible.

To satisfy the requirements of consultation or consent under Rules 1.2(c) or 1.7(c), Lawyer would have to explain the various ways in which the clients' interests could come into conflict, the possible hampering of both of their respective claims if they were to agree not to take conflicting positions, the possible added cost and disruption if it were necessary for either or both to get new counsel later, and the complications concerning compensation if a contingent fee were contemplated, etc. We note, moreover, that in *Griva, supra,* the Court of Appeals recently rejected a contention that, as a matter of law, consent to dual representation cannot be withdrawn when an actual conflict arises.

It is, of course, possible that Lawyer could represent both clients without having to take antagonistic positions: Lawyer's evident premise of bifurcated proceedings might prove correct; the plaintiffs might agree not to attack each other in the liability phase; both plaintiffs might lose in the liability phase; if they win, they might agree on joint representation with limited objectives to obviate a conflict, or on separate representation of one or both (assuming the complications as to fees could be resolved), etc. Accordingly, we are not prepared to say that Rule 1.7 precludes such representation.

Even if the clients provided meaningful consent to representation after Lawyer's full disclosure, Lawyer would still have to "comply with all other applicable rules with respect to such representation" of each client. Rule 1.7(c)(2). As explained in Comment [15] to Rule 1.7,

> Disclosure and consent to representation do not diminish a lawyer's obligations to comply with the other Rules of Professional Conduct. For example, even if a client provides informed and uncoerced consent, a lawyer may not undertake or continue a representation if the lawyer is unable to comply with the obligations regarding diligence . . . provided in [Rule 1.3].

Rule 1.3(a) states: "A lawyer shall represent a client zealously and diligently within the bounds of the law."[5] It is well-settled that this duty of zealous representation cannot be compromised, even with the consent of the client. Indeed, this Committee has concluded several times that the representation of a party — even with consent — would be improper where "the lawyer himself . . . conclude[s] that his ability zealously to represent th[at] . . . party (as required by Rule 1.3) would be compromised" by a conflict of interest. D.C. Bar Op. No. 226 (1992).[6] Thus, Lawyer will have to determine whether, in view of the scope of representation agreed to by the clients, his obligations to them will limit his ability to represent each of them zealously and diligently.

The Committee has doubts about whether a client, if adequately informed of the possible constraints on Lawyer's representation, would consent to such joint representation. The Committee also has concerns whether properly informed clients would agree to limit the scope of the representation in such a way that Lawyer could reasonably conclude that he would be able to satisfy his duty of

[4] This opinion is not dispositive because of significant language differences between DR 5-105 and Rule 1.7. D.C. Rule 1.7 differs substantially from ABA Model Rule 1.7, which was itself a substantial revision of DR 5-105 and 5-101 (concerning "appearance of impropriety"). However, although the revision was intended to facilitate a somewhat wider range of multiple representation, the changes were intended largely to clarify, to eliminate ambiguity, and to apply objective rather than subjective standards, without necessarily changing the results in cases under the old Rules. Proposed Rules of Prof. Conduct & Related Comments as recommended by the D.C. Bar Bd. of Governors (Nov. 19, 1986) at 66-69 ("Yellow Book"); *see Griva v. Davison, supra.* In particular, Rule 1.7 does not expressly carry forward the requirement of DR 5-105 that it be "obvious" that the lawyer could provide "adequate representation" to both clients. However, Rule 1.7(c)(2) points in the same direction by permitting representation only if the lawyer "is able to comply with all other applicable rules." *See* Yellow Book, *id.*

[5] Rule 1.3 states more fully:

> "(a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
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> (b) A lawyer shall not intentionally:
>
> (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules, or
>
> (2) prejudice or damage a client during the course of the professional relationship.

[6] *See also* D.C. Bar Op. No. 210 (1990) ("The Committee has previously recognized that the obvious ability to provide adequate representation, which pursuant to DR 7-101 [the predecessor to Rule 1.3] must be zealous, is an independent requirement which must be met even though consent is provided."); D.C. Bar Op. No. 163 1986)(same); D.C. Bar Op. No. 49 (1978)(same).

zealous representation. However, the Committee does not believe that the possibility of such representation should be wholly precluded. *But cf.*, Rule 1.7 Comment [16] ("It is much to be preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a lawyer should bear this fact in mind in considering whether disclosure should be made and consent obtained at the outset.") Thus, Lawyer can proceed, but only with informed consent of all clients after they are fully informed of the possible risks, consequences, and costs of joint representation, including the risk that each client may need new counsel at a later phase of the proceeding, and that even with the clients' consent the court might disqualify Lawyer,[7] and only if he concludes that he can provide zealous representation to each client.

We note that the same problem can arise in a variety of contexts. While the particular issues may vary depending upon the governing laws, the nature of the claims, and the relief sought, the need for informed consent and the duty of zealous representation will always be present. Whether consent to joint representation will be permitted will depend upon the particular circumstances.

Inquiry No. 93-1-2
Adopted: June 21, 1994

*Opinion No. 249*

**Lawyer Advertising**

• Rule 7.1(a) permits truthful claims of lawyer specialization so long as they can be substantiated. Claims that a lawyer can help a client "when others cannot" are inherently incapable of substantiation and are prohibited by Rule 7.1(a)(2), as is a claim in a print advertisement that a lawyer "can help YOU."

**Applicable Rule**

• **Rule 7.1(a)**(Communications Concerning a Lawyer's Services)

*Inquiry*

A practitioner has sent us draft advertising copy for the "yellow pages directory" and asks: "I would appreciate receiving a written opinion from the Ethics committee regarding the advertisement."

The inquirer does not draw our attention to any particular portion of or statement in the advertisement. The ad appears designed to fill half a page. It features a stylized Statue of Liberty in the lower left corner and a picture of the practitioner in the upper right. At the top of the ad, in display type, the ad states: "Nationally known IMMIGRATION attorney Can Help YOU Too!" The ad continues in smaller type:

> A visa application once denied, may be denied forever! You need an expert in immigration law. [The practitioner] knows the system and the people, so he can help you when others can't. In 28 years of practice, he and his associates have solved more than 2,150 immigration problems.
>
> [The practitioner] has made his reputation at the I.N.S! And has learned how to cut through red tape to speed your application. Simple cases and tough ones to . . . he knows where to turn.
>
> Fast, efficient, economical solutions to all types of immigration problems . . .

Under the practitioner's picture there is a statement "Call me now, I'll discuss your case with you by phone for FREE!" The ad states at the bottom "SE HABLA ESPANOL" and repeats this sentiment in the language and alphabets of three other countries. The ad also indicates that the practitioner has been "LICENSED SINCE 1963" and formerly was a government trial attorney.

*Discussion*

The portion of the District of Columbia Rules of Professional Conduct applicable to this inquiry is Rule 7.1(a), which provides:

> (a) 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:
>
> (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

Relevant commentary to this Rule states:

> [1] It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amou t of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

In determining whether the advertisement in question violates Rule 7.1(a), the primary test, therefore, is whether the advertisement, or any portion of it, is misleading.

The thrust of the instant ad is that the practitioner has become expert through experience in dealing with immigration law problems and that his expertise in dealing with the Immigration and Naturalization Service allows him to be "fast, efficient [and] economical." While such claims of special expertise are prohibited in some jurisdictions, the District of Columbia does not prohibit such statements. Indeed, the Court of Appeals, at the recommendation of the Bar, expressly rejected Rule 7.4 of the ABA Model Rules of Professional Conduct, which had attempted to regulate claims of specialization. Moreover, nothing in the commentary to D.C. Rule 7.1 suggests that the Court of Appeals intended to prevent statements claiming specialization or expertise in a particular area of the law. Accordingly, we conclude that statements of expertise in immigration law in the advertisement before us are not to be deemed inherently misleading even though such statements are to some extent incapable of substantiation.

The specific claim of expertise made in the ad does not appear to be misleading in fact. The basis of the claim of experience is disclosed in the ad, namely that the practitioner and his associates have handled 2,150 representations in I.N.S. matters over 28 years. As required by Rule 7.1(a)(2), this claim is capable of substantiation and, we assume, that the practitioner will, as he must, be able to substantiate this claim with documentation upon request by a client.[1] Therefore,

[7] To assure that there has been adequate consultation and consent, it may be advisable for the consent to be memorialized in writing. *Cf., e.g.,* Doyle & Blumenthal, *The Defendants' Perspective: Ethical Considerations in Representing and Counseling Multiple Parties in Employment Litigation*, 10 Labor Law . 19, 38-39 (1994) (same consent).

[1] Similarly, we assume that the practitioner's claim to be "nationally known" can be documented.

in the absence of a factual record suggesting that this practitioner's claims of expertise are false or will be understood by the public to go beyond "what reasonably may be inferred from an evaluation" of this practitioner's stated years of practice and the number of INS cases he has handled, *Peel v. Attorney Registration and Disciplinary Comm'n,* 110 S. Ct. 2281, 2288 (1990), we have no reason to believe that this particular ad is inherently or potentially misleading in its claim of expertise.

We have more concern with two other matters. First, the statement that the practitioner "can help you when others can't" is precisely the sort of comparative claim that is prohibited by Comment [1][2] and Rule 7.1(a)(2), since it is incapable of substantiation. Second, practitioner's claim that he "can help YOU" is also misleading, since there is no way that such a claim can be accurate in the abstract and the practitioner cannot know whether or not he can help any client until some facts are known about the client's case.[3]

Whether the proposed advertisement is misleading in any other way, this Committee has no way of knowing. Here, we have no facts — hypothetical or real — concerning consumers' reactions to claims made in the ad, and we have no process by which we can ascertain whether the statements made in the advertisement are accurate or whether the public to which this advertisement is directed will be mislead in any material manner by the advertisement.[4] In the absence of specific proof that consumers would be mislead by the advertisement, it would be folly for this Committee to venture further guidance. *Cf., e.g., Ibanez v. Florida Department of Business and Professional Regulation,* ___ U.S. ___, No. 93-639, slip op. at 5 (June 13, 1994) (to regulate commercial speech, state must demonstrate that its concerns about such speech are "real and that its restriction will in fact alleviate them to a material degree," *quoting Edenfield v. Fane,* 507 U.S. ___, slip op. at 9).

[2] "Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated."

[3] In reaching the conclusion that this advertisement violates Rule 7.1(a)(2) and is therefore prohibited, the Committee takes no position on whether Rule 7.1(a)(2) is itself constitutional as so applied.

[4] Under this Committee's charter from the Bar, we are to decide cases on hypothetical facts and, accordingly, this Committee has no factfinding authority or procedures. *See* Rule E-4 of the Rules of the Legal Ethics Committee of the District of Columbia Bar.

Inquiry No. 90-9-38
Adopted: July 19, 1994

*Opinion No. 250*

**Duty To Turn Over Files Of Former Client To New Lawyer When Unpaid Fees Are Outstanding**

- Assertion of a retaining lien on work product to secure payment by a former client of unpaid fees is disfavored and should be undertaken only where it is clear that all the conditions of Rule 1.8(i) have been met.

**Applicable Rules**

- **Rule 1.8(i)** (Lien on Client Files)
- **Rule 1.16(d)** (Termination of Representation)

*Inquiry*

From 1988 until 1993, Inquirer was a partner or counsel to a law firm in the District of Columbia, specializing in representing clients before the Federal Communications Commission (FCC). In 1993, he left that law firm and established a practice as a sole practitioner. Many of the clients served by Inquirer at his former law firm have "followed" him to his new sole practice and have authorized Inquirer to tell his former law firm that they instruct the firm to turn their files over to Inquirer. However, at least some of these clients have outstanding unpaid balances of fees owed to Inquirer's former firm.

Inquirer raises a number of questions as to whether particular types of documents in the files of clients with unpaid fees owed to the firm must be turned over to him, per the client's request, under Rule 1.16(d), or whether his former firm is entitled to withhold such materials as "work product" under Rule 1.8(i).

*Discussion*

The rules governing disposition of client files when a representation is terminated are reasonably clear. Under Rule 1.16(d) a lawyer is required to "take timely steps to the extent reasonably practicable to protect a client's interests" in connection with termination of representation, including "surrendering papers and property to which the client is entitled." Rule 1.16(d) also provides, however, that the lawyer "may retain papers relating to the client to the extent permitted by Rule 1.8(i)."

Rule 1.8(i), in turn, permits a lawyer to impose a lien (often called a "retaining lien") upon a client's files[1] to secure payment of fees — but only to a very limited extent. Under DR 5-103(A) of the Code of Professional Responsibility, in effect in the District of Columbia through 1990, lawyers were broadly permitted to assert a retaining lien on a client's files to secure payment of fees. But even this rule was interpreted narrowly by this Committee, which went so far as to suggest, in one opinion, that retaining liens should not be permitted. *See* D.C. Bar Op. 59 (undated), note 13. *See also* D.C. Bar Op. 119 (1988), in which we described the retaining lien as "an unattractive and potentially quite harmful tool."

These concerns were reflected in the adoption of the District of Columbia's version of the Model Rules of Professional Conduct, effective in 1991. While Rule 1.8(j) of the ABA's Model Rules broadly permits the assertion of liens on client files to secure payment of fees, the parallel provision of the D.C. Rules of Professional Conduct, Rule 1.8(i), is much narrower. It bars imposition of a lawyer's lien on a client's files, "except upon the lawyer's own work product, and only to the extent that the work product has not been paid for." Rule 1.8(i) further provides that the exception permitting a lawyer to withhold work product from the client does not apply when the client has become unable to pay the outstanding fee or when withholding the work product "would present a significant risk to the client of irreparable harm." As discussed in our recent Opinion No. 230 (1992), the comments to Rule 1.8(i) and its "legislative history" emphasize that surrender of all files to the client at the termination of a representation is the general rule, and that the work product exception should be construed narrowly. Thus, Comment [9] emphasizes that only "materials generated by the lawyer's own effort" are included within the work product exception and that not *all* work

[1] Rule 1.8(i) does not address the question of when a lawyer may assert a retaining lien against client property other than files in the lawyer's possession; that issue is presumably governed by statutory or common law of the jurisdiction.

product can be withheld "merely because a portion of the lawyer's fees had not been paid." Similarly, Comment [10] notes that the possibility that a client "might irretrievably lose a significant right or become subject to a significant liability because of the withholding of the work product" constitutes irreparable harm, requiring that the work product be surrendered even if the fees are unpaid.

In sum, it seems clear to us that retaining liens on client files are now strongly disfavored in the District of Columbia, that the work product exception permitting such liens should be construed narrowly, and that a lawyer should assert a retaining lien on work product relating to a former client only where the exception is clearly applicable and where the lawyer's financial interests Opinion No. 59, "clearly outweigh the adversely affected interests of his former client." D.C. Bar Op. 59, *supra.*

With these principles in mind, we turn to the specific questions raised by the Inquirer.

The Inquirer asks first whether particular categories of client files fall within the work product exception of Rule 1.8(i). We agree with the Inquirer that files containing copies of applications filed with the FCC and amendments and correspondence relating to those applications — also filed with the FCC — are not within the work product exception. Regardless of their initial status, once such materials are filed with a public agency, they are not work product. Similarly, we agree with the Inquirer that files containing pleadings filed with the FCC and authorizations issued by the FCC do not constitute work product. We also agree that documents prepared by persons outside the law firm (e.g., pleadings filed by other parties, newspaper articles, press releases) and correspondence from the client or third parties to the law firm obviously do not constitute work product, since they were not prepared by lawyers or other personnel of the law firm. Finally, copies of correspondence previously sent to the client should not be withheld, in our view, even though such copies might technically be considered work product.[2]

On the other hand, we believe that materials such as drafts of pleadings, applications or other documents, notes of meetings and research memoranda and materials constitute work product eligible for the Rule 1.8(i) exception so long as they were prepared by a lawyer or other employee of the law firm.

The Inquirer also asks about the scope of the work product lien when a client, at the time of termination of the representation, has paid some but not all of the lawyer's or law firm's fees. As Comment [9] makes clear, not all of the work product can be withheld merely because a portion of the lawyer's fees has not been paid. Where the unpaid fees can be identified on a temporal basis, it is relatively easy to apply Rule 1.8(i): only work product produced during the period for which fees remain unpaid may be withheld. Thus, for example, if a terminated client has paid fees through 1992, and outstanding fees relate only to work done in 1993, the law firm may withhold only work product produced in 1993. Where the time period covered by unpaid fees cannot be clearly identified, the lawyer may withhold only work product that clearly has not been paid for.

Finally, the Inquirer notes that some of his clients have advised his former firm that, because of the Inquirer's "continuing need to respond to FCC inquiries and requirements in a timely fashion (in the client's behalf), your withholding any portion of the work product of the [client's] files would present a significant risk of irreparable harm to my interest." The Inquirer asks whether this assertion by the client is binding on the former firm, precluding it from invoking a Rule 1.8(i) lien on unpaid work product. We believe that, while such an assertion by a former client must be given great weight by the firm, it is not conclusive. A lawyer must make his or her own judgment as to whether the client will be irreparably harmed if the work product is withheld. Of course, the lawyer must give the client the benefit of the doubt if the question is a close one.

Inquiry No. 93-6-13
Adopted: October 18, 1994

*Opinion No. 251*

**Safekeeping of Settlement Proceeds Claimed Both by the Client and a Third Person**

- When both the client and a third person claim an interest in settlement proceeds held by a lawyer in his IOLTA account, the portion of the proceeds in dispute should not be disbursed to the client if the lawyer reasonably believes that the third party has a just claim to such portion. These disputed proceeds should be retained in the account until the dispute is resolved. Any undisputed portion of the settlement proceeds must be distributed promptly to the parties entitled to receive such portions.

**Applicable Rules**

- **Rule 1.15** (Safekeeping Property)
- **Rule 1.6** (Confidentiality of Information)

*Inquiry*

The inquirer represents a client in a personal injury case who was treated at D.C. General Hospital. The District of Columbia Government paid the client's medical expenses. The litigation was settled favorably for the client and the inquirer has received the settlement monies. The District Government, under D.C. Code § 3-507, *et. seq.*, [Health Care Assistance Reimbursement Act] has asserted a Medicaid lien over the settlement proceeds, seeking reimbursement of medical benefits paid by the District on the client's behalf. Following settlement, the lawyer requested the District to reduce the amount of its lien because (1) some of the amounts reflected in the lien were for charges unrelated to his client's accident-related injuries and medical care; (2) some of the accident-related charges were deemed excessive in a deposition given by the client's D.C. General Hospital treating physician; and (3) the lien is subject to compromise under D.C. Code § 3-507(b). Either the District has refused, or has not responded to, this request. Inquirer's client has asked inquirer to disburse all of the settlement proceeds directly to him. Inquirer notes that he expects his client to spend the money once it is received and asks whether he can, under the rules, hold the funds that are subject to the District's lien in his IOLTA account.

*Discussion*

Rule 1.15, Safekeeping Property, generally requires a lawyer to deliver promptly to the client or a third person any funds or other property that the client

[2] If the lawyer wishes to keep copies of files sent to a former client, the lawyer must bear the cost of making such copies. *See* D.C. Bar Op. 168 (April 15, 1986).

or a third person is entitled to receive.[1] Comment [4] to Rule 1.15 acknowledges that other parties "may have just claims against funds or other property in a lawyer's custody." The comment states further that the 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." In the case at issue, the District government has asserted a statutory lien over a portion of the settlement proceeds. District law provides that, after receipt of a notice of a perfected Medicaid lien (presumably the case here), if certain persons dispose of funds without paying the amount necessary to satisfy the lien, that person is personally liable for one year for any amount that the District is unable to recover.[2]

Whenever the lawyer holds funds that he reasonably believes are subject to a perfected statutory lien, the lien should be considered to be a third party "just claim" against the funds held in the lawyer's custody, as that term is used in Comment [4] to Rule 1.15. Under such circumstances, the lawyer should refuse to disburse the contested settlement proceeds to the client. Instead, the lawyer should hold the disputed funds until the dispute has been resolved.[3] Of course, the uncontested portion of the proceeds should be promptly delivered to the client pursuant to Rule 1.15(b). Rule 1.15 and the comment thereunder recognize that, although the lawyer has a paramount obligation to the client, there may also be an ethical duty to third parties as to funds, in the lawyer's possession, to which the third parties may be entitled.[4]

In cases where the lawyer holds disputed funds, he may at the client's request attempt to resolve the dispute by negotiating with the party asserting the claim to the funds. Pending disposition of the disputed funds by an agreement of the parties or by court order, the inquirer must hold the contested proceeds pursuant to Rule 1.15(a). Upon request of the third party (or the client), the lawyer must render a full account as to the proceeds, subject to the confidentiality rules of Rule 1.6.

*Conclusion*

A lawyer may distribute to a client only those settlement funds that the client is entitled to receive.

Inquiry No. 93-7-17
Adopted: October 18, 1994

*Opinion No. 252*

**Obligations of a Lawyer Appointed Guardian Ad Litem in a Child Abuse and Neglect Proceeding with Respect to Potential Tort Claims of the Child**

• A lawyer who is appointed guardian ad litem in a child abuse and neglect proceeding does not have an obligation to initiate tort claims on behalf of the child. If, however, the lawyer/guardian ad litem identifies significant potential claims the child has against third parties, the lawyer is obligated to notify the child or those responsible for the child's care of the potential claims. When necessary to preserve these claims, the lawyer also is obligated to take reasonable steps to file notices that are required by statute.

A lawyer/guardian ad litem cannot enter into a retainer agreement in a tort action on the child's behalf or represent the child after the retainer is signed unless a proper third party represents the child's interests in that case.

**Applicable Rules**

- **Rule 1.2** (Scope of Representation)
- **Rule 1.3** (Diligence and Zeal)
- **Rule 1.4** (Communication)
- **Rule 1.7** (Conflict of Interest)
- **Rule 1.14** (Representing a Client with a Disability)

*Inquiry*

Inquirer seeks advice on the authority and obligations of a lawyer appointed as guardian ad litem for a child in abuse and neglect proceedings with respect to potential tort claims arising in connection with the child's placement. For example, inquirer asks whether the lawyer must (or may) bring a claim for negligence on the child's behalf for injuries sustained from scalding water in a foster home in which the child has been placed as a result of the neglect proceedings.

Inquirer asks a number of subsidiary questions relating to injuries to the child resulting from someone's negligence. Inquirer asks whether the guardian ad litem can retain counsel, including herself or himself, and if so, whether approval of the child's parents must be sought and obtained. Inquirer also asks whether the guardian ad litem has immunity for improperly pursuing or failing to pursue a claim on behalf of the child.

*Discussion*

Inquirer presents questions of substantive law as well as questions of legal ethics under the Rules of Professional Conduct. The Committee only addresses the ethical questions, but must do so in the context of the role and authority of the guardian ad litem in child abuse and neglect proceedings in the District of Columbia.

*Background: The Guardian Ad Litem's Role in Child Abuse and Neglect Proceedings*

The Superior Court has jurisdiction to adjudicate allegations of child abuse and neglect. The court has authority to alter the custodial placement of a child, terminate parental rights and take other actions designed to protect a child's well-being.

Where a child is alleged to have been abused or neglected, and proceedings

[1] Rule 1.15(b) states:

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

[2] D.C. Code § 3-507 provides:

If after receiving notice of the lien under paragraph (2) of subsection (d) of this section a beneficiary, third party, or an insurer of a third-party tortfeasor disposes of funds covered by a lien perfected under this section without paying the District the amount of its lien that could have been satisfied from those funds after paying off any prior liens, that beneficiary, third party, or insurer shall, for a period of 1 year from the date the funds were improperly disposed of, be liable to the District for any amount that, because of the disposition, it is unable to recover.

[3] *See, e.g., In re Cassidy*, 89 Ill. 2d 145, 432 N.E. 2d 274 (1982). The court held that the attorney could not be censured where he had not disbursed to his client settlement proceeds in his trust account on which third parties had liens.

[4] Rule 1.15(b) and Comment [4]. *See also Leon v. Martinez*, N.Y. Ct. App., No. 103 (7/7/94). In *Martinez*, the court rejected the lawyer's argument that he was obligated under DR 9-102 to pay to his client the settlement funds in his possession and permitted the lawyer to be sued by third parties to enforce their claim for a portion of the settlement proceeds. The court concluded that the rule explicitly created ethical duties to third parties with respect to funds, held by the lawyer, to which the third parties may be entitled.

commence in Superior Court, the parent(s) or other involved adults are represented by counsel. In addition, the Court appoints "a guardian ad litem who is an attorney to represent the child in the proceedings." D.C. Code §16-2304(b).[1] *See also* Super. Ct. Neg. R. 27. The role of the guardian ad litem in neglect proceedings has been subject to a great deal of discussion in the legal literature.[2] As the District of Columbia Court of Appeals has observed, "[t]he definition of the precise roles of the attorney and the guardian ad litem is still evolving and not without difficulty." *S.S. v. D.M.*, 597 A.2d 870, 877 (D.C. 1991) (footnote omitted). The Committee understands that, in the absence of a conflict, in the District of Columbia, the guardian ad litem acts as lawyer for the child.[3]

The responsibilities of the guardian ad litem are quite broad. The Practice Standards mandate that the guardian ad litem engage in ongoing review of the child's well-being and report to the court. The guardian ad litem is also expected to "ensure that realistic goals are set in the case and that appropriate time periods are set for reviewing progress toward those goals." *Id.* In the event of an order for termination of parental rights, the guardian ad litem is responsible "for following the case and scheduling in-court reviews to ensure that prompt adoptive action is taken." *Id.* In *In re L.H.*, the court held that the guardian ad litem even had the authority to file a petition for termination of parental rights.

The duration of the appointment is open-ended. Although the appointment stems from a single judicial "proceeding" in which custody, an adjudication of neglect or termination of parental rights is at issue, D.C. Code §§16-918(b), 16-2304(b), the obligations deriving from the appointment may continue until the child turns twenty-one because of the duty to monitor the progress of the child and periodically report to the court. The Superior Court Rules governing the duration of the appointment reflect these expectations, and may be contrasted to the duration of appointment of lawyers for children in custody matters brought in domestic relations proceedings. As to the latter, Super. Ct. Dom. Rel. R. 17 provides that the appearance of an attorney is deemed to have terminated when a judgment or final order is entered from which no appeal has been taken. In neglect proceedings, by contrast, until the case is closed the appearance continues and withdrawal may only be accomplished with leave of court. Super. Ct. Neg. R. 27. Attorneys from Counsel for Child Abuse and Neglect have advised the Committee that a lawyer may act as a guardian ad litem for a child involved in neglect proceedings for many years.

*1. Does the guardian ad litem appointed in the abuse and neglect proceeding have an obligation to initiate tort claims on behalf of the child?*

No. Scope of representation is usually governed by agreement between lawyer and client.[4] Comment [4] to Rule 1.2(a) of the Rules of Professional Conduct, however, addresses situations where the scope of representation is determined in a fashion other than by lawyer-client agreement. Comment [4] states that "The objectives or scope of services provided by the 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*" (emphasis added). The comment goes on to give examples: a retainer defining the scope of representation, a legal aid agency limiting its work to certain types of cases and an insurer restricting representation to matters involving insurance coverage.

Thus, where a lawyer is appointed to represent an individual in a particular proceeding, the lawyer's obligation will be defined by the statute, regulation or orders governing the appointment. For example, a lawyer appointed for a criminal defendant is not required to represent the defendant with respect to landlord-tenant matters, nor even regarding alleged constitutional violations in connection with the defendant's conditions of confinement (except to the extent relevant to the disposition of the criminal charge itself). Here, the guardian ad litem is appointed to represent the child "in the [neglect] proceeding," D.C. Code §2304(b). However broad the responsibilities attendant to representation in those proceedings may be, the scope of the appointment nevertheless is limited to matters concerning custody and placement. In the absence of a statutory obligation to represent the child in other matters, then, we believe the lawyer has no ethical obligation to represent the child regarding other claims the child may have, including independent actions in tort, even for injuries inflicted during a placement made as a result of the neglect proceedings.

*2. Does the guardian ad litem have an obligation to advise the child or responsible adults of potential claims against third parties the child may have?*

A lawyer ordinarily is not required to provide advice about matters or potential claims not within the scope of the retainer agreement or appointment. In In-

[1] The statute provides, in relevant part:

> The Superior Court shall in every case involving a neglected child which results in a judicial proceeding, including the termination of the parent and child relationship pursuant to subchapter III of this chapter, appoint a guardian ad litem who is an attorney to represent the child in the proceedings. The guardian ad litem shall in general be charged with the representation of the child's best interests.
>
> The role and responsibilities of a guardian ad litem in other proceedings may differ.

[2] Some commentators argue that the guardian ad litem in a neglect proceeding should be an independent advisor to the court on the question of the child's best interests, while others contend that the guardian ad litem should advocate for the child in the same way as a lawyer represents any other client. Yet a third group take a view that where the guardian ad litem's assessment of the child's best interests is consistent with the child's wishes, the guardian ad litem should act as the lawyer for the child; if the views of the guardian and the lawyer conflict, the guardian ad litem adheres to the "best interests" standard, but another lawyer is appointed to represent the child. The question has been the subject of opinions of legal ethics committees, *see, e.g.*, Ariz. Op. 86-13 Wis. Op. E-89-13 (1989), as well as discussion in the literature on child advocacy. *See generally* M. Soler *et al.*, *Representing the Child Client* (1993).

[3] The Court of Appeals has noted that while the guardian ad litem is expected to make an independent investigation of and make a judgment about the child's best interests, so long as the views of the guardian ad litem and child coincide, the guardian ad litem acts is expected to "represent and advocate for" the child's best interests. *In re L.H.*, 634 A.2d 1230 (1993); *see also S.S., supra* at 876. Counsel for Child Abuse and Neglect, a branch of the Family Division of Superior Court, has issued *Practice Standards for Attorneys in Neglect Cases in the District of Columbia Superior Court.* Those standards suggest that unless the guardian's assessment of best interests conflict with the child's wishes, the role of the guardian ad litem in neglect proceedings is as an advocate for the child

In the event that the guardian ad litem's assessment of the child's best interests conflict with the views of the child, the *Practice Standards* advise that counsel notify the court and ask that separate counsel be appointed. The court may appoint a second attorney to serve as the child's counsel, representing the child's views, while the guardian ad litem notifies the court of the his or her assessment of the child's best interests. *In the Matters of A.S. and J.S.*, 118 D.W.L.R. 2221, 2227 n. 15 (Super. Ct. Oct. 11, 1990).

[4] Rule 1.2 appears to incorporate the substantive law that governs the lawyer-client representaiton agreement.

formal Opinion 1465 (1981), the ABA Standing Committee on Ethics and Professional Responsibility addressed the question whether a public defender representing a criminal defendant on appeal has an obligation to advise the client of a potential civil claim for malpractice against the lawyer who represented the client at trial. The Committee held that the ABA Model Code neither prohibited nor required such advice. It noted that under Ethical Consideration 2-2 of the ABA Model Code,[5] which advises lawyers "to assist lay-persons to recognize legal problems because such problems may not be self-revealing and often are not timely notice," it is "proper" for appellate counsel to advise the client of a possible malpractice claim. The Committee found that there was no obligation, however, to do so.

The D.C. Rules of Professional Conduct contain similar advice. Comment [4] to Rule 2.1 notes that "In general, a lawyer is not expected to give advice until asked by the client." The Comment goes on to note, however, that "A lawyer *ordinarily* has no duty to initiate investigation of the 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." (Emphasis added.)

The circumstances here, however, are not ordinary. Although Comment [4] gives no clue when the lawyer has an obligation to initiate advice to the client even in the absence of a request for it, we believe this is one such circumstance. The unique role of the guardian ad litem in abuse and neglect cases leads us to conclude that if the lawyer for a child identifies significant potential claims of the child against third parties, the lawyer has the obligation to notify the child or those responsible for the child's care (and in appropriate cases, the court) of the potential claims and, when necessary to preserve them, take reasonable steps to file notices required by statute.

There exist a number of elements of the role of the guardian ad litem plays that lead us to this conclusion. The guardian ad litem is responsible for monitoring many aspects of the child's life under circumstances where others have been alleged to fail in that responsibility; because of the child's youth and isolation from the family, the guardian ad litem is likely to be the only possible source of legal advice available to the child concerning potential claims; and the duration of the appointment puts the guardian ad litem in a good position to make reasonable judgments about potential claims. The lawyer, accordingly, should exercise judgment whether investigation or action may be warranted and, if so, what steps should be taken.

This limited duty finds support as well from Rule 2.1, describing the lawyer's role as adviser, Rule 1.3, requiring diligent representation, and Rule 1.4, mandating communication with clients. Rule 2.1 provides that when representing a client, "a lawyer shall exercise independent professional judgment and render candid advice." As indicated above, this duty is generally limited to the matter in which representation is provided, but where there is no other likely source of advice, a narrow reading of the duty does nothing more than guarantee that rights will be lost.

Comment [8] to Rule 1.3 is also relevant. That Comment addresses the situation where, as here, the lawyer serves a client "over a substantial period in a variety of matters." In such circumstances, the Comment advises, "the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal." The Comment goes on to state that it is the responsibility of the lawyer to assure that the client understands the limits of the representation.

Finally, Comment [3] to Rule 1.4 states: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of the representation."

These comments, read together, suggest that the lawyer has an obligation at least to assure that colorable claims for compensation do not simply drift away because no one else is aware of them, especially in a situation where the child is unlikely to turn elsewhere for help. The guardian ad litem is responsible for understanding and reporting on the client's well-being during the pendency of the neglect proceeding and may be the only person who has knowledge of the potential claim or is in a position to take steps to protect the client's interests regarding the claim. The child can reasonably expect the lawyer not to allow strong claims to be abandoned. Accordingly, we believe the Rules impose an obligation to inform the child or responsible adult of potential claims for injuries the lawyer is aware of, and, where statutory notice requirements exist, to preserve potential claims the lawyer reasonably believes warrants preservation.

We stress the narrowness of this obligation to advise and to preserve. It is not a duty to investigate potential claims. Nor is it a duty to take steps to preserve all potential claims, but only those that come to the lawyer's attention and which the lawyer reasonably believes may be colorable. Nor, finally, is there any duty to provide representation in these matters. In all cases the lawyer is expected to exercise reasonable judgment whether the potential claims should be the subject of advice and preservation.

*3. May the guardian ad litem appointed in the neglect proceeding initiate tort claims on behalf of the child?*

When the guardian ad litem seeks to initiate actions beyond the scope of the appointment, the guardian ad litem's actions must be governed by the more general rules applicable to the representation of children. This Committee has not previously addressed these questions. Three rules in particular, Rules 1.2, 1.7 and 1.14, are especially relevant to the determination whether the guardian ad litem may proceed with a tort action on behalf of the child.

Rule 1.2 provides that the client and the lawyer mutually agree on the objectives of representation. Unless the child is too young to consult, the child's minority does not obviate the obligation to consult with the client concerning the bringing of a tort claim as an element of the normal lawyer-client relationship. Rule 1.14(a) provides:

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

Comment [1] to Rule 1.14(a) elaborates on the obligation to seek to maintain a normal lawyer-client relationship with a child or a person with a disability. It rec-

[5] Ethical Considerations under the Model Code are aspirational in character.

ognizes generally that "a client lacking in legal capacity often has the ability to understand, to deliberate upon, and reach conclusions about matters affecting the client's well-being." The Comment goes on to recognize that children "as young as five or six years, and certainly those of ten or twelve" are entitled to have their opinions concerning custody given some legal weight.

Rule 1.14 thus embraces research on child development suggesting that children often have the capacity to, and therefore should, participate in legal decisions affecting them. The extent of their involvement and decision-making role depends on the age and individual characteristics of the child. The lawyer therefore must make an assessment of the client's ability to participate, and "as far as reasonably possible", invite the child to make decisions about the potential claim. Rule 1.14(b) admonishes the lawyer to seek appointment of a guardian or take other protective action only if the lawyer "reasonably believes that the client cannot adequately act in the client's own interest." Thus, if the child is able to participate in the decision whether to bring a tort claim, she must be given an opportunity to do so in a manner appropriate to the child's age and stage of development.

If, after consulting with the child as appropriate, the guardian ad litem and the child agree that a tort action should be brought, may the guardian ad litem represent the child?

We believe that Rule 1.7 precludes the guardian ad litem from entering into a retainer agreement on the child's behalf and acting as lawyer for the child in tort actions unless an additional guardian ad litem is appointed for that case. Rule 1.7(b)(4) prohibits a lawyer from representing a client "where the lawyer's professional judgment could be adversely affected by the lawyer's responsibility to or interests in a third party or the lawyer's own financial interests."

The conflict in this situation is obvious, since in entering an agreement to represent the child, the guardian ad litem would be acting on behalf both of the child and on behalf of herself in a transaction where the lawyer's financial interests are directly at stake and are adverse to those of the child (e.g., what fee should be charged?). The situation is similar to the one this Committee considered in Opinion 156 (1985), where a guardian ad litem sought to consent, on behalf of the child, to simultaneous representation of the child and prospective adoptive parents. We observed there that the "lawyer cannot provide disinterested consent [on behalf of the child] to his own employment by the prospective parents." Similarly here, the guardian ad litem cannot consent on the child's behalf to bringing a case or entering a financial arrangement with the guardian ad litem. Further, post-retainer conflicts problems, e.g., making decisions in the litigation, particularly about settlement, preclude the guardian ad litem from acting as both guardian ad litem and lawyer for the child in the tort action. *See* Mich. Standing Comm. on Professional and Judicial Ethics Op. RI-213 (1994).

Accordingly, the guardian ad litem cannot consent, on behalf of the child, to her own retention to bring tort litigation on behalf of the child. Even if consent to proceed in the litigation has been obtained elsewhere,[6] the guardian ad litem cannot proceed in the dual roles of lawyer in the tort case and guardian ad litem in the abuse or neglect case[7] unless another decision-maker is available to direct the litigation in the tort case. This requires a third party decision maker, e.g., a parent, a guardian ad litem separately appointed for that tort case, or referral to another lawyer for the tort litigation. Even with third party participation, the guardian ad litem who proceeds with representation in the tort case must be vigilant about potential conflicts between representation in the tort litigation and responsibilities as guardian ad litem in the abuse and neglect case. Without additional facts, we are not prepared to say that the potential conflicts in the two roles require a per se rule precluding representation in both proceedings so long as a separate guardian ad litem is appointed for the tort case.[8] The consequences of a per se rule, moreover, would be to further limit access to legal representation to children who already have the greatest difficulty obtaining counsel. In addition, the guardian ad litem is likely to be in the best position to learn the facts of the alleged tort action and make appropriate judgments about its chances of success and financial value.

*4. If the lawyer acting as guardian ad litem brings a case on behalf of the child, does he or she have immunity for improperly pursuing or failing to pursue a claim for legal action on behalf of the child?*

This question is one of substantive law beyond the purview of the Committee.

Inquiry No. 92-11-41
Adopted Nov. 15, 1994

*Opinion No. 253*

**Referral Fee Arrangement Between Law Firms and Insurance Companies**

• A law firm that (1) pays an insurance company a referral fee for clients referred from the company, (2) subleases office space on the premises of the insurance company, and (3) maintains a line of credit from the principals of the insurance company, may satisfy Rule 7.1, which requires that the potential client be informed of payments made to intermediaries, by disclosing these facts, but still not satisfy Rule 1.7, which sets forth the more detailed disclosure required when potential conflicts of interest exist. Moreover, even if the disclosure satisfied the rigorous requirements of Rule 1.7, and even if the client provided meaningful consent to the arrangement as would be required by Rule 1.7, the law firm would not be able to provide the zealous representation required by Rule 1.3 in cases involving a direct conflict of interest between the insurance company and the referred client.

[6] *See also* Superior Court Civil Rule 17(c), governing bringing suits on behalf of children. Whether the parents need to be involved in the decision is a matter of substantive law that the Committee does not address.

[7] Ethics committees in other jurisdictions have opined that to act as guardian ad litem and lawyer does not pose an inherent conflict, but these opinions did not address the special problems in tort cases. Wis. Legal Ethics Op. E-89-13 (1989), Ariz. Ethics Comm. Op. 86-13 (1986).

[8] *See* N.H. Ethics Op. 1088-0/15 (1989)(lawyer who was appointed guardian ad litem for two minor children who were the victims of felonious assault and participated in plea negotiations in which the defendant plead nolo contenders may represent the children through their mother in a civil suit unless the lawyer may be called as a witness in the trial of the civil action). N.Y. State Bar Ass'n Ethics Op. 648 (1993), decided under the Model Code's "appearance of impropriety" standard, advised that law guardians, the equivalent of guardians ad litem here, should "take particular care to avoid even the appearance that he or she has taken advantage of the fiduciary relationship between guardian and child to obtain valuable subsequent employment as counsel."

**Applicable Rules Provisions**

- **Rule 1.3(a) - (b)** (Diligence and Zeal)
- **Rule 1.7(b) - (c)** (Conflict of Interest: General Rule)
- **Rule 5.4** (Professional Independence of a Lawyer)
- **Rule 7.1** (Communications Concerning a Lawyer's Services)

*Inquiry*

The inquiring lawyer represents a Law Firm that proposes to pay an Insurance Company for clients the Company referred to the Firm. Payment would be due upon settlement or judgment in the referred cases and would be based upon a fee of $300 for each of the first three hundred cases referred, $425 for each of the next hundred cases, and $500 per case thereafter. In addition, the Insurance Company offered to sublease office space on its premises to the Law Firm for use as a satellite office and to arrange for a line of credit from principals of the Company to the Law Firm.

The Insurance Company provides liability insurance to members of a specific industry in which civil claims for damages are common. The Insurance Company's liability plan covers claims made *against* industry members, but does not cover claims made *by* industry members. Nonetheless, industry members often ask the Insurance Company to help them select a lawyer to handle cases in which they intend to assert, rather than, defend against, a claim.

As part of the contemplated referral process, the Insurance Company would advise potential Law Firm clients of (1) the advisability of consulting legal counsel, (2) their right to seek legal counsel of their own choice, and (3) the availability of counsel in the Law Firm's satellite office on the Insurance Company's premises. The Insurance Company would also provide such potential clients with a brochure to be produced by the Law Firm; the Law Firm would be responsible for the brochure's compliance with Rule 7.1(a) of the District of Columbia Rules of Professional Conduct ("D.C. Rules" or "Rules"). Upon contacting the Law Firm, each referred client would receive written disclosure concerning the referral fee plan, the sublease arrangement, and the line of credit. This written notice would also include a statement that payment of the referral fee (which would be paid by the firm from its percentage contingency fee) would have no effect on the total fee charged to the client.

The inquirer framed the request as an inquiry under D.C. Rule 7.1, which governs the use of intermediaries in soliciting business for lawyers. While Rule 7.1 is relevant, it is not independent of the other Rules, and the inquiry also implicates D.C. Rule 5.4(a) dealing with the sharing of legal fees with nonlawyers; D.C. Rule 1.7 relating to conflicts of interest; and D.C. Rule 1.3 setting forth the duty of zealous representation.

*Discussion*

*A. Rules 5.4 and 7.1*

D.C. Rule 5.4 flatly prohibits lawyers from sharing legal fees with nonlawyers (except in a limited situation not applicable here). However, without any reference to Rule 5.4, Rule 7.1(b)(5) allows a lawyer to pay an intermediary to solicit clients if the lawyer takes

> reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged.

There is therefore considerable tension between D.C. Rule 5.4, which prohibits lawyers from sharing fees with nonlawyers, and D.C. Rule 7.1(b)(5), which recognizes that lawyers may pay intermediaries for referrals. This tension is alleviated in the Model Rules of Professional Conduct ("Model Rules") because Model Rule 7.2(c) absolutely prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services," except that a lawyer may "pay the usual charges of a not-for-profit lawyer referral service or legal service organization." In adopting the D.C. Rule 7.1, the D.C. drafters

> decided not to retain the prohibition in ABA proposed Rule 7.2(c) concerning the use of paid intermediaries to contact prospective clients. ... The Board of Governors agreed that the ABA's prohibition against paid intermediaries should not be retained, but added, in subparagraph (b)(5), certain disclosure requirements. ... The use of paid intermediaries may assist lawyers in making their availability known to those who might not otherwise be able to secure the legal representation they desire. Proposed D.C. Rules of Professional Conduct, Comment [17] to Rule 7.1 (Nov. 19, 1986).

While commentary to the Proposed D.C. Rules does not specifically address how replacing Model Rule 7.2(c) with D.C. Rule 7.1(b)(5) – thereby allowing lawyers to pay referral fees to intermediaries – can be reconciled with Rule 5.4's prohibition against sharing legal fees with nonlawyers, it is our view that D.C. Rule 7.1(b)(5) was intended to be a narrow exception to Rule 5.4. Therefore, only those lawyers who disclose to their clients the information required under Rule 7.1(b)(5) can escape Rule 5.4's general ban against the sharing of legal fees with nonlawyers.

The Law Firm in this inquiry would satisfy all the requirements of D.C. Rule 7.1(b)(5) by disclosing information on the referral fee, the sublease arrangement, and the line of credit, along with the statement that the payment of the referral fee would have no effect on the total fee for the client. Because the inquiry states that the Law Firm intends to make all of these required disclosures, the referral arrangement between the Insurance Company and the Law Firm would not run afoul of D.C. Rule 7.1.[1] Yet the analysis does not end here. Rule 7.1 does not address the more complicated situation where the lawyer and the intermediary have a business relationship that could lead to a conflict of interest between the lawyer and the referred client. For guidance in this case, we must consider Rule 1.7 dealing with conflicts of interest.

*B. Rule 1.7*

Resolving the issues arising under Rules 5.4 and 7.1 does not resolve the question whether the proposed business relationship between the Insurance Company and the Law Firm would hinder independent and aggressive legal representation in situations where the referred client's interests conflict with the Insurance Company's interests within the meaning of D.C. Rule 1.7(b)(4). Generally, insurance companies agree to pay for a lawyer to represent the insured for claims on which the insurance company may be liable; in exchange, the insured agrees to relinquish his right to control

[1] Of course, if the consideration paid by the lawyer to the intermediary who referred the client has any effect on the total fee that the lawyer charges to the client, then the referral fee would have to be "reasonable" pursuant to D.C. Rule 1.5. This is not a concern in the present inquiry because we are assuming that the Law Firm would pay the Insurance Company from its percentage of the contingency fee, so the referral fee would have no effect on the total attorney's fee charged to the client and that the Law Firm bases its contingency fee on well-established standards within the profession.

the defense and settlement process.[2] In this typical situation, the insurance company usually hires one attorney to represent both itself and the insured.

There are, however, situations where it would be inappropriate for one attorney to represent both the insurance company and the insured policyholder, including where: (1) the insurer takes the position that its policy does not cover the claim; (2) a potential conflict of interest exists between the insurer and the insured;[3] or (3) the insurer represents two or more insureds with potentially adverse interests.[4] The inquiry does not contemplate that the Law Firm will represent the Insurance Company on any of the latter's matters so that these situations, which concern conflicts of interests between clients, are not directly applicable. Rule 1.7(b)(4) nonetheless forbids, except as permitted through disclosure and consent, a lawyer from representing a client when the lawyer has financial or business interests in a third party (here the Insurance Company) that "reasonably may" adversely affect the lawyer's professional judgment on behalf of the client,[5] notwithstanding the fact that the third party Insurance Company will not also be a client of the Law Firm.

The referral arrangement at issue here anticipates a mutually beneficial long-term relationship between the Law Firm and the Insurance Company: the Company does not receive maximum benefits until the 401st referred case. Moreover, the Law Firm further commits to the relationship by renting office space on the Insurance Company's premises. Such a plan involves substantial commitments between the Insurance Company and the Law Firm, with business incentives for the Law Firm to please the Insurance Company on its handling of referred claims. A lawyer's judgment may be adversely affected, as defined in Rule 1.7(b)(4), by conflicts between the Insurance Company and a referred policyholder, which may arise in the following ways.

According to the inquiry, the Insurance Company intends to refer to the Law Firm for legal consultation current policyholders who belong to a specific industry in which civil claims for damages are common.[6] It is likely that such a policyholder would ask for referrals from the Insurance Company regarding disputes arising out of the policyholder's business, which might include matters for which the policy issued by the Insurance Company arguably should provide coverage or legal representation. This might lead to a direct conflict by requiring the Law Firm to decide whether the policy requires the Insurance Company to provide coverage and/or legal representation and to press those claims against the Insurance Company should they prove meritorious. For instance, counsel for a policyholder in a case involving denial of coverage by the Insurance Company would have to confront the Insurance Company on the issue of whether the policy properly covered the policyholder's claim.

Moreover, where the Insurance Company insures two or more policyholders with adverse interests, counsel for a referred policyholder might be obliged to press the claim that the Insurance Company should pay for independent legal representation on behalf of the policyholder.

In addition, many such referrals from the Insurance Company likely touch upon the policyholder's business, for which the Insurance Company provides liability insurance. They thus present the threat of a counterclaim alleging liability on the part of the client that might trigger the Insurance Company's duty to defend and provide coverage under the policy and possibly necessitate a third-party action against the referring Insurance Company. For instance, a policyholder might seek a referral in order to press a claim, for which the liability policy issued by Insurance Company would not provide coverage. If the policyholder's claim arises out of its business activities, however, the threat exists that the defendant may file a counterclaim triggering coverage under the policy. These kinds of cases would necessarily involve a direct conflict of interest that could tempt the attorney to balance the client's interest in receiving coverage and being the beneficiary of the company's duty to defend against those of the Insurance Company in denying coverage and/or a duty to defend.

There may be situations when client referrals from the Insurance Company to the Law Firm would involve no direct conflicts of interest. For instance, an art insurance company that insures only rare paintings could refer one of its customers to a law firm with which it had entered into the proposed referral arrangement to pursue a medical malpractice claim. Because the subject of the proposed representation would bear no relationship to any coverage provided by the insurer, there is no possibility that the suit would involve claims, counterclaims or third-party claims that might trigger coverage provided by the insurance company. We suspect, however, that these kinds of referrals would be very uncommon because

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[2] "Liability insurance policies typically provide that the insurer (the company) will pay any judgment for damages entered against the insured and will bear the cost of providing a defense against a claim for damages, including the cost of hiring a lawyer to present the interests of the insured. In return for those protections, the company typically retains the right to control the defense of the action and the decision whether to settle any claims." Charles W. Wolfram, Modern Legal Ethics 428 (1986).

[3] *See* D.C. Bar Op. 173 (1986) ("[T]he lawyer cannot continue to represent the insured where the insurer has a different interest and the lawyer's performance for the insured will be affected adversely by that different interest, unless each client consents after full disclosure and it is 'obvious' the attorney adequately can perform.")(citation omitted).

The following list describes other situations where the interests of the insurer and insured interests may be adverse:

1. Complaint alleges claims against the insured which may or may not potentially fall within the insurance policy;

2. Potential damages exceed insurance policy limitations;

3. The insurer has provided inadequate representation for the insured;

4. A conflict of interest arises between the insured and the insurer in settlement negotiations.

Annotation, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R. 4th 932, 941-954 (1986).

[4] In such circumstances, some jurisdictions require the insurance company to pay for independent counsel. *See, e.g., Illinois Mun. League Rish Mgt. v. Siebert*, 585 N.E. 2d 1130, 1136 (Ill. App. 4th Dist. 1992). *See generally* Annotation, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer, supra* note 3. The D.C. courts have not ruled on whether the insurance company must reimburse insureds who are entitled to and do obtain independent counsel. With the law ambiguous, D.C. insurance companies may require the policyholder to pay for independent counsel. The Committee takes no position on this practice at this time.

[5] D.C. Rule 1.7(b)(4) reads:

(b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interest.

[6] The inquiry does not specify the precise nature of the cases that the Insurance Company would refer to the Law Firm, but because the facts indicate that the Insurance Company intends to refer clients in the specific industry who are also policyholders, we discuss only situations involving clients referred to the Law Firm who are also policyholders.

insurance companies would not generally have the expertise to select lawyers for claims completely unconnected to matters for which the insurers provide coverage.[7]

If the conflict is direct, 1.7(c)(1) nonetheless permits a lawyer to represent a client if that client consents after "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[8] This "full disclosure" goes far beyond the cursory disclosure requirements of Rule 7.1(b)(5). Full disclosure requires "a detailed explanation of the risks and disadvantages to the client." *In re James,* 452 A.2d 163, 167 (D.C. App. 1982), *cert. denied,* 460 U.S. 1038 (1983).

The Law Firm in this inquiry would not meet the strict disclosure requirements of Rule 1.7. To understand the nature and extent of a possible conflict, a referred client must know whether the firm receives a substantial amount of business pursuant to a referral agreement with an adversary or potential adversary, such as the Insurance Company. That information should at the very least include the percentage of the Law Firm's total income derived through referrals from the Insurance Company. The Law Firm does not propose to reveal to the referred client this or other relevant information concerning the referral arrangement.

Furthermore, after full and meaningful disclosure, Rule 1.7(c)(1) requires the client to consent to representation from the lawyer despite the potential conflict of interest. *See, e.g., In re James,* 452 A.2d at 167; *see also* D.C. Bar Op. 210 (1990). Consent "must not be coerced either by the lawyer or by any other person." D.C. Rule 1.7, Comment [14]. Even if a referred client provided meaningful consent to representation after the Law Firm's full detailed disclosure of the potential conflict of interest, the Law Firm would still have to "comply with all other applicable rules with respect to such representation" of the referred client. Rule 1.7(c)(2). As explained in Comment [15] to Rule 1.7:

> [D]isclosure and consent to representation do not diminish a lawyer's obligations to comply with the other Rules of Professional Conduct. For example, even if a client provides informed and uncoerced consent, a lawyer may not undertake or continue a representation if the lawyer is unable to comply with the obligations regarding diligence ... provided in Rule 1.3.

*C.Rule 1.3*

D.C. Rule 1.3(a) states: "A lawyer shall represent a client zealously and diligently within the bounds of the law."[9] It is well-settled that this duty of zealous representation cannot be compromised, even with the consent of the client. Indeed, this Committee has concluded several times that the representation of a party – even with consent – would be improper where "the lawyer himself conclude[s] that his ability zealously to represent th[at] party (as required by Rule 1.3) would be compromised" by a conflict of interest. D.C. Bar Op. 226 (1992). *See also* D.C. Bar Op. 210 (1990) ("The Committee has previously recognized that the obvious ability to provide adequate representation, which pursuant to DR 7-101 [the predecessor to Rule 1.3] must be zealous, is an independent requirement which must be met even though consent is provided."); D.C. Bar Op. 163 (1986) (same); D.C. Bar Op. 49 (1978) (same).

In cases involving a direct conflict, the Law Firm's proposed arrangement with the Insurance Company necessarily raises a serious obstacle to the zealous representation of referred clients. Use of the referral scheme in such situations raises the same concerns as in a case where an insurance company appoints counsel to represent a policyholder to avoid a potential conflict between the insurance company and the policyholder. In such cases, "[a]lthough [some] courts seem to trust the insurer and attorney to act in the best interests of the insured, the more common view is that the longstanding ties that defense counsel has with the insurer will inevitably influence his conduct of the case." Berg, *Losing Control of the Defense – The Insured's Right to Select His Own Counsel,* 26 For the Defense 10, 15 (July 1984).[10]

In short, the Law Firm would always be tempted to sacrifice the client's interests due to the Firm's long-term financial relationship with the Insurance Company in any matter involving a direct conflict between a potential client and the Insurance Company. We therefore conclude that when the referred client's interests in the matter for which representation is sought involves conflicts with the interests of the Insurance Company, the Law Firm cannot provide the zealous representation required by Rule 1.3.[11]

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[7] Cases where a referred client's action falls completely outside of the Insurance Company's field of coverage could still involve "positional" conflicts of interest. Positional conflicts arise where a lawyer's clients hold different views on what the law or public policy ought to be, even though the clients' interests and positions do not clash in a particular matter. For instance, in our example involving rare paintings and medical malpractice, the referring art insurance company might favor an interpretation of the law on punitive damages that would conflict with the position beneficial to the referred medical malpractice claimant. Four sources discussing positional conflicts at greater length, *see, e.g.,* Model Rule 1.7; ABA Formal Op. 93-377 (Dec. 9, 1993).

[8] D.C. Rule 1.7(c) reads:

> "(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above, if:
>
> (1) Each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer is able to comply with all other applicable rules with respect to such representation."

[9] Rule 1.3 states more fully:

> (a) A lawyer shall represent a client zealously and diligently within the bounds of the law.
>
> (b) A lawyer shall not intentionally:
>
> (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or
>
> (2) prejudice or damage a client during the course of the professional relationship.

[10] *See, e.g., Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin,* 828 P.2d 745, 749-50 (Alaska 1992) (appointed counsel proposed to put insured through bankruptcy in order to reduce insurer's liability to plaintiff); *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.,* 208 Cal. Rptr. 494, 498 (1984) ("A[n] [appointed] lawyer who does not look out for the carrier's best interest may soon find himself out of work."). *See also* Brown and Romaker, *Cumis, Conflicts and the Civil Code; Section 2860 Changes Little,* 25 Cal. W.L. Rev. 45, 54 (1988) ("The attorney wishing to maintain the insurer's business does not want to aggravate the company."); Saxon, *Conflicts of Interest: Insurer's Expanding Duty to Defend and the Impact of "Cumis" Counsel,* 23 Idaho L. Rev. 351, 353 (1987) (Insurance counsel's "relationship with the insurer is contractual, usually ongoing, supported by strong financial interests and often strengthen by sincere friendships."); Berch and Berch, *Will the Real Counsel of the Insured Please Rise?,* 19 Ariz. St. L. J. 27, 29-30 (1987) ("[T]he attorney's economic interests weigh heavily in favor of the insurer, which after all, may retain his services in other cases; yet the rules of professional responsibility tip the scales toward the insured.").

[11] The Committee is aware that the D.C. Court of Appeals is considering a proposal to amend the D.C. Rules. *See* Proposed Amendments to the D.C. Rules of Professional Conduct, D.C. Rules of Professional Conduct Review Committee, F. Whitten Peters, Chair (Dec. 8, 1993). The proposed amendments would delete Rule 1.7(c)(2) and would add commentary to Rule 1.3 stating that "Rule 1.3 is not meant to govern conflicts of interest." Under these Proposed Amendments, a Law Firm that obtains the consent

*Conclusion*

Although the Law Firm in this inquiry would satisfy the disclosure requirements of D.C. Rule 7.1, it would fall short of the more demanding disclosure required by Rule 1.7 in cases of direct conflict. Moreover, even if the client provided meaningful consent under Rule 1.7, this would not cure the Law Firm's inability to provide the zealous representation required by Rule 1.3 in cases of direct conflict. The Committee believes that, when referrals will be on behalf of policyholders whose business activities are covered by the Insurance Company's liability insurance, the Law Firm's ability to accept such referrals would be limited by D.C. Rule 1.7 and D.C. Rule 1.3.

Inquiry No. 91-5-18
Adopted: November 15, 1994

*Opinion No. 254*

**Use of Abbreviations by Limited Liability Companies, Limited Liability Partnerships and Professional Limited Liability Companies**

• In light of recent legislation that has been adopted in the District of Columbia, law firms organized as limited liability companies, limited liability partnerships, or professional limited liability companies are no longer limited to using the designation, "limited liability company", "limited liability partnership", or "professional limited liability company", as the case may be, as the last words of their formal name. These companies may now alternatively use the abbreviations "L.L.C.", "L.L.P.", or "P.L.L.C.", respectively.

**Applicable Rules**

• **Rule 7.1(a)** (Communications Concerning a Lawyer's Services)
• **Rule 7.5(a) and (b)** (Firm Names and Letterheads)

*Inquiry*

In 1993, this Committee adopted Opinion No. 235, which permitted D.C. Bar members to practice in local offices of out-of-state firms that were organized under state law as "limited liability companies" or "registered limited liability partnerships." Because these forms of business organization were foreign to this jurisdiction, however, the Committee concluded that the formal name under which these law firms practice must identify in full, not merely by abbreviation, the limited liability business form.

Since Opinion No. 235 was adopted, the Registered Limited Liability Partnership Amendment Act and the Limited Liability Company Act of 1994 have been enacted in the District of Columbia. Numerous lawyers have contacted the Committee to determine whether it remains necessary to identify their form of business organization in full or if abbreviations are now acceptable.

*Discussion*

In Opinion No. 235, the Committee stated "[t]here may come a time in the not too distant future when, either by District of Columbia Council action, or otherwise, the implications of the abbreviation 'L.L.P.' [or 'L.L.C.'] will be as well understood as the implications of the historically more common abbreviations 'P.C.' or 'P.A.', but until that time comes we are not disposed to approve the use in the District of Columbia of the abbreviation." In October 1993, the Registered Limited Liability Partnership Amendment Act was enacted in the District of Columbia.[1] D.C. Code §41-144 states that "[t]he name of a registered limited liability partnership shall contain the words 'Registered Limited Liability Partnership' *or the abbreviation 'L.L.P.'* as the last words or letters of its name." (emphasis added).

More recently, on May 3, 1994, the District of Columbia Council passed the Limited Liability Company Act of 1994.[2] Under D.C. Code § 29-1304, "a limited liability company name shall contain the words 'limited liability company' *or the abbreviation 'L.L.C.'*" (emphasis added). The Limited Liability Company Act of 1994 also provided guidance for "professional limited liability companies" which are limited liability companies organized solely for the purpose of rendering professional services through its members, managers, or employees. Pursuant to D.C. Code §29-1304, a "professional limited liability company name shall contain the words 'professional limited liability company' *or the abbreviation 'P.L.L.C'.*" (emphasis added)

In light of these recent legislative enactments, we see no reason to disallow the use of the abbreviations, "L.L.P.", "L.L.C.", or "P.L.L.C." Therefore, the Committee revises its position taken in Opinion No. 235 regarding the use of abbreviations by law firms organized under limited liability statutes. A law firm so organized will satisfy the requirements of Rules 7.1(a), and 7.5(a) and (b) by identifying its form of business organization either in full or by use of the appropriate abbreviation.

Adopted: March 21, 1995

*Opinion No. 255*

**Use Of Former Firm Lawyer On A Contract Basis**

• A law firm and a former firm lawyer employed by the firm by contract on a case-by-case basis are not regarded as a single entity for conflicts purposes so long as clients of the firm are accurately informed about the nature of the relationship between the firm and the contract lawyer and so long as no impression is created that there is a continuing relationship between the firm and the lawyer.

**Applicable Rules**

• **Rule 1.5(e)** (Division of Fees)
• **Rule 1.7(b)(4)** (Conflicts Created by Lawyer's Own Interests)
• **Rule 1.10(a)** (Imputed Disqualification)
• **Rule 7.1(a)** (Communications Regarding a Lawyer's Services)

*Inquiry*

The Inquirer is a law firm (the Firm) that is engaged in the practice of law in the District of Columbia and is incorporated under the D.C. Professional Corporations Act. One of its shareholder lawyers, whom we will refer to as B, is terminating his employment agreement with the Firm and his general association with the Firm as a practicing lawyer, although he will remain a shareholder in the Firm (as permitted by D.C. Code § 29-608) unless and until his shares are bought out by the Firm. B will no longer, however, share in any profits or losses of the Firm, and his name will not appear in the Firm's letterhead or in any lists of Firm lawyers in Martindale-Hubbell

required by Rule 1.7 would not be barred in advance from representing referred clients on matters involving a conflict between the clients and the Insurance Company. This proposed change would *not* diminish Rule 1.3's duty of zealous representation.

[1] 40 D.C. Reg. 5764 (Aug. 13, 1993), 7477 (Oct. 29, 1993)(notice of enactment).

[2] 41 D.C. Reg. 3010 (May 27, 1994), 5138 (Aug. 5, 1994)(notice of enactment).

or similar publications.

B will become an officer of Corporation X, but his position with Corporation X will not involve the provision of legal services. Corporation X will sublease space from the Firm and B will occupy that subleased space. The sublease contains a provision obligating Corporation X and its employees, including B, to refrain from listening to or examining matters pertaining to firm clients or firm business. The Firm has also established a screening system and taken other steps to assure that no confidential information of the Firm or its clients is made available, without authorization, to Corporation X or to B. In addition, B will be excluded from the Firm's conflict clearance system and will thus not have access to information about new client matters of the Firm.

Because of B's expertise in a specialized area of the law in which the Firm will continue to practice, the Firm contemplates an arrangement with B, to which Corporation X has consented, in which it proposes to employ B from time to time, as an independent contractor, to assist the Firm as a lawyer or expert witness in providing legal services to the Firm's clients. The Firm and B contemplate entering into a general contract, under which B would agree to consider serving in particular matters as a contract attorney (designated as "special counsel") or as an expert witness, or individual matter-specific contracts on each matter on which B is retained by the Firm. B will not be guaranteed any particular amount of payments from the Firm.

The Firm also proposes to include in promotional materials and letters to clients representations that B's services are available to the Firm in his field of expertise when such services may be ethically provided and subject to his obligations to Corporation X.

On the basis of these facts, the Firm requests our advice as to (1) whether the arrangements it contemplates will result in imputation to the Firm under Rule 1.10 of any disqualification of B flowing from his status as an executive of Corporation X in matters in which B is *not* assisting the firm as an independent contractor; and (2) whether the representations that the Firm intends to make in promotional letters to clients are consistent with Rule 7.1.

*Discussion*

When B becomes an employee of Corporation X, he will not be acting as a lawyer for Corporation X. Most of the provisions of Rule 1.7, therefore, would not apply to work done by B as a contract lawyer for the Firm because they are triggered by a lawyer representing clients in more than one matter. However, B's position with Corporation X could result in B's disqualification, under Rule 1.7(b)(4),[1] from representing a client in a situation in which his professional judgment on behalf of that client would, or reasonably might, be adversely affected by B's responsibilities to Corporation X or his interest in Corporation X created by his high-level executive position.

In any case in which B would be disqualified from representing a client under Rule 1.7(b)(4) because of his responsibilities to or interest in Corporation X, the Firm clearly would also be disqualified under Rule 1.10(a) if B were associated with the Firm in that representation as a contract lawyer.[2] The question posed by the Inquiry is whether the Firm's contemplated relationship with B is a sufficiently ongoing alliance or association to impute to the Firm B's disqualifications even on Firm matters on which B is not working as a contract lawyer.

We think not. To be sure, both this Committee and the ABA Standing Committee on Ethics and Professional Responsibility have held that a continuing "of counsel" relationship between a lawyer and a firm or a continuing relationship between two firms (as in the case of a "correspondent" law firm) result in the lawyer and the Firm, or the two firms, being treated as a single entity for conflicts purposes. *See* D.C. Opinion No. 192 (May 17, 1988); ABA Formal Opinion No. 84-351 (October 20, 1984). But, in our view, the association of a lawyer with a firm on an ad hoc, case-by-case basis does not create that kind of continuing relationship, triggering imputation under Section 1.10 of the individual lawyer's disqualifications to the firm, except with respect to the individual matters on which the lawyer is associated with the firm – so long as the firm does not create the impression among its clients or the public at large that such a continuing relationship exists.

Here, B will not be included on the Firm's letterhead or in other listings of firm lawyers. He will be screened from confidential information about Firm clients and matters on which he is not employed as an independent contractor. And promotional materials and letters to clients that mention his availability will make clear that he is available to work on specific matters on a case-by-case basis and that he does not have a continuing relationship with the Firm. We believe these steps are sufficient to avoid a general imputation of B's disqualifications to the Firm. See ABA Formal Opinion 88-356 (Dec. 16, 1988).

We add, however, a cautionary note. We believe that the term "special counsel" should not be used to describe B's relationship to the Firm. While the term might be appropriately thought to denote a relationship for the particular case only, we note that the term "special counsel" is also used by many law firms more or less interchangeably with terms such as "counsel" and "of counsel," to denominate a continuing relationship. See ABA Formal Opinion 90-357 (May 10, 1990). While it may be true that all these terms have an evolving rather than a fixed meaning (*see* D.C. Opinion No. 151 (April 16, 1985)), we think that the Firm in this case would be well-advised to refer to B as a "consultant" or "contract lawyer" rather than a "special counsel."

The same caveat applies to the second question raised by the Inquiry. We see no violation of Rule 7.1[3] in the Firm's plans to describe for prospective clients, in promotional materials and letters, the availability of B as a contract lawyer or expert witness in particular cases. The key here is full and accurate disclosure. As the ABA Committee had occasion to observe recently in the context of discussing networks or alliances between law firms, "It is critical, no matter what words are used to describe the relationship between firms, for clients to receive information that will tell them the exact nature of the relationship and the extent to which resources of another firm will be available in connection with the client's retention of the firm that is claiming the rela-

[1] Rule 1.7(b)(4) provides that a lawyer shall not, without the consent of the client, represent a client where "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

[2] Since B will be employed and compensated by the Firm, this situation is different from the common one in which two lawyers in different firms are co-counsel in a case. In such situations, conflicts of one lawyer are not imputed to the other, at least in the absence of an exchange of confidential information. E.g., *Richers v. Marsh & McLennan Group Associated,* 459 N.W. 2d 478 (Iowa 1990); *Brennan's Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168 (5th Cir. 1979).

[3] Rule 7.1 bars false or misleading communications about a lawyer's services.

tionship." ABA Formal Opinion 94-388 (December 5, 1994). The mandate of Rule 7.1 can be met only if a full description of the relationship is provided to all prospective and present clients for whom the relationship may be relevant. *Id.*

The same principles apply here, and we conclude that the planned representations by the Firm as to its relationship with B are adequate to assure compliance with Rule 7.1. We again recommend, however, that the Firm not use the term "special counsel" to describe B's relationship to the Firm.

Inquiry No. 95-2-3
Adopted: March 21, 1995

*Opinion No. 256*

**Inadvertent Disclosure of Privileged Material to Opposing Counsel**

- Where a lawyer has inadvertently included documents containing client secrets or confidences in material delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the documents before the inadvertence of the disclosure is brought to that lawyer's attention, the receiving lawyer engages in no ethical violation by retaining and using those documents. Where, on the other hand, the receiving lawyer knows of the inadvertence of the disclosure before the documents are examined, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the receiving lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material.

Depending on the facts, the lawyer making the inadvertent disclosure may, by so doing, violate Rule 1.1, requiring a lawyer to use diligence and care in a representation.

**Applicable Rules**

- **Rule 1.1** (Competence)
- **Rule 1.6** (Confidentiality of Information)
- **Rule 1.15** (Safekeeping Property)
- **Rule 8.4(c)** (Misconduct - Dishonesty, Fraud, Deceit, or Misrepresentation)

*Inquiry*

The inquirers are opposing lawyers in a securities arbitration. During the course of discovery in the arbitration proceeding, the lawyer for the respondent was given unrestricted access by claimant's lawyer to a substantial volume of documents. After their review, respondent's lawyer identified documents for copying; the copying was accomplished by claimant's lawyer and the copies were delivered to respondent's lawyer.

After copying and delivery of the documents, claimant's lawyer informed respondent's lawyer that one or more documents, consisting of handwritten notes, contained privileged attorney-client communications. The documents themselves, on their face, did not contain any indication of their privileged status.

Lawyers for both the claimant and the respondent have inquired whether the disclosure of the privileged material, under the circumstances described above, constitutes a waiver of the attorney-client privilege and whether respondent's lawyer may, without violating ethical rules, use the assertedly privileged material which he now has in his possession.

*Discussion*

The inquiry raises for the first time in this jurisdiction the ethical issues raised by the no longer infrequent occurrence of inadvertent disclosure of confidential documents to opposing counsel.[1] The situation can occur, as here, in the context of a document discovery, through a secretarial error in mailing or, as an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient.

While the question of waiver of an evidentiary privilege is beyond our authority,[2] the inquiry does present two important questions of legal ethics:

(1) What are the ethical obligations of a lawyer who receives confidential material inadvertently disclosed by opposing counsel; and

(2) Whether an inadvertent disclosure of information which a lawyer is ethically obliged to protect itself constitutes an ethical violation.

*Ethical Obligations of a Lawyer Who Receives Inadvertently Disclosed Confidential Material*

There are several different scenarios under which a lawyer might inadvertently be sent another party's confidential information. In the inquiry presented to us, the information was included with other documents intended to be provided the lawyer. The confidential information was not marked as such, and contained no indication that it was not freely provided to the receiving lawyer; and the receiving lawyer did not learn of the assertedly confidential nature of the documents until *after* he had read them.

In other situations, confidential information might be received by a lawyer who knows that it was not intended for him. This could occur, for example, when the sending lawyer specifically communicates to the receiving lawyer, before that lawyer reads a document that bore no indication of confidentiality, that the document was misdirected and should be returned unexamined.

Between these two poles – of complete lack of awareness of the inadvertence of the disclosure and actual knowledge of it – lies a continuum of fact situations in which there may be differing levels of indication of the possibility of an inadvertent disclosure.

*1. Inadvertently Disclosed Documents — Where There Is No Indication of Confidentiality*

No Rule of Professional Conduct directly addresses the conduct in issue in this inquiry. However, if we dissect the individual components of the activity we are examining, substantial guidance emerges. First, where the confidential document is received by opposing counsel with *no* indication that the disclosure was inadvertent, and is read by opposing counsel before being otherwise informed of these circumstances (as through a communication from the sending lawyer), we see no ethical violation if the receiving lawyer retains the documents and uses the disclosed information. Such a situation would arise under the facts of this inquiry, where privileged documents (containing no indication of such status) were included in a large document production and were reviewed in the ordinary course by receiving counsel before being notified of the inadvertent disclosure.

[1] We assume for the purpose of this inquiry that the disclosure of the privileged documents was truly inadvertent: that is, it was not specifically intended by plaintiff's counsel.

[2] Legal Ethics Committee opinions are limited to issues arising under the D.C. Rules of Professional Conduct. The question of whether any particular facts and circumstance constitute a waiver of the attorney-client privilege is one under the law of evidence. We therefore decline to respond to that part of the inquiry which seeks our opinion on whether, under the facts presented to us, there has been a waiver of the attorney-client privilege. *See* Ethics Committee Rule C-5, and Ethics Opinion No. 83. *See also* Comment [5] to Rule 1.6 (Confidentiality of Information): "This Rule is not intended to govern or affect judicial application of the attorney-client privilege or work product doctrine . . . ."

We begin our analysis with the belief that a lawyer (no different than any other person) should be able to presume that materials delivered to him or her in the ordinary course were intended to be so delivered. Such a presumption accords with both common sense and experience; moreover, the absence of such a presumption would place the unreasonable burden on a lawyer of examining the circumstances of the delivery of all mail, faxes and other material before reading them.

And so, in the situation described above, the documents were freely provided by the sending lawyer, the receiving lawyer could reasonably presume the documents were intended for that lawyer, the documents themselves did not inform the receiving lawyer that their disclosure was inadvertent, and the documents were examined by opposing counsel in good faith before being informed of the claim of privilege. Under these circumstances, we see nothing improper or unethical about counsel's use of the disclosed document. Rule 1.6 (Confidentiality of Information) is obviously inapplicable to the conduct of the receiving lawyer, as it only governs a lawyer's disclosure and use of confidences and secrets of the lawyer's client. We see no other Rule applicable to this situation which would prohibit use of the document.

Indeed, we do not see how the receiving lawyer could be prohibited from using the information acquired during the document review. First, and most importantly, under case law likely applicable in this jurisdiction, the facts we have assumed – an inadvertent disclosure of confidential documents – constitute a *waiver* of the attorney-client privilege. Such a waiver occurs when the privileged communication is disclosed to a third-party, and the law in this jurisdiction appears to be that even an inadvertent disclosure to a third-party operates as a waiver. *See, e.g., Wichita Land & Cattle Co. v. Amer. Fed. Bank*, 148 F.R.D. 456 (D.D.C. 1992); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).[3] In *Wichita Land & Cattle*, the facts were similar to those presented in the inquiry described above: allegedly privileged materials were inadvertently included in a document production and were reviewed by opposing counsel before their privileged status was ascertained and asserted. The court found a waiver, holding that any uncompelled disclosure of otherwise privileged information is inconsistent with the evidentiary privilege, and therefore results in its loss.

In *In re Sealed Case*, the document in issue was a memorandum of a corporate vice-president to the company's chief accountant containing the advice of the company's lawyer. During a routine audit of the company's defense contracting business, the memorandum was given to a government auditor. When, many months later, the company resisted a subpoena for this document on the ground of attorney-client privilege, the government argued that the prior disclosure constituted a waiver of the privilege. The court agreed, holding that the possessor of privileged information must guard it carefully – "like jewels" – and that any uncompelled disclosure will waive the privilege. *Id.* at 980.

Thus, where (as in this jurisdiction) the underlying law holds that inadvertently disclosed information is no longer protected, there would appear to be no justification for requiring the receiving lawyer to accord it special treatment.[4]

Second, once read, the inadvertently disclosed information becomes part of the body of knowledge residing in the mind of the receiving lawyer, who may wish to use it to further the interests of that lawyer's client. For example, under the facts of this inquiry, if the assertedly privileged information revealed that the securities arbitration claimants (whose lawyers produced the documents) possessed actual knowledge of the truth of matters alleged to have been misrepresented to them, and if this were relevant to the defense of their claims, respondent's counsel (the receiving lawyers) would not likely be able to accord confidential status to the information and still properly represent their client.[5] Should those lawyers take action, such as directing discovery to the claimant, seeking to develop evidence of that party's prior knowledge of allegedly fraudulent representations, the lawyers would be courting an ethical violation unless they could establish that their litigation strategy derived from some source other than the inadvertently disclosed information.

An interpretation of the ethical rules that required the receiving lawyer to protect the confidentiality of these materials would, we believe, place too much of a burden on the exercise of a lawyer's obligation to represent his client zealously and diligently (Rule 1.3). As the ethics committee of another jurisdiction observed in concluding that a lawyer may use inadvertently disclosed confidential information:

> Once confidential material has been examined even if briefly, the information cannot be purged from the mind of the attorney who inadvertently received it.[6]

Indeed, if the receiving lawyer were under some ethical inhibition from using that information, the lawyer could have a prohibited conflict of interest under Rule 1.7(b)(4), which could require withdrawal under Rule 1.16(a). Rule 1.7(b)(4) prohibits a lawyer from representing a client in a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests." If the receiving lawyer were under some ethical inhibition from using the inadvertently disclosed information to the fullest in a particular case, his professional judgment "reasonably may be adversely affected" in that case. In the example just noted, if the receiving lawyer in the securities arbitration learned from the disclosed document of a possible defense of "actual knowledge" to a misrepresentation claim, and was ethically inhibited from using that information in defense of his client, it is probable that his professional judgment "reasonably may be adversely affected" by a concern that his pursuit of this avenue of defense could result in a breach of professional ethics.[7]

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[3] These federal court decisions are federal question cases where, under Fed. R. Evid. 501, the existence of evidentiary privileges is governed by federal law. We are aware of no reported decisions on this subject under District of Columbia law.

Many (but not all) other jurisdictions have reached the same conclusion about the consequence of an inadvertent disclosure of privileged information. *See, e.g., Granada Corp. v. First Court of Appeals*, 844 S.W. 2d 223 (Tex. 1992); *In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984); and *Aerojet-General Corp. v. Transport Indemnity Ins.* 22 Cal. Rptr. 862 (Ct. App. 1993).

Cases in which the courts have examined other factors in deciding whether to find a waiver from an inadvertent disclosure include *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (ND Ill. 1982); and *Berg Electronics, Inc., v. Molex, Inc.*, No. 94-470, (D. Del., Feb. 8, 1995).

[4] In some jurisdictions, an inadvertent disclosure does not *ipso facto*, waive the attorney-client privilege. *See supra* note 3. Were we in such a jurisdiction, our conclusion might be different.

[5] Actual knowledge of the truth of a misrepresented matter is usually a defense to a claim of fraud. *See, e.g., Mayer v. Oil Field Systems Corp.*, 803 F.2d 749 (2d Cir. 1986).

[6] Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Op. 93-11 (Dec. 3, 1993).

[7] By this conclusion, we do not imply that a lawyer *must* retain and/or use inadvertently disclosed materials that are not subject of ethical restraints. As a matter of courtesy or reciprocity, a lawyer may decline to retain or use documents that the lawyer might

Precedent from other jurisdictions is in accord with our conclusion that no ethical violation arises from a lawyer's use of inadvertently disclosed material, where the receiving lawyer had no knowledge that the materials were inadvertently disclosed before they were read. *Aerojet-General Corp. v. Transport Indemnity Ins.*, 22 Cal. Rptr. 862 (Ct. App. 1993), involved a situation where a lawyer for one party to litigation received a memorandum prepared by opposing counsel describing a witness interview. The document had been sent by the preparing lawyer to his client's insuror, which had mistakenly sent it to another insured, who happened to be the receiving lawyer's client. The memorandum bore no indication that it was priviliged.

The court allowed the document to be used by the receiving lawyer, finding no ethical violation in his reading or use of it. According to the court:

> Once [the receiving lawyer] had acquired the information in a manner that was not due to his own fault or wrongdoing, he cannot purge it from his mind. Indeed, his professional obligation demands the he utilize the knowledge about the case on his client's behalf. *Id.* at 867-68.

A similar conclusion was reached in *Granada Corp. v. First Court of Appeals*, 844 S.W. 2d 223 (Tex. 1992), where privileged materials were included in a document production. Eleven months after the disclosure, and after the documents had been reviewed by the receiving lawyer, the disclosing lawyer sought their return and an order prohibiting their use. The court declined to do so, holding that the privilege had been waived and that the receiving lawyer engaged in no misconduct in reading and using the documents. *See also* Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline Op. 93-11 (Dec. 3, 1993) (decided under the Code of Professional Responsibility).

*2. Inadvertently Disclosed Documents — Where the Receiving Lawyer Knows of the Inadvertence*

On the other hand, where the receiving lawyer has not examined the misdirected material before gaining knowledge of the inadvertence of the disclosure, it is our opinion that the lawyer should, at a minimum, seek guidance from the sending lawyer and, if that lawyer confirms the inadvertence of the disclosure and requests return of the material, unread, the receiving lawyer should do so.

In our view, a failure to do so would be a dishonest act, in violation of Rule 8.4(c).[8] A document received by a lawyer under these circumstances comes to the lawyer with "notice" that it does not belong to him. In that sense, it is little different than a wallet found on the street: the finder knows that it does not belong to him, and should he appropriate to himself the wallet's contents, the finder engages in the tort of conversion.[9]

Moreover, under such circumstances, there really has been no "disclosure" such as to invoke the holdings of *Wichita Land & Cattle* and *In re Sealed Case*. In reaching its decision in *Wichita Land & Cattle*, the District Court referred approvingly to *Chubb Integrated Systems, Ltd., v. Nat. Bank of Washington*, 103 F.R.D. 52 (D.D.C. 1984), which held that a disclosure of a document does not occur until some outsider to the asserted confidentiality learns the "gist" of its contents. *Id.* at 63. The District Court for this District recently applied *Chubb* in a case in which several boxes of privileged documents were inadvertently disclosed as part of a large document discovery. Disclosing counsel discovered the inadvertence one week after the document production, and moved for their return. The court, in order to determine whether receiving counsel could use the documents, ordered a hearing to determine whether receiving counsel had learned their gist. *In re United Mine Workers of Amer. Employee Benefit Litigation*, 156 F.R.D. 507, 512 (D.D.C. 1984). Presumably, if receiving counsel could establish that he had learned of the gist of the documents before being informed of the inadvertence of the disclosure, the court would allow their use; otherwise, it would not.

Applying this interpretation to the matter before us, there would be no "disclosure" to a receiving lawyer who has possession of a document and has not read it when the lawyer learns that the document was only inadvertently provided. Reading the materials under these circumstances should be treated as the equivalent of a lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. *Cf., Lipin v. Bender*, 644 N.E. 2d 1300 (N.Y. 1994).[10]

We also ground our opinion on Rule 1.15 (Safekeeping Property). Documents (separate from the information contained in them) which are inadvertently delivered to a lawyer and which the lawyer knows are not his are the property of another and therefore subject to that Rule. Under Rule 1.15(a), the lawyer must safeguard that property, and under Rule 1.15(b), the lawyer must notify the sending lawyer of his possession of the documents and return them (if so requested). We reached precisely this conclusion in our Opinion No. 242, concerning a lawyer's receipt from his client of documents belonging to a third party.

This different ethical result, when the receiving lawyer *does* know that documents were inadvertently disclosed, also finds

otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary. *See* Rules 1.2(a) and 1.4(b).

[8] In *In re Shorter*, 570 A. 2d 760 (D.C. App. 1990), a disciplinary case, the Court of Appeals defined "dishonesty" as including "conduct evincing a lack of honesty, probity or integrity in principle; [a] lack of fairness and straightforwardness . . . . Thus, what may not legally be characterized as an act of fraud, deceit or misrepresentation may still evince dishonesty." *Id.* at 768.

[9] At common law, a finder of lost property, if he takes custody of it, is responsible to the owner of the property for its safekeeping and return. *Cf. Costello v. Ten Eyck*, 49 NW 152 (Mich. 1891); *Fisher v. Klingenberger*, 576 NYS 2d 476 (Rochester City Ct. 1991). *See also*, 1 Am. Jur. 2d Abandoned, Lost and Unclaimed Property, § 21 (1994); 36A C.J.S. Finding Lost Goods §§ 7, 8 (1961).

[10] Where the lawyer knows that a document was inadvertently disclosed, Rule 1.6 (Confidentiality of Information) presents no barrier to disclosure to the sending lawyer by the receiving lawyer of the fact of receipt of the inadvertently disclosed document. Rule 1.6(b) protects "confidences" (defined as information protected by the attorney-client privilege) and "secrets" (defined as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client").

Under these circumstances, the fact of receipt of the inadvertently disclosed document is plainly not a "confidence" under Rule 1.6, as it was not part of an attorney-client communication. Nor is it a "secret": the client has made no request for inviolability, the disclosure would not be embarrassing to the client, and the disclosure could not be detrimental to the client, since the receiving lawyer has no right to use the information anyway.

Nor need the client be consulted about the course of action when the receiving lawyer is required to return the inadvertently disclosed documents, since such a requirement derives from an affirmative ethical obligation of the lawyer. Client consent is not necessary for the lawyer to fulfill this ethical obligation, and the client may not insist that the lawyer not return, unread, the subject documents any more than a client may not insist that her lawyer overlook a conflict of interest that, under the Rules of Professional Conduct, require withdrawal from representation. Of course, there is no reason why the lawyer may not inform the lawyer's client of the fact of receipt of the documents and the lawyer's actions in response thereto.

support elsewhere. In *Resolution Trust Corp. v. First American Bank,* No. 4:94-CV-83 (W.D. Mich. 1994), a lawyer received a privileged document, known to be inadvertently disclosed. The court held that receiving counsel's reading of such a document was improper.

ABA Formal Opinion 92-368 (Nov. 10, 1992) also addresses this issue. The specific situation it discusses is one where the inadvertently disclosed confidential material was received "under circumstances where it is clear that the materials were not intended for the receiving lawyer." *Id.* at 1. The Opinion concludes that the receiving lawyer should not examine the materials once the inadvertence is discovered, should notify the sending lawyer of their receipt, and should abide by the sending lawyer's instructions as to their disposition. That conclusion is in accord with ours. [11]

We disagree, however, with the discussion in the ABA Opinion (at pp. 4-5) that its conclusion would also apply even where the receiving lawyer did not become aware of the inadvertance until *after* the lawyer read the documents. The Opinion overlooks the other important considerations that apply in such a circumstance (*i.e.*, the fact that the information cannot be purged from the mind of the receiving lawyer, the lawyer's obligation to his client of zealous representation, and the potential conflict of interest under Rule 1.7(b)), and may have been mistaken in its view that most courts do not treat inadvertent disclosure as a waiver of the privilege. The courts in this jurisdiction, and several others, have reached a contrary conclusion.

****

The line we have drawn between an ethical and an unethical use of inadvertently disclosed information is based on the receiving lawyer's knowledge of the inadvertence of the disclosure. Thus, for example, where the document has no facial or contextual indication of privilege and the receiving lawyer has not learned of its inadvertent disclosure, the receiving lawyer who reads such a document commits no breach of ethics.

At the other extreme is the document for which the inadvertence of the disclosure is actually known to the lawyer before he reads it. Such a situation would exist, for example, when a confidential letter to a lawyer's client is inadvertently mailed to opposing counsel, and opposing counsel is specifically informed of the mailing error before the letter is delivered to his office. Opposing counsel's reading of the letter would be unethical.

Many situations will fall somewhere between these two clear examples, *i.e.*, there may be some indication on the document or in its context that the disclosure was inadvertent, but there may also be good reason for the receiving lawyer to conclude otherwise.[12] Whether a particular set of facts and circumstances constitutes dishonesty will depend on whether it shows the requisite *knowledge* on the part of the receiving lawyer (*see* paragraph [6] in the Terminology section of the Rules for the definition of "knows").[13]

*Did the Inadvertent Disclosure Itself Constitute an Ethical Violation?*

The facts of this opinion also raise the question of the ethical obligations of a lawyer to protect confidential documents from inadvertent disclosure. District of Columbia Rule of Professional Conduct 1.6(a) establishes the obligation of a lawyer to protect confidential and secret client information. It provides as follows:

> Except when permitted under paragraph (c) or (d), a lawyer shall not *knowingly:*
>
> (1) Reveal a confidence or secret of the lawyer's client;
>
> (2) Use a confidence or secret of the lawyer's client to the disadvantage of the client;
>
> (3) Use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person. (*Emphasis added.*)

Rule 1.6(a) only prohibits disclosures of client confidences and secrets made "knowingly", a term is defined in the "Terminology" section of the Rules as denoting "actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."

In a situation where the disclosure was truly inadvertent, that is, where it did not proceed from any actual knowledge that privileged material was contained in the production of discovery documents, from any actual knowledge that it was included in a mailing to opposing counsel, etc., we do not believe that Rule 1.6(a) is violated. Thus, a negligent disclosure of confidential or secret information would not violate this Rule.

There remains, however, the question whether the inadvertent disclosure of confidential or secret information violates some other ethical provision. Where the disclosure occurred through the conduct of a subordinate lawyer or employee in the sending lawyer's firm, a violation of Rule 1.6(e) may result. That Rule requires that:

> A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client . . . .

Where, for example, a lawyer entrusts an associate lawyer or a non-lawyer employee with a document production, and fails to use reasonable care in instructing such person about the identification or handling of confidential or secret material, such supervising lawyer may violate Rule 1.6(e) if such material is improperly disclosed. *See also* Rules 5.1(b) and 5.3(b).

Where, however, the disclosure is solely the product of the lawyer's own inadvertence, Rule 1.6(e) would appear to be inapplicable. But the lawyer's inadvertence could violate Rule 1.1 (Competence), which provides as follows:

> (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters.

[11] We disagree with the ABA Opinion only as to the legal basis for the conclusion that the described conduct is unethical. The ABA Opinion found no Rule or Professional Conduct governing the activity in question, and so based its conclusion on general "precepts underlying the Model Rules." *Id.* at 2. We believe that Rules 8.4(c) and 1.15 govern.

[12] For example, a document when created may have been marked "Confidential" or "Privileged", without regard to whether the document was actually entitled to some legal evidentiary privilege. A copy of document so marked in a document production would not, in many circumstances, establish the receiving lawyer's knowledge of an inadvertent disclosure of privileged material. Such marking, as noted, is often indiscriminately used and, therefore, of no legal significance; also, the receiving lawyer may be entitled to assume that any privilege that did exist with respect to the document was being voluntarily waived, to further the interests of the sending lawyer, by inclusion in the document production.

[13] There will be, we expect, some situations in which the receiving lawyer believes that his/her right to examine a document is ambiguous, because there are conflicting indications as to inadvertence. In such a situation, the prudent receiving lawyer would either contact the sending lawyer for instructions before examining the document, or have another person not working on the matter to which the document relates examine it to assist in clarifying its status.

Because we are not in a position to determine the precise facts that led to the inadvertent disclosure in the matter presented to us, we cannot say whether it constitutes a violation of Rule 1.1. If, for example,the disclosure occurred because counsel failed to review the documents to be made available to possessing counsel with the thoroughness and preparation required under Rule 1.1(a) or the skill and care required under Rule 1.1(b), the inadvertence could be an ethical violation. On the other hand, the fact of an inadvertent disclosure would not itself be evidence of a violation of Rule 1.1, as such disclosure could well occur even in the presence of appropriate levels of attention and skill.

Inquiry No. 94-8-35
Adopted: May 16, 1995

*Opinion No. 257*

**Disclosure Obligations of Criminal Defense Lawyer Charged with a Crime by the Prosecutor**

• A lawyer who specializes in the defense of criminal cases in the Superior Court who is charged with a crime by the United States Attorney's office may continue to represent existing criminal clients and may accept new criminal defense representations, but only if the lawyer makes full disclosure to his existing and potential clients and obtains their consent.

**Applicable Rules**

• **Rule 1.3** (Diligence and Zeal)
• **Rule 1.7** (Conflict of Interest: General Rule)

*Inquiry*

An attorney's practice is limited to defending clients charged with criminal offenses in the Superior Court. The attorney has himself been charged with possession of marijuana by the United States Attorney's office, and the lawyer's case is pending in the Superior Court. The question presented is whether the lawyer may continue to represent his existing clients and may accept new clients during the pendency of his criminal case without making disclosure to the clients of the criminal charges against him. The lawyer feels that his judgment on behalf of his clients will not be affected by the pendency of the criminal charges against him, and he feels that he ought not to be obliged to make any disclosure to his clients as a result.

*Discussion*

This inquiry is governed by Rule1.7(b)(4) of the District of Columbia Rules of Professional Conduct. That rule states that, without consent:

> ...a lawyer shall not represent a client with respect to a matter if: ...(4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

The consent referred to above is explained in Rule 1.7(c) as follows:

> A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if: (1) each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and (2) the lawyer is able to comply with all other applicable rules with respect to such representation.

We have no hesitation in finding that Rule1.7(b) applies to the inquirer's situation and that it compels disclosure to the inquirer's clients and the seeking of their informed consent.

The exact question presented is whether the inquirer's status as a criminal defendant in his own personal case gives rise to a question whether his professional judgment in defending his clients in criminal cases will be or reasonably may be adversely affected. We think, on the facts presented to us, that it does. The inquirer is in the process of being prosecuted by the same office that prosecutes his clients. The temptation for the inquirer either to become less aggressive – to his clients' detriment – in the hopes of currying favor with his adversary in his clients' cases or to become increasingly and excessively aggressive – to his clients' detriment – as a result of his own status as a criminal defendant is undeniable.

The inquirer forcefully states in his inquiry that he sincerely believes that neither the manner in which he represents his clients nor the manner in which he exercises his professional judgment on behalf of his clients will be or could reasonably be affected by his status as a criminal defendant. We believe that, despite the inquirer's undoubtedly heartfelt beliefs in this regard, an objective observer might reasonably believe that the inquirer's professional judgment on behalf of his clients would be colored by his personal situation. Therefore, his clients must be informed under Rule1.7(b)(4).[1]

In D.C. Opinion No. 210 (April 17, 1990), this Committee had an opportunity to examine an analogous situation. In that opinion, we considered the situation of a lawyer principally engaged in criminal defense work who applied for a position with the United States Attorney's office. Opinion No. 210 was decided under the Code of Professional Responsibility then in effect and specifically under DR 7-101 (representing a client zealously) and DR 5-101 (refusing employment when the interests of the lawyer may impair his independent professional judgment).

When this Committee published its Opinion No. 210, the Court of Appeals had already adopted the District of Columbia's Rules of Professional Conduct, which were to become effective at the beginning of the following year. The Committee found that a criminal defense attorney thus situated was obliged to divulge to her clients the fact of her job application and to seek their consent to her continued representation in light of her pending job application. In so doing, this Committee explicitly held that it would reach the same result under Rule 1.7.

Now that the Rules of Professional Conduct have come into effect, we observe that the principles set forth both here and in Opinion No. 210 were and are the principles that continue to govern a conflict of this type. Opinion No. 210 speaks in some detail of the types of pitfalls that might arise:

> ...The lawyer may perceive the particular prosecutor handling a case or matter she has been retained to defend as having some influence over her employment prospects. She may also believe that her advocacy skills as demonstrated in that case or matter will provide a principal basis upon which she will be evaluated. If so, she likely will seek to make a favorable impression. It is difficult to know

[1] It is worth pointing out that the ABA Model Rule 1.7 speaks in terms of a more subjective standard. That rule talks about the lawyer's reasonable belief that the representation will not be adversely affected by the lawyer's own interests. Despite the apparently subjective nature of the test set forth in the ABA Model Rule and its predecessor in the ABA Model Code, courts have consistently taken the view that the test was in fact an objective one. In any event, under the District of Columbia version of Rule 1.17, the test in the District of Columbia is a more overtly objective one.

whether these subjective feelings will compromise her zealous representation of her client. They may or they may not. In some circumstances, the lawyer may work even harder in her client's behalf in order to demonstrate her competence and ability.

Thus, the lawyer may redouble the effort and time she previously gave to the client's cause, working more vigorously to master the applicable law and facts of the case. Obscure tactics and defenses may receive greater attention than otherwise, and the lawyer, in an effort to perform well, may conduct a more thorough discovery to better anticipate the prosecution's attack. At trial, the attorney may put forth her defense and counter the prosecution more energetically than otherwise. All of this activity, though driven by the lawyer's personal interest in performing well and enhancing her employment prospects, would benefit the client also. The interests of the lawyer and the client in this situation, therefore, could very well be consistent.

On the other hand, when representing clients in criminal proceedings, the lawyer is often required to make judgments as to courses of action and to assert rights that heavily burden the prosecution and create difficult obstacles to conviction of the lawyer's clients. The prosecutor may view some of defense counsel's tactics as unwarranted, technical, unreasonable or even personally offensive.

Moreover, criminal investigations and trials are the most adversarial of all litigation. It is to be expected that the prosecutor will vigorously contest, in his effort to obtain a conviction, virtually all of defense counsel's requests for discovery, pre-trial motions, and trial tactics. In the context of such hotly contested and adversarial proceedings, relation-ships between opposing counsel may become strained. Nevertheless, defense counsel is obligated to take whatever lawful and ethical measures are required to vindicate a client's cause without regard to opposition, obstruction, or personal interest, such as a desire not to offend or irritate members of the prosecutor's office from which he is seeking or may have recently received favorable job consideration. Where concern for jeopardizing her employment opportunities interferes with a lawyer's representation of her client, an impermissible conflict of interest exists.

The difficulty, therefore, is that, while the lawyer may react in this situation in a manner entirely consistent with her client's best interests, she could also perceive her own interest to be in conflict with those of her client.

Those considerations apply with equal force to the situation of a criminal defense lawyer who finds himself charged by his adversary[2] with having committed a crime.

In closing, we emphasize that, as the rules point out and as this Committee has observed on several prior occasions, the disclosure to be made to the client must be full and complete. The rule itself talks about "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." We think it is difficult for a lawyer to make an adequate disclosure in a situation like this in which the lawyer's own personal interests are involved. There is obviously a strong temptation to minimize the consequences of the adverse relationship in discussions with the client and to soft-pedal the potential disadvantages to the client if the client should consent.

The lawyer presumably wants to be retained by the client. The lawyer genuinely believes that his judgment will not be affected, although we have found that to a reasonable observer, it might be. It is therefore difficult – but nevertheless required – for the lawyer to summon up for the client the full range of possible negative consequences to the client before the client can effectively consent and waive the conflict. The lawyer must be particularly scrupulous to make sure that the client has a fair and impartial assessment of the likelihood of any such adverse consequence occurring.

As the Court said in a related context: "Full disclosure . . . requires a detailed explanation of the risks and disadvantages to the client entailed in the agreement, including any liabilities that will or may foreseeably accrue to him." *In re James,* 452 A.2d 163 (D.C. 1982). Because the situation here is so fraught with difficulty for the lawyer, we observe that the better practice may well be for the lawyer to make the disclosure of the potential adverse consequences to the clients in writing so that the clients will have a fair opportunity to reflect upon that disclosure at their leisure and so that there will be no dispute at a later date between the lawyer and the clients as to what disclosure was in fact made. While a written disclosure is not required in these circumstances by the rules, it is undoubtedly desirable.

[2] The nature of the relationship between the prosecutor and a criminal defense lawyer is particularly acute because the prosecutor's client is the government. Therefore, in many ways, the prosecutor becomes nearly a party to the proceeding himself; in some jurisdictions prosecutions are even brought in the name of the prosecutor and not in the name of sovereign.

Inquiry No. 92-10-37
Adopted: September 20, 1995

*Opinion No. 258*

## Application of Rule 4.2(a) to Lawyers as Parties Proceeding *Pro Se*

- A lawyer who is a party in a matter and is proceeding *pro se* cannot communicate directly with another party who is known to be represented by counsel in the matter without first obtaining consent from the other party's lawyer.

### Applicable Rule

- **Rule 4.2** (Communication Between Lawyer and Opposing Parties)

### *Inquiry*

The inquirer, a private practitioner, requests an opinion concerning whether an attorney who is a party in a matter and who is proceeding *pro se* may, under Rule 4.2, communicate directly with another represented party in the same matter without first obtaining the consent of the other party's lawyer.

Rule 4.2(a), the "no contact" rule, provides that, "[d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so." However, Comment [1] to Rule 4.2 plainly states that "*parties* to a matter may communicate directly with each other" (emphasis added).

This inquiry, therefore, poses the novel question of how, if at all, the freedom of parties to communicate directly with each other without the permission or presence of counsel is altered or nullified by the fact that one of the parties to the matter is, herself, a lawyer.[1]

### *Discussion*

For the purposes of this inquiry, the Committee assumes that (1) the contemplated communication is directly with a

[1] This opinion addresses only the situation in which the lawyer-party is proceeding *pro se*. We do not address the situation in which the lawyer-party is represented by counsel.

party[2] in the matter, not a non-party employee or other non-party individual; (2) the dispute is a "matter" for purposes of Rule 4.2(a); (3) the other party is represented by counsel; (4) the communication is about the "subject of the representation;" and (5) the direct communication is not otherwise "authorized by law."

The Committee recognizes that neither the ABA Model Rules of Professional Conduct nor the D.C. Rules of Professional Conduct speaks directly to *pro se* representation issues.[3] This gap does not end our inquiry, however, nor does it create a professional ethics vacuum for lawyer-parties who choose to proceed *pro se*.

The Committee has considered the societal interests and purpose behind Rule 4.2 and its commentary, and has read Rule 4.2 and its commentary in the context of all the professional conduct rules.[4] In light of these principles and the language of Rule 4.2, we conclude that a lawyer proceeding *pro se* in a matter must not communicate or cause another to communicate about the subject of the matter with a party known to be represented by another lawyer in that matter, unless the lawyer-party has the prior consent of the lawyer representing such other party.

To avoid absurd results, however, the Committee excludes from the reach of this opinion situations in which the other party, if not a lawyer, ordinarily would not consult a lawyer or retain a lawyer to represent him. For example, a lawyer-consumer whose suit has been damaged by the dry cleaners should be free to address the problem directly with the manager, rather than having to contact the lawyer for the dry cleaners. Similarly, a lawyer-neighbor may deal directly with a neighbor about a noisy pet or a tree that fell on the lawyer's property, without concern whether the neighbor has a lawyer. Or a lawyer-citizen may write to the chief executive of a corporation protesting its planned theme park. It would be unreasonable to suggest in these types of situations that a lawyer-party cannot deal directly with the other person or entity. However, when a dispute has matured to the point where a person would ordinarily retain counsel, the lawyer-party must treat herself as covered by Rule 4.2.

Rule 4.2 has at its core the concern that lawyers generally are in a better position, by education and training,[5] to overwhelm a lay party and exploit his lack of legal knowledge in the course of communicating directly with the lay party. Courts and this Committee have noted that the Rule is intended to protect against the lawyer who might coax a statement or settlement or otherwise take advantage of the unsuspecting and momentarily uncounseled lay person.[6] Thus, courts have noted the "difficulty the uncounseled layperson has in marshalling the information and foresight required to conduct negotiations about complex legal issues with a lawyer representing [an adverse party]."[7]

Courts also have observed that Rule 4.2 helps prevent the inadvertent disclosure of privileged information[8] and has "preserved the proper functioning of the legal system"[9] by protecting the integrity of the lawyer-client relationship. These societal concerns and interests have no less validity when the lawyer positioned to do the coaxing is a lawyer-party proceeding pro se.

Comment [1] to Rule 4.2, which permits direct, interparty communications, does not create an exception to Rule 4.2. The comment merely reflects the American jurisprudential tradition that parties generally are free to communicate directly with each other. This tradition is based on the belief that parties have a right to settle their disputes without the involvement or consent of their lawyers.

However, this right of the parties is not absolute. A party cannot achieve a settlement from another uncounseled party through "duress, harassment, or overbearing conduct."[10] It is precisely this limitation on traditionally allowable interparty communications that takes precedence over the commentary to Rule 4.2 when one of the parties is a lawyer.

A lawyer, like a lay person, has the unqualified right to represent herself in a matter, even if, as the old adage has it, she thereby acquires a fool for a client. But, unlike the lay party, the *pro se* lawyer brings her professional skills and legal knowledge with her whenever she deals with her lay

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[2] In so assuming, the Committee notes that the term "party" is not limited to formal parties in litigation. Rule 4.2, Comment [4]. *See also* Rule 4.2(c), which, for purposes of this rule, defines "party" to include "any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates." We also note that Rule 4.2(d) excludes from the Rule's scope communications by a lawyer with government officials who can redress a client's grievances.

[3] In fact, the Rules appear to embody two assumptions– that the lawyer is (1) representing (i.e., acting as lawyer for) a (2) third party (i.e., a client other than herself). Some courts have specifically held that certain disciplinary rules are inapplicable to the situation where a lawyer is representing herself. *Lawson v. Nevada Power Co.*, 739 F. Supp. 23, 24 (D.D.C. 1990) (disciplinary rule requiring a lawyer to withdraw from trial if she is called as a witness does not require disqualification of lawyer who is proceeding *pro se*). *See also O'Neil v. Bergan*, 452 A.2d 337, 344 (D.C. 1982); *Koger v. Weber*, 455 N.Y.S. 2d 935, 937 (N.Y. Sup. Ct. 1982); Downey, *Fools and Their Ethics: The Professional Responsibility of Pro Se Attorneys*, 34 B.C.L. Rev. 529 (1993) (advocating the adoption of a new ABA Model Rule preserving the lawyer's right to self-representation but urging the lawyer to retain outside counsel if her self-representation would violate the ethical standards normally applicable to the conduct of a lawyer representing another person).

[4] Under the Rules, lawyers are admonished not to harass opponents. *See* Rules 1.16 (a lawyer should withdraw if the representation will result in a violation of the Rules of Professional Conduct); 3.1 (a lawyer shall not bring or defend action except on a nonfrivolous basis); 3.2 (a lawyer should not delay a case solely to harass or maliciously injure another); 3.4 (a lawyer shall deal fairly with opposing parties and counsel in pretrial and trial matters); 3.5 ( a lawyer shall respect the impartiality and decorum of the tribunal); 4.2 ( a lawyer shall not talk to parties represented by counsel about the subject of the representation).

[5] *See Valassis v. Samelson*, 143 F.R.D. 118, 120 (E.D. Mich.1992); *Brown v. St. Joseph County*, 148 F.R.D. 246, 249 (N.D. Ind. 1993); *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 82 (N.D.J. 1991); *University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327 (E.D. Pa. 1990); *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1084 (S.D.N.Y. 1989); *Frey v. Department of Health and Human Serv.*, 106 F.R.D. 32, 34 (E.D.N.Y. 1985); *United States v. Galanis*, 685 F. Supp. 901, 902 (S.D.N.Y. 1988); Kurlatzik, *The Prohibition on Communication with an Adverse Party*, 51 Conn. B.J. 136, 145-46 (1977).

[6] *See United States v. Batchelor*, 484 F. Supp. 812, 813 (E.D. Pa. 1980); *Sherrod v. Furniture Ctr*, 769 F. Supp. 1021, 1022 (W.D. Tenn. 1991); *Hanntz. v. Shiley, Inc.*, 766 F. Supp. 258, 265 (D.N.J. 1991); *Polycast Technology Corp. v. Uniroayl, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990); *Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984). *See also* DC Bar Legal Ethics Comm. Op. 80 (1979); ABA Comm. on Professional Ethics and Grievances Formal Op. 108 (1934); *Frey v. Dep't of Health and Human Serv.*, 106 F.R.D. at 34 (E.D.N.Y. 1985); Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 U. Pa. L.Rev. 683 (1979).

[7] *United States v. Batchelor*, 484 F. Supp. at 813. Our opinion does not turn on the level of sophistication of the lay party in a matter. Such a subjective analysis, we believe, would create unnecessary confusion and uncertainty as to the propriety of lawyer-party conduct in future cases.

[8] *Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. at 625.

[9] *Wright v. Group Health Hosp.*, 691 P.2d at 567; *Carter v. Kamaras*, 430 A.2d 1058, 1059 (R.I. 1981).

[10] *See Lewis v. S.S. Baune*, 534 F.2d 1115, 1122 (3d Cir. 1976)

adversary. The lawyer-party, no matter whether she is acting in her "lawyer" or her "party" capacity, still retains a presumptively unfair advantage over an opposing party. We therefore conclude that a lawyer must comply with the requirements of Rule 4.2(a) when she represents a client, be that client the lawyer herself or another party.

Inquiry No. 92-6-19
Adopted September 20, 1995

*Opinion No. 259*

**Conflict Issues in Representations Involving Estates**

- Under the substantive law of the District of Columbia, a lawyer retained by a personal representative or conservator for a representation in connection with a decedent's or ward's estate represents the personal representative or conservator rather than the estate. The lawyer may not, therefore, bring an action adverse to the personal representative or conservator without his or her consent.

**Applicable Rules**

- **Rule 1.7** (Conflict of Interest: General Rule)
- **Rule 1 .9**(Conflict of Interest: Former Client)

*Inquiry*

The inquiring lawyer has raised an issue concerning her representation of the estate of an incapacitated person. A court appointed X, Y, and Z as conservators[1] for A's estate. In addition to serving as a conservator for A's estate, X also served as one of the two trustees for a trust established in A's name. One of the beneficiaries of the trust was A's estate.

The two trustees initially retained the inquirer to perform an audit of the trust, paying her fees from funds in the trust. At the completion of the audit, the inquirer met with the trustees, as well as the conservators of A's estate, to discuss issues identified in the audit. After the inquirer's work for the trust had been completed, the conservators asked her to serve as counsel to A's estate[2], and she accepted. The inquirer's fees were paid by the conservator from the estate, subject to court approval.

Approximately three years after the inquirer began her representation with respect to the estate, Y and Z (two of the three co-conservators) asked her to look into the question whether the fees of the two trustees of the trust – including X, the other conservator of A's estate – were excessive. The inquirer prepared an opinion letter as to the propriety of the trustees' fees and provided legal representation to Y and Z in their effort to remove X as a conservator. The court subsequently removed X as conservator. The question posed by the inquirer, at the direction of the court, is whether her continuing representation of the estate represents an impermissible conflict of interest because she had previously taken a position that is adverse to X.

*Discussion*

The answer to the immediate question posed by the inquirer is that, after the removal of X as a co-conservator, her representation of the estate or the remaining conservators does not present a conflict of interest under Rule 1.7 or Rule 1.9. Under the law in the District of Columbia, as discussed below, the inquirer had an attorney-client relationship with X. Accordingly, Rule 1.9 prohibits her, without consent, from now taking a position adverse to X in the same matter or one substantially related to a matter on which she previously represented X[3]. As we take the facts, though, X is no longer a conservator of the estate, and the inquirer is therefore no longer involved in any action that is adverse to X. Accordingly, the inquirer's current representation of A's estate or the remaining conservators does not present a conflict of interest.

The inquiry does, however, lead us to address a second question of greater significance to the trusts and estates bar: whether a conflict of interest existed when the inquirer took a position adverse to X at a time when X was still a co-conservator of A's estate. The critical issue for answering that question is the identity of the client.

The inquirer believed that it was permissible for her to take action adverse to X while X was still a conservator because the inquirer's client was the estate and not the conservators. Underlying her position is the premise that the existence of a conflict in a matter involving an estate should be analyzed under Rule 1.13 (Organization as Client). Just as a corporation can hire a lawyer only if its constituents (*e.g.*, president or general counsel) take steps to do so, an estate cannot hire a lawyer except through its constituents – in this case the conservators. Although X and the other conservators hired her and interacted with her, the inquirer believed that since she had been retained to represent the estate and her fees were being paid out of the estate, the estate was her client. Indeed, in a recent case in Michigan, the court analyzed whether an estate is a client within the scope of Rule 1.13, and concluded that it was. *See Steinway v. Bolden,* 460 N.W.2d 306 (Mich. Ct. App. 1990).

Similarly, the inquirer also believed that X was not a former client with respect to her representation of the trust. Although X was a trustee at the time the inquirer provided advice concerning the trust, the inquirer understood her client to be the trust rather than the individual trustees.

The position urged by the inquirer is by no means without force or logic. In general, the fact that the constituents of an organizational client interact with the client "does not mean, however, that constituents of an organizational client are the clients of the lawyer."Rule 1.13, Comment 3. Although the lawyer communicates with the organization through its constituents, the client is the organization, not its constituents. Indeed, "[t]he principle that a lawyer represents the entity and not its individual shareholders or other constituents applies even when the shareholders come into conflict with the entity." Opinion No. 216 (Jan. 15, 1991).[4] Since the inquirer believed X's actions were harmful to the estate – which

[1]The D.C. Code defines "conservator" as "a person who is appointed by the court to manage the estate of a protected individual." *See* D.C. Code Ann. §21-2011(3).

[2]While the inquirer understood that she was being asked to represent the estate, not the conservators, there was no formal engagement letter reflecting that understanding. Moreover, as we discuss below, the law in the District of Columbia is that the client in such situtations is the conservator, not the estate.

[3]Rule 1.9 provides that "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 consents after consultation."

[4]A prior opinion, decided under the former D.C. Code of Professional Responsibility, as well as a number of court cases, have recognized that a lawyer representing an organization may take a position adverse to one of its constituents even where the lawyer has interacted with the constituent. *See* Opinion No. 159 (Sept. 15, 1985); *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982); *U.S. Industries, Inc. v. Goldman*, 421 F. Supp. 7, 11 (S.D.N.Y. 1976); *Wayland v. Shore Lobster & Shrimp Corp.*, 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982).

she understood to be her client – she considered it appropriate to take actions adverse to X in order to benefit the estate.

The critical flaw in the inquirer's reasoning, however, is that under the substantive law of the District of Columbia, as well as the law of most jurisdictions, the client of a lawyer representing an estate is the fiduciary – in this case the conservator – and not the estate.[5] On two recent occasions, the D.C. Court of Appeals has addressed the identity of the client in estates law. In a 1987 decision involving the question of compensation for the attorney for a decedent's estate, the court stated:

> The general purposes of the Reform Act, however, support the propositions that it sought to enhance the efficiency of these proceedings by increasing, at least with regard to undisputed matters, the power of the personal representative, and that *counsel for the estate was viewed as an employee of the personal representative.*

*Poe v. Noble*, 525 A.2d 190, 193 (D.C. 1987) (emphasis added). In a 1993 case, *Hopkins v. Akins*, 637 A.2d 424, 428 (D.C. 1993), which involved facts closer to those before us, the court considered the obligations of an attorney when the personal representative of a decedent's estate is depleting the assets of the estate. The *Hopkins* court relied on the language from *Poe* quoted above to conclude that the attorney had no legal duty to the beneficiaries of the estate because the client was the personal representative of the estate and not the estate.

Thus, even though the inquirer's view that the estate was the client is a plausible one, that question is one of substantive law and this Committee has no authority to alter the result dictated by settled law in the District of Columbia. It is worth noting, moreover, that the law in the District of Columbia on this point is in accord with the law in most other jurisdictions. *See* American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct* 3 (2d ed. 1995) ("Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries."); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 Fordham L. Rev. 1319, 1321 ("A majority of authorities addressing this issue conclude (more or less) that the personal representative is the client . . . ."); *see, e.g., Goldberg v. Frye*, 266 Cal. Rptr. 483 (Ct. App. 1990); *Rutkoski v. Hollis*, 600 N.E.2d 1284 (Ill. App. Ct. 1992). Although we have not located any D.C. case applying the approach of *Poe* and *Hopkins* to a ward's estate as opposed to a decedent's estate, we see no reason why the D.C. Court of Appeals would reach a different result concerning such estates. *See ACTEC Commentaries* at 133 ("The lawyer retained by a fiduciary for a disabled person, including a guardian, conservator, or attorney-in-fact, stands in a lawyer-client relationship with respect to the fiduciary.").

Once it is recognized that the inquirer represented the conservators of the estate, and not the estate itself, it is apparent that she should not have assisted two of the conservators – Y and Z – in taking actions adverse to the third conservator – X – since X was a current client of hers. Specifically, Rule 1.7(b)(1) provides that a lawyer is conditionally prohibited from representing a client with respect to a matter if "a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter." In the present case, the position of Y and Z was unquestionably adverse to X's position since Y and Z were challenging the fees that X had been paid as a trustee. And X did not consent to the inquirer's representation of Y and Z with respect to that issue.

We note that commentators have struggled to find some justification for permitting a lawyer for an estate at least to be permitted – if not required – to disclose when he or she learns that the fiduciary is taking actions detrimental to the estate. *See ACTEC* Commentaries at 34 ("[I]n some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary."); Pennell, *Who is the Client?* at 1321-22 ("many [authorities] also state that a duty – akin to a fiduciary duty – runs from the attorney directly to the beneficiaries of the fiduciary entity"). Indeed, Rule 1.6(d)(2)(A) provides that a lawyer may use or reveal client confidences or secrets "when permitted by these rules or required by law or court order."

In these circumstances, though, we can find no basis for a lawyer taking action adverse to a fiduciary client. To begin with, we are not aware of any rule of law in the District of Columbia permitting a lawyer for a fiduciary to disclose client confidences because the fiduciary may have breached some legal obligation.[6] In addition, even if such a rule existed, that rule would not mean that the inquirer would be permitted to take a position adverse to X concerning that conduct. Indeed, a recent opinion by the ABA Committee on Professional Responsibility concerning counseling of a fiduciary explains that all of the Rules of Professional Conduct should apply in the context of estates law in the same manner that they would apply in any other situation. ABA Formal Op. 94-380 (May 9, 1994). Under the Rules, there was no basis for the inquirer to ignore the prohibition on taking actions adverse to another of her clients.

We therefore conclude that when Y and Z approached the inquirer concerning X's actions as trustee, the inquirer should have declined to provide legal advice, absent X's consent, because X was a client. However, to the extent that the estate and the remaining conservators are no longer in a position adverse to X, we see no problem with the inquirer's continued representation of the conservators.

Inquiry No. 95-5-16
Adopted: October 18, 1995

[5] A comment to the Model Rules, which was not included in the D.C. Rules of Professional Conduct, explicitly contemplates that the identity of the client will depend on the underlying law of the jurisdiction. *See* Model Rule 1.7, Comment [13] ("In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries."). We accord no significance to the omission of this comment from the D.C. Rules.

[6] In *Hopkins*, the court in describing the facts noted that after Hopkins learned that the personal representative of the estate was apparently stealing money from the estate, she disclosed the representative's actions to both a former Register of Wills and the current Register of Wills. However, at the time that the lawyer in Hopkins disclosed her client's confidences, the D.C. Code of Professional Responsibility was in effect, and it permitted a lawyer, without client consent, to reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3). Current D.C. Rule 1.6(c), by contrast, permits such a disclosure without consent only to prevent a criminal act likely to result in death or substantial bodily harm or to prevent bribery or intimidation of persons involved in judicial proceedings.

*Opinion No. 260*

## Agreements Limiting the Professional Liability of Lawyers to Former Clients

• A lawyer may not condition settlement of a pending fee dispute on the agreement of the lawyer's unrepresented former client to release the lawyer from malpractice liability unless, prior to negotiating such a release, the lawyer advises the former client of any facts and circumstances known to the lawyer that he reasonably believes might give rise to a claim of malpractice liability.

A lawyer may agree to forego full payment of fees in exchange for a release from or waiver of liability to a client as to a malpractice claim that the lawyer knows might have been resolved in the client's favor, providing the lawyer first gives timely written notice to the client that independent counsel should be obtained prior to negotiating such a settlement or release. Under no circumstances may a lawyer ask a former client to execute a release prohibiting the client from filing a complaint with Bar Counsel.

### Applicable Rules

• **Rule 1.8(g)** (Conflict of Interest: Prohibited Transactions)
• **Rule 8.3(a)** (Reporting Professional Misconduct)
• **Rule 8.4** (Misconduct)

*Inquiry*

The Inquirer has requested an opinion based on the following hypothetical fact situation:

A retained lawyer provides substantial legal services for a client over an extensive period of time. When a disagreement occurs, the client discharges the lawyer. The lawyer then sues the client for non-payment of fees. During settlement discussions, the lawyer agrees to accept a portion of the fee that the lawyer believes is due in exchange for a written release from the client. That release states: "I agree to waive and release this firm, including the lawyers employed by the firm, from all claims, complaints or causes of action of any nature as a result of or relating to this firm's representation of and billings to me through the date of this agreement."

Based on this hypothetical, Inquirer asks the following questions:

(1) Is this a violation of the ethical standards in the District of Columbia Rules of Professional Conduct?[1]

(2) Are the following factors outcome determinative:

a) whether the client was represented by different counsel at the time the release was executed;
b) whether the lawyer has filed suit against the client for non-payment of fees;
c) whether the lawyer was aware of any potential malpractice claims against him?

(3) Can a lawyer agree to forego full payment of fees in exchange for a release or waiver of the lawyer's liability to the client in a malpractice suit that the lawyer knows may have resulted in a verdict favoring the client?

(4) Under what circumstances, if any, may a lawyer ask a client to execute a release prohibiting the client from filing a complaint with Bar Counsel?

We conclude that the lawyer in the hypothetical would violate Rule 8.4(c) if: (i) the former client was not represented at the time the release was executed; (ii) the former client was executing the release in consideration for the lawyer's release of the former client from any liability arising out of the lawyer's claim for unpaid fees; and (iii) the lawyer was aware of facts and circumstances that the lawyer reasonably believed might give rise to a claim of malpractice. We further conclude that a lawyer may agree to forego full payment of fees in exchange for a release from or waiver of liability to a client in a malpractice claim that the lawyer knows might have been resolved in the client's favor, providing the lawyer first gives timely written notice to the client that independent counsel should be obtained prior to negotiating such a settlement or release. Finally, we conclude that under no circumstances may a lawyer seek to execute a release that would bar a lawyer's client from filing a complaint with Bar Counsel. The bases of these conclusions are discussed below.

*Discussion*

*A. Rule 8.4(c): Conduct Involving Dishonesty, Fraud, or Misrepresentation*

Rule 8.4(c) provides that a lawyer engages in professional misconduct when he or she engages "in conduct involving dishonesty, fraud, deceit, or misrepresentation." In D.C. Bar Op. 79 (1979), we interpreted the term "fraud" as including a false or misleading statement, and we have recognized "that 'fraud' almost always means acts of affirmative representation rather than failure to disclose material facts."[2] Where a lawyer is seeking to settle a claim filed for unpaid fees against a former client who is unrepresented in exchange for the former client's release of malpractice liability, the former client must be able to compare the value of the offered fee reduction with the value of the lawyer's potential malpractice liability in order to determine whether the settlement offer is fair. The lawyer's failure to disclose facts of which he has knowledge that would reasonably give rise to malpractice liability would violate the prohibition in Rule 8.4(c) against dishonest or fraudulent conduct. Absent such a requirement, the former client might not be fully apprised of potential malpractice claims where, as in the hypothetical presented, the client waives rights to pursue "all claims, complaints or causes of action of any nature," and the drafting lawyer seems intent on obfuscating the meaning of the agreement, and not merely limiting malpractice liability. To find otherwise would allow a lawyer to provide the former client with "false or misleading" information about the agreement.

In reaching our conclusion that the facts presented in the hypothetical would run afoul of Rule 8.4(c), we wish to stress that each of the factors raised in Inquirer's second inquiry is outcome-determinative. First, Rule 8.4(c) would not require disclosure if the lawyer had not filed suit to collect unpaid fees. Otherwise, there would be no consideration to support the former client's promise to release the lawyer from any future malpractice liability. Second, Rule 8.4(c) would not apply if the former client were represented, because the client's new counsel would be capable of evaluating the existence and value of the client's malpractice claim through discovery. And third, Rule 8.4(c) would only require disclosure of facts known to the lawyer that the lawyer reasonably believes would give rise to malpractice liability, since one cannot withhold or misrepresent information about which one has no knowledge or that one does not reasonably believe is relevant.

Finally, the Committee wishes to emphasize that its opinion about a lawyer's duty under Rule 8.4(c) is limited to the

[1] See D.C. Rules of Professional Conduct (hereinafter "Rule ___"), D.C. Court Rules Ann., app. A (1994).

[2] D.C. Bar Op. 119 (1983) at 203 (quoting Note, *Legal Ethics and the Destruction of Evidence*, 88 Yale L.J. 1665, 1667 (1979)).

facts presented in this hypothetical: whether disclosure is required in the context of a negotiation between a lawyer and a former client to settle a fee dispute between them. The Committee is not concluding that a lawyer has a general duty to disclose malpractice liability to a former client in the absence of these circumstances.

*B. Rule 1.8(g)(2): Agreements Limiting a Lawyer's Malpractice Liability to an Unrepresented or Former Client.*

Rule 1.8 prohibits certain lawyer-client transactions as conflicts of interest, including the making of certain agreements with a client to limit a lawyer's professional liability. Rule 1.8(g). Under Rule 1.8(g)(2), "[a] lawyer shall not settle a claim for . . . [malpractice] liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith." This provision refers to the negotiation and execution of an agreement to limit or release a lawyer's professional liability once representation has commenced or has been terminated.

A lawyer "settling a claim" under Rule 1.8(g)(2) owes certain duties to a former client. For example, a discharged lawyer must advise a former client in writing that independent representation is appropriate. When a former client has already filed a claim for malpractice and has already obtained independent counsel for that action, the discharged lawyer need not provide this notice, as discovery will unearth the relevant facts.

A discharged lawyer also must allow the former client a reasonable period of time to consult and/or retain new counsel regarding the effect of a release of malpractice claims and, if needed, to negotiate and execute such a settlement or release on the former client's behalf. Where a former client opts not to retain independent counsel after receiving such notice, the discharged lawyer has nonetheless fulfilled this obligation.

Therefore, a lawyer may agree to forego full payment of fees in exchange for a release or waiver of the lawyer's liability to the client in a malpractice suit that the lawyer knows might have resulted in a verdict favoring the client if the lawyer first gives timely written notice to the client that independent counsel should be obtained prior to negotiating such a settlement or release and allows the client a reasonable period of time to retain new counsel.

*C. Rule 8.4(d): Agreements Limiting a Lawyer's Exposure to Disciplinary Action*

Rule 8.4 makes subject to discipline several types of behavior characterized as "professional misconduct," including conduct that "seriously interferes with the administration of justice." Rule 8.4(d).[3] We believe that an agreement whereby an unrepresented client or former client executes a release in which the client agrees not to file a complaint with Bar Counsel against the lawyer constitutes conduct that "seriously interferes with the administration of justice."

The organization of the Bar of the District of Columbia serves, *inter alia,* "to aid the Court in carrying on and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, * * * and high standards of conduct; * * * to the end that the public responsibility of the legal profession may be more effectively discharged." District of Columbia Court Rules Ann., D.C. Bar Rule I (1994) (hereinafter "D.C. Bar Rule __"). To accomplish these goals, the Bar has adopted the Rules of Professional Conduct and established procedures by which members of the Bar who violate those Rules shall be disciplined. D.C. Bar Rules X, XI. Allowing a lawyer to bargain with a client to avoid those procedures, would significantly impair the Bar's ability to regulate its members as well as protect the courts, the legal profession, and the public's confidence in the integrity and competence of the judicial system, thereby "seriously interfere[ing] with the administration of justice."[4]

It is irrelevant, in our opinion, that a lawyer seeks to preclude the filing of a complaint by a client or negotiates for the withdrawal of an existing complaint as part of an agreement to settle a malpractice claim or fee dispute with a former client.[5] Under no circumstances may a lawyer seek to thwart the Bar's duty to oversee, regulate and discipline its members by eliciting a former client's agreement not to file a complaint with Bar Counsel.

Of course, where the former client has obtained counsel for the settlement agreement, the former client's counsel has a duty to report any unprivileged misconduct that is discovered to Bar Counsel if the conduct fits within the standards set forth in Rule 8.3(a). Rule 8.3(a) requires that:

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

In this Committee's Opinion No. 246 (1994), we determined that Rule 8.3(a) imposed an absolute duty on a lawyer to report another lawyer's misconduct. To be sure, a lawyer's "failure to report would itself be an ethical violation." *Id.* at 62. This rule allows Bar Counsel to help maintain the Bar's integrity and prevents the use of such information as a threat during negotiations to obtain a bargaining advantage.[6]

Inquiry No. 88-1-1
Adopted: October 18, 1995

*Opinion No. 261*

## Emergency Room Referrals by a Law School Clinical Program

[3] ABA Model Rule 8.4(d) prohibits conduct "'prejudicial' to the administration of justice." D.C. rejected that term as overly vague and, instead, adopted the language used to explain the meaning of the term "prejudicial." Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar 249, at ¶10 (submitted to the D.C. Court of Appeals Nov. 19, 1986). Thus, the Rule was not intended to convey a different meaning. Rule 8.4(d) cmt 2.

DR 1-102(A)(5) was the Model Code equivalent to Rule 8.4(d) and ABA Model Rule 8.4(d).

[4] *Accord, In re Blackwelder,* 615 N.E. 2d 106, 108 (Ind. 1993) (applying Rule 8.4(d); Ariz. State Bar Op. No. 91-23 (Nov. 25, 1991) *digested in* Lawyers Man. at 1001:1404 (agreement barring filing of disciplinary complaint "undermin[es] the Bar's efforts at self-regulation" and limits "the integrity of the profession"; citing Rules 8.4(d) and 1.8(h)); Maine Op. 68 (1986), *digested in* Lawyers Man. at 901:4202 (attorney's attempt to be released from past or future ethical misconduct is "ineffective" and prohibited by ethics rules).

[5] *E.g., People v. Bennett,* 810 P.2d 661, 663-66 (Colo. 1991) (attorney may not ask former client to withdraw grievance to bar committee, whether or not request is a condition to a settlement of a malpractice claim); applying DR 1-102(A)(5)); *People v. Moffitt,* 801 P.2d 1197, 1198 (Colo. 1990) (same); *Committee on Legal Ethics of the W.Va. State Bar v. Smith,* 156 W. Va. 471, 194 S.E.2d 665, 667-69 (1973) (once complaint has been filed with state ethics board, that board must hear it whether or not the complainant has subsequently agreed to withdraw the complaint); N.C. Op. 83 (1989), *digested in* Lawyers Man. at 901:6615 (attorney against whom malpractice suit has been filed may not condition its settlement on withdrawal of or promise not to file disciplinary complaint against attorney; applying state's equivalent of D.C. Rule 8.4(a), (d)) .

[6] *See also* Rule 8.4(g), which states: "It is professional misconduct for a lawyer to seek or threaten to seek criminal or disciplinary charges solely to obtain an advantage in a civil matter.

- Rule 7.1(b)(2) and (3) does not apply to a law school clinical program's referrals of emergency room patients, who have been the victims of spouse abuse, either to counsel with which none of the law students making the referrals is affiliated or to a list of several counsel where some of the law students are affiliated with one of the counsel on the list and where the victims do not have to select a particular counsel while in the emergency room.

**Applicable Rule**

- **Rule 7.1** (Communications Concerning a Lawyer's Services)

*Inquiry*

Inquirers are the Director and two members of an organization that provides pro bono legal assistance to battered women. The organization, which is staffed by law students and supervised by a law professor, has developed a new Program that will provide legal information to battered women in the emergency room of a local hospital. This information will include advice on the availability of legal remedies and representation. In addition, if a patient requests, one of the Program's counselors will refer the patient to sources of legal assistance. If the patient has financial resources that render her ineligible for pro bono assistance, she will be referred to fee-charging attorneys. None of the Program's counselors will be affiliated with these fee-charging attorneys. If the patient is eligible for pro bono assistance, the counselors will refer her to pro bono legal clinics with which some of the counselors may be affiliated. No referrals will be made unless the patient specifically requests one. Counselors will only provide patients with the names of sources of legal assistance; patients will pursue these referrals on their own volition after they have left the emergency room.

The inquirers have asked the Committee whether the Program's emergency room referrals would violate Rule 7.1(b)(2) and (3) of the District of Columbia Rules of Professional Conduct ("D.C. Rules" or "Rules").[1] We conclude that they would not.

*Discussion*

D.C. Rule 7.1 provides that

> "(b) A lawyer shall not seek by in-person contact, or through an intermediary, employment . . . by a non-lawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:
>
> . . .
>
> (2) the solicitation involves the use of undue influence;
>
> (3) the potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer . . . ."

In order to determine whether the Program's referrals would violate Rule 7.1(b)(2) and (3), we must divide the referrals into two categories – those to lawyers or legal clinics with which the Program's counselors are not affiliated and those to legal clinics with which some of the counselors may be affiliated.

Beginning with the first category, Rule 7.1(b)(2) and (3) would not apply to referrals to unaffiliated lawyers. Rule 7.1(b) governs a lawyer's attempt to solicit, that is, to "seek . . . employment," from a potential client either directly or through an intermediary. Thus, this Committee has previously applied Rule 7.1(b) to an arrangement in which a law firm planned to pay a per-client fee to an insurance company for referrals[2] and to one in which a law firm planned to retain a marketing agent to solicit clients.[3] In both cases, the law firms engaged intermediaries for the specific purpose of obtaining clients. In contrast, an attorney who receives a referral from a counselor who is not the attorney's agent, who receives no consideration for the referral,[4] and who is not acting under the attorney's direction[5] is not actively "seeking employment" within the meaning of Rule 7.1(b). Rather, the attorney is the passive beneficiary of a recommendation. Rule 7.1(b), therefore, would not apply to a referral to any attorney with which the Program's counselors are not affiliated.[6]

It is a closer question whether Rule 7.1(b) applies to referrals made by counselors to lawyers or legal clinics with which some of the Program's counselors may be affiliated. The circumstances surrounding the referrals in this particular inquiry, however, lead us to conclude that the provisions of Rule 7.1(b) do not apply. Here, a counselor is providing a patient with a list of clinics and attorneys that may include an attorney or clinic with which some of the Program's counselors are affiliated, but the counselor is not encouraging the patient to select an affiliated clinic or attorney over the other clinics and attorneys on the list. Thus, the Program is not "seeking employment" for an affiliated clinic or attorney, and Rule 1.7(b) would not apply.

The conduct that is the subject of this inquiry is, therefore, quite different from the in-person solicitations that were at issue in *In re Gregory*, 574 A.2d 265 (D.C. 1990), where the D.C. Court of Appeals found that a lawyer's aggressive, in-person solicitations of criminal defendants in a courthouse may have violated DR 2-103(A)(3) of the Code of Professional Responsibility of the District of Columbia, the nearly identically worded predecessor to Rule 7.1(b)(3).[7] Unlike the respondent in *In re Gregory*, who was soliciting clients for only himself, the counselors in this inquiry are merely providing patients with a list of

[1] The inquirers also requested an opinion on whether the Program would involve the unauthorized practice of law within the meaning of Rule 5.5 of the D.C. Rules and D.C. Court of Appeals Rule 49(b)(2) and (3). The definition of the practice of law is a question of law, *see* Rule 5.5 cmt. 1, and, under Committee Rule C-5, the Legal Ethics Committee does not provide opinions on questions of law. Therefore, the Committee does not address this aspect of the inquiry.

[2] *See* D.C. Bar Op. 253 (1994).

[3] *See* D.C. Bar Op. 225 (1992).

[4] *See, e.g., Pace v. State* 368 So. 2d 340, 342 (Fla. 1979) (solicitation rule does not apply to "the recommendation of an attorney by anyone to another where the one recommending has no relationship or privity with the attorney as the latter's agent or as his employee or other similar relationship."); *Louisiana State Bar Ass'n v. St. Romain*, 560 So. 2d 820, 823 (La. 1990) (solicitation rule does not apply because there was insufficient proof that a lawyer solicited "clients through a non-lawyer who is rewarded for the solicitation."); *In re Appert*, 315 N.W.2d 204, 214 (Minn. 1981) (solicitaiton rule does not apply to lawyer's attempt to contact prospective client who had been referred to him by a student researcher at a law school because "no exchange of value took place" between the student and the lawyer).

[5] *Cf. In re Berlant*, 328 A.2d 471, 477-78 (Pa. 1974) (solicitation rule applies because "solicitation agreement existed or, at the very least, that appellant knew of the solicitation when he accepted the cases."), *cert. denied* 421 U.S. 964 (1975).

[6] *See* D.C. Bar Op. 51 (1978) ("it is clearly permissible for [an insurance agent] to refer clients to the inquiring party as a result of his own independent deliberation.").

[7] DR 2-103 (A) provided that:

> "A lawyer shall not seek by in-person contact, or through an intermediary, his or her employment (or employment of a partner or associate) by a non-lawyer who has not sought his or her advice regarding employment of a lawyer, if:
>
> . . .
>
> (3) The potential client is apparently in a physical or mental condition which would make it unlikely that he or she could exercise reasonable, considered judgment as to the selection of a lawyer."

legal clinics and attorneys; they are not in any way suggesting to these patients that the latter select one attorney or clinic on the list over another or that they select any of the clinics or attorneys on the list.

Moreover, in contrast to *In re Gregory*, which found that courthouse solicitation is likely to exploit a vulnerable group of potential clients, in violation of DR 2-103, the program at issue here would minimize the possibility that a patient would feel pressured in her choice of an attorney by providing the patient with a list of clinics and attorneys only if the patient requests one and by permitting the patients to pursue these referrals on their own volition after they have left the emergency room and have had more time for additional reflection.[8]

The activities performed by the counselors here are significantly more like the activities approved by the Committee in D.C. Bar Op. 64 (1979). In that opinion, this Committee concluded that the Law Students in Court Program, which operated an information booth in the Landlord-Tenant Branch of the Superior Court that informed tenants about the free legal assistance that the program offered, did not violate DR 2-103 of the Code of Professional Responsibility.

*Conclusion*

The Committee concludes that the Program's emergency room referrals would not violate Rule 7.1(b)(2) and (3). When the Program refers patients to attorneys and clinics with which the Program's counselors are not affiliated, the referrals are mere recommendations to which Rule 7.1(b)(2) and (3) does not apply. When the Program referrals include attorneys or clinics with which some of its counselors may be affiliated, Rule 7.1(b)(2) and (3) also does not apply, since the patients are not being pressured to select the affiliated attorneys and clinics over the other attorneys and clinics in the referrals.

Inquiry No. 95-4-10
Adopted: November 21, 1995

[8] According to the court, the lawyer, "accosted persons known by him to have been charged with an incarcerable criminal offense, who were without counsel, and who had just been advised by a judge concerning the maximum possible penalties upon conviction and the important assistance and attorney could provide. *The vulnerability of persons in that situation should have been, and indeed was, obvious to the Respondent.*" 574 A.2d at 268 (emphasis in original).

*Opinion No. 262*

**Application of Rule 1.5(d) to Receipt of a Contingent Fee in a Writ of Error Coram Nobis Proceeding**

• Rule 1.5(d), prohibiting contingent fees in criminal cases, does not apply to a writ of error coram nobis proceeding. Therefore, a lawyer may accept a contingent fee to represent an individual in such a proceeding.

**Applicable Rule**

• **Rule 1.5(d)** (Ban on Contingent Fees for Representing a Defendant in a Criminal Case)

*Inquiry*

The inquirer, a private lawyer, requests an opinion whether a lawyer may enter into a contingent fee agreement to represent a person, who was previously convicted by a court-martial and has been released, in an effort to have the prior criminal conviction set aside by a writ of error coram nobis. If successful, the individual will be entitled to back pay and allowances from which the lawyer's contingent fee will be paid.

*Discussion*

Rule 1.5 provides that a "[a] lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Comment [6] to the Rule notes that this provision continues the prohibition imposed under the previous Code of Professional Responsibility. According to Ethical Consideration 2-20 of that Code, "[p]ublic policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee."

A Writ of Error Coram Nobis ("Writ") originally was a common law writ brought to correct a judgment that the court would not have made had it known of an error of fact at the time of the original proceeding. The Writ was brought in an independent civil proceeding governed by civil rules.[1] Today, the Writ is the only post-conviction remedy that can be used to vacate a federal conviction after the petitioner has been released from custody. It will be granted only where necessary to correct errors of such a fundamental character as to render the previous court proceeding invalid.[2] Such errors include a violation of the right to counsel; incompetency of counsel; insanity or incompetency of the petitioner at trial; and a subsequent Supreme Court or appellate decision holding unconstitutional the federal statute under which petitioner was convicted. In other words, the Writ will be granted only where the circumstances compel such action to achieve justice.[3]

For the reasons discussed below, we conclude that Rule 1.5(d) does not apply to a Writ proceeding. We believe that Rule 1.5(d) is intended to apply to criminal cases in which the government proceeds against a criminal defendant. By comparison, the petition for a Writ is filed by an individual who, after release from custody, claims error in the previous criminal proceeding. The individual is not identified as a defendant, but rather as the petitioner.

Although many reasons have been given for the ban on contingent fees in criminal cases, and the precise rationale is somewhat murky, we find that none of these reasons apply to a Coram Nobis proceeding. One reason often given is that if contingent fees were permitted, lawyers would be less likely to accept less meritorious cases. In a Writ proceeding, however, the concern that lawyers will be discouraged from representing criminal defendants does not apply, since the criminal proceedings are already complete.

A second rationale for the ban was that "legal services in criminal cases do not produce a *res* with which to pay the fee."[4] Even if that rationale were still relevant, we note that the Writ in a court-martial conviction may generate a *res* (back pay and allowances) from which a fee can be paid. Finally, it is argued that contingent fees are not necessary in criminal cases because there is a constitutional guarantee of counsel for indigent criminal defendants. In a Writ proceeding, however, there is no such right to counsel. Contingent fees thus may enable individuals to secure counsel when they might otherwise lack the necessary financial resources to do so.

Whether a Writ proceeding is a civil or

[1] 18 Am. Jur. 2d *Coram Nobis* § 2 (1985).

[2] 38 A.L.R. Fed. 617 § 4(a) (1978).

[3] A Writ is an important remedy because of certain negative collateral consequences that result from a conviction, e.g., denial of certain rights (voting, holding office); expulsion from, or denial of access to, certain professions; sentence enhancement for recidivism; and the social and economic stigma of a conviction.

[4] EC 2-20, *supra.*

criminal proceeding has not been clearly decided. A confusing footnote to a Supreme Court opinion[5] and a division among the circuits[6] have served to muddy the waters in this regard.

But even if the Writ proceeding were deemed to be a criminal proceeding, the petitioner in the proceeding would have to be a "defendant," in our view, to bring the proposed transaction within Rule 1.5(d). Although he was the defendant in the original criminal case, the Committee believes that, at this stage of the legal proceedings, the *coram nobis* petitioner is not a "defendant." As we noted above, Rule 1.5(d), by its terms, applies only to representation of a "defendant in a criminal case." In our view, the representation of an individual in a Writ proceeding, where the individual allegedly wronged, i.e., the petitioner, initiates the legal action, is plainly not covered by the Rule. Thus, a lawyer may accept a contingent fee in a Writ proceeding.

Inquiry No. 95-3-7
Adopted: November 21, 1995

*Opinion No. 263*

## Contacts With Persons Represented by Counsel; Application of Rule 8.4(g) to Criminal Contempt Proceedings

• Where Lawyer A purports to limit his/her representation of a party in litigation to a particular aspect of that litigation, opposing Lawyer B, under Rule 4.2(a), may not communicate directly with Lawyer A's client on other aspects of the litigation without Lawyer A's consent, where there are issues in common in the represented and unrepresented aspects of the case. Where consent is withheld, Lawyer A must nevertheless receive the communication from Lawyer B and transmit it to the client.

The bringing of a motion for criminal contempt of a domestic relations civil protection order, in order to gain advantage in the underlying domestic relations case, is not seeking criminal charges to gain advantage in a civil matter, as prohibited by Rule 8.4(g).

### Applicable Rules

• **Rule 1.4(a)** (Keeping Client Informed of Status of a Matter)
• **Rule 4.2(a)** (Communications Between Lawyer and Opposing Parties)
• **Rule 8.4(g)** (Seeking or Threatening Criminal Charges to Obtain Advantage in Civil Matter)

*Inquiry*

The Inquirer is a lawyer who represents victims of domestic violence in proceedings in Superior Court. We are informed by the Inquirer that one legal remedy for a victim of domestic violence is a Civil Protection Order (CPO), a court order issued against the perpetrator of the domestic violence. Among other things, the CPO prohibits the respondent-perpetrator from coming into physical proximity of the petitioner-victim. *See* D.C. Code §16-1005.

If a CPO is violated, the petitioner may bring a motion for criminal contempt against the respondent. Under District of Columbia Superior Court practice, the criminal contempt proceeding is initiated by motion in the action which led to the issuance of the CPO. *See* Rule 12, D.C Superior Court Family Division Rules on Intra-Family Proceedings. *See also* D.C. Code, §16-1005(f). The petitioner may also separately move the court to modify the terms of the CPO to give greater protection from the perpetrator.

If the respondent in a CPO proceeding is indigent, the Superior Court will appoint counsel to represent that person in a criminal contempt proceeding. We are advised that appointed counsel for the respondent usually limits his representation to the contempt motion, most likely because his Criminal Justice Act appointment is so limited, and does not provide representation in the motion to amend the CPO order. Comment [4] to Rule of Professional Conduct 1.2 approves such limited representation, where the "scope of services provided by the lawyer may be limited . . . by terms under which the lawyer's services are made available to the client. "Nevertheless, the CPO modification proceeding and the criminal contempt proceeding typically involve some common facts, *i.e.,* those relating to the alleged violation of the CPO.

One question posed by the Inquirer concerns the situation where counsel appointed to defend the criminal contempt motion does not, in fact, consider his representation to include the CPO modification proceeding. The Inquirer acknowledges that the lawyer for the petitioner/victim cannot communicate directly with the respondent concerning the contempt matter, since counsel has been appointed for the respondent in that proceeding; but she asks if it is ethical for her to communicate directly with the respondent concerning the CPO modification proceeding.

The Inquirer also asks whether it is ethical for a criminal contempt motion to be filed in a CPO matter so that, among other things, its pendency (and the consequent risk to the respondent of a fine or imprisonment) may be used to obtain the respondent's consent to a modification of the CPO to afford greater protection to the petitioner-victim.

*Discussion*

*Communications With a Party Represented By Counsel*

The ethical propriety of communication by a lawyer for a party with another party to a matter is governed by subpart (a) of Rule of Professional Conduct 4.2 ("Communication Between Lawyer and Opposing Parties"), which reads as follows:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be *represented by another lawyer in the matter,* unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so (emphasis added).

The Rule 4.2(a) question presented to us depends upon whether the CPO modification proceeding in which the lawyer seeks to communicate directly with the respondent is the same "matter" as the contempt proceeding, in which the respondent has legal representation. If it is, then Rule 4.2(a) prohibits direct communication from the petitioner's lawyer to respondent without the consent of respondent's counsel. Under the facts of this Inquiry, we believe that the litigation in which the two motions have been filed is a single "matter" for purposes

[5] *U.S. v. Morgan,* 346 U.S. 502 (1954) (Writ available to challenge criminal judgments under the all writs section of the Judicial Code, construing 28 U.S.C. §1651(a).) The referenced footnote is quoted in relevant part: "Such a motion is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding . . . . This motion is of the same general character as one under 28 U.S.C. §2255." *id.* at 505 n.4. (At the time, courts viewed §2255 motions as civil proceedings.)

[6] There has been much litigation in this area because the nature of the proceeding (whether civil or criminal) determines which rules of procedure apply in the federal courts.

COURTS APPLYING CIVIL RULES: *U.S. v. Craig,* 907 F.2d 653 (7th Cir. 1990), *cert. denied,* (1990) (time for appeal); *U.S. v. Cooper,* 876 F.2d 1192 (5th Cir. 1989) (per curiam)(time for appeal); *U.S. v. Balistriere,* 606 F. 2d 216 (7th Cir. 1979) (discovery); *U.S. v. Keough,* 391 F. 2d 138 (2d Cir. 1968) (time for appeal).

COURTS APPLYING CRIMINAL RULES: *Yasui v. U.S.,* 772 F.2d 1496 (9th Cir. 1985)(time for appeal); *U.S. v. Mills,* 430F.2d 526 (8th Cir. 1970)(time for appeal).

of Rule 4.2(a), and that this direct communication is prohibited without the requisite consent.

The term "matter" is used in several other provisions of the Rules of Professional Conduct, including Rules 1.7 and 1.9 (conflicts of interest), and Rule 1.10 (imputed disqualification). It is nowhere defined, but Comment [3] to Rule 1.7 states, with reference to when a lawyer is adverse to a client in a "matter," that:

> [t]he concept of "matter" is typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the position of parties exists.

This Comment suggests that, at least with respect to litigation, a particular litigation is a "matter."

ABA Opinion 95-396 (July 28, 1995) discusses Rule 4.2(a). Concerning the meaning of the term "matter" and its scope, the ABA Opinion offers this example from criminal law:

> [I]f the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B.... By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer.

The quoted language, while not addressing the specific situation in the Inquiry before us, is consistent with an interpretation of "matter" as a particular litigation. Moreover, we believe that such an interpretation is the only one which makes any sense. While litigation may have many facets to it, those facets typically have at least some facts, evidence and legal principles in common. Activities or developments in one facet of a case rarely fail to have implications in others. That circumstance is well-illustrated in the Inquiry before us, where the core question in a CPO modification motion and in a criminal contempt motion is the same: what, if anything, did the respondent do in violation of the CPO.

If, for purposes of Rule 4.2(a), "matter" were interpreted to mean that the CPO modification proceeding and the contempt proceeding were different "matters," then a communication by the petitioner's lawyer to the respondent concerning the CPO modification proceeding would not violate Rule 4.2(a), because the respondent would be unrepresented in that "matter."Yet, because of the common facts in the two motions, a communication concerning the modification motion from the petitioner's lawyer directly to the respondent would involve all of the concerns Rule 4.2(a) addresses, such as the lawyer's use of the advantages of the lawyer's training and experience to secure concessions or admissions from the adverse party. Clearly, such direct contact could influence, in a way that Rule 4.2(a) was intended to prevent, the ability of respondent's lawyer to represent his client in the contempt motion. As one court observed in a case concerning Rule 4.2(a)'s predecessor, DR 7-104(A)(1):

> The purpose of this prohibition is to prevent a person from being deprived of the advice of retained counsel by the bypassing of such counsel.... Disciplinary Rule 7-104(A)(1) preserves the attorney-client relationship as well as the proper functioning of the judicial system and at the same time safeguards the opposing party from an approach that may be improper or from an approach that may be well intended but misguided.

*Carter v. Kanaras*, 430 A.2d 1058, 1059 (R.I. 1981). A respected commentator puts the reason for the Rule 4. 2(a) prohibition more bluntly:

> The prohibition is founded on the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party.

Wolfram, *Modern Legal Ethics* (1986). Thus, our conclusion is that the relevant "matter" is the legal proceeding brought by the domestic violence victim, with the CPO modification and contempt motions being but different aspects of that proceeding. [1]

Since we believe that there is just one matter in the type of domestic violence case the Inquirer describes, we believe that Rule 4.2(a) would require the lawyer representing the domestic violence petitioner to seek the consent of the lawyer representing the respondent in the contempt proceeding before communicating with the respondent directly concerning the CPO modification. Where consent is given, the communication obviously may occur without ethical consequence under Rule 4.2(a).

Yet we can envision situations in which consent might not be given as, for example, when respondent's lawyer is concerned that his client might say something in a CPO modification discussion with opposing counsel that might be used against the client in the contempt proceeding. But where consent is not given by the appointed lawyer, that lawyer cannot use Rule 4.2(a) and the limited scope of the engagement to prevent any CPO modification communications between the petitioner's lawyer and the respondent. The petitioner's lawyer needs to be able to communicate in some way with the respondent concerning the CPO modification motion, be it directly or through counsel. The subjects of such communication could be as routine as scheduling matters, or could involve settlement, evidence or other more substantive matters. There must be a way for these to occur. If the respondent's lawyer refuses to allow such communication with the respondent directly, then the lawyer must accept the communication from the petitioner's lawyer and take appropriate steps in response, such as transmitting the information to his client and acting on his client's wishes.

In other words, where respondent's lawyer invokes Rule 4.2(a) to prevent a direct communication between petitioner's lawyer and his client, respondent's lawyer must receive that communication as occurring within the scope of his representation of the respondent, and report the communication to his/her client.[2] To fail to do so would, in our opinion, constitute a violation of Rule 1.4 (requiring a lawyer to keep his client informed about the status of a matter).[3]

In summary, under the facts of this case,

[1] A different conclusion might result if the represented and unrepresented aspects of a litigation were *completely* unrelated, such that there would be no way that a direct communication from a lawyer to the opposing party could prejudice the ability of that party's lawyer to represent his client. *Cf.* ABA Op. 93-396 (1993).

[2] Where the respondent's lawyer advises petitioner's counsel that he is not in a position to give or withold consent because he does not represent the respondent in the CPO modification motion, the petitioner's lawyer may treat that as consent under Rule 4.2(a) to a direct communication with the respondent. In this circumstance, petitioner's lawyer may reasonably conclude that respondent's counsel has evaluated the consequences to the criminal contempt motion of a direct communication with his client concerning CPO modification, and has concluded that he has no objection to it.

[3] Rule 1.4 requires that:

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

the petitioner's lawyer may not initiate direct communication with the respondent before contacting that party's lawyer. The response of respondent's lawyer will then inform the petitioner's lawyer to how to proceed. If the respondent's lawyer does not object to communication by petitioner's lawyer with the respondent directly, petitioner's lawyer may do so without violating Rule 4.2(a). If, on the other hand, respondent's lawyer advises petitioner's lawyer not to communicate directly with the respondent, the petitioner's lawyer may not do so, but respondent's lawyer thereby assumes the obligation to transmit information from petitioner's lawyer to his/her client and to take such further steps as may be necessary under the circumstances.

*Use of the Contempt Proceeding to Gain Advantage under the CPO*

The second question presented to us is whether the petitioner's lawyer, after filing a motion for contempt, may offer not to prosecute the motion in order to negotiate a modification of the CPO that would be more favorable to the petitioner. The applicable ethical principle is found in Rule of Professional Conduct 8.4(g), which states:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (g) seek or threaten to seek criminal charges or disciplinary charges solely to obtain advantage in a civil matter.

The inquiry raises two potential questions:is a criminal contempt proceeding in a CPO matter a "criminal charge" under Rule 8.4(g) and, if it is, under the facts of the inquiry, is it raised solely to gain advantage in the CPO-modification matter.

There are no prior Legal Ethics Committee opinions concerning this aspect of Rule 8.4(g) or its predecessor in the Code of Professional Responsibility, DR 7-105.[4] As regards the meaning of the term "criminal charges", we see no reason why we should not interpret it as having its ordinary meaning in substantive law. And, according to clear authority in this jurisdiction, a criminal contempt proceeding is not a criminal prosecution. *See Beckham v. United States*, 609 A. 2d 1122 (D.C. 1992); *Matter of Wiggins*, 359 A. 2d 579 (D.C. 1976). It follows, then, that seeking or threatening criminal contempt is not seeking or threatening criminal charges under Rule 8.4(g).

This is, we believe, the correct conclusion.In an underlying civil matter in the District of Columbia, a criminal contempt motion may be brought by a party for the specific purpose of enforcing an order of the court in that proceeding. It is, then, by its very nature, a remedy that is available for the specific purpose of furthering the ends of a civil matter. To interpret Rule 8.4(g) to apply to such a proceeding would, effectively, make it a disciplinary violation for a lawyer to seek this particular remedy, a clearly illogical and anomalous result, and one we do not believe was intended by the drafters of this Rule.

Inquiry No. 95-4-13
Adopted: January 17,1996

*Opinion No. 264*

**Refunds of Special Retainers; Commingling of Such Funds with the General Funds of the Law Firm Upon Receipt**

• A retainer that is tied directly to provision of legal services, rather than designed solely to ensure availability, constitutes a special retainer which is earned upon provision of the contemplated services rather than upon receipt. A law firm must refund unused portions of such a retainer. Under the District of Columbia Rules of Professional Conduct, a special retainer or fee advance becomes the property of the law firm upon receipt; may be commingled with the law firm's own funds; and must not be commingled with client funds in a client trust account. Such an arrangement must not prevent an accounting to the client or a refund if required.

**Applicable Rules**

• **Rule 1.15** (Fee Advances)
• **Rule 1.16** (Client Right to Discharge Counsel)

*Inquiry*

The Inquirer is a law firm that wishes to place into effect a legal services plan in the government contract field for small business concerns. As explained by the Inquirer, "companies desiring to enroll in the [Plan] would pay a fixed fee of $4,500 for up to 40 hours of government contract legal services during the ensuing year. (There is also a one-time 20 hour, six-month trial plan for $2,500.) Except where conflicts arise subsequent to enrollment and no waiver is received, the enrollment fee would not be refundable." The Inquirer states that the hourly fee under the plan (assuming full utilization of the contemplated hours) is substantially lower than its normal hourly rates. Enrollment in the plan would be contractual, pursuant to a written agreement containing the following terms:

> For a one-year period of enrollment, [Inquirer] will provide up to 40 hours of legal services to the Company on any federal government contract matter(s). For the six-month trial period of enrollment, [Inquirer] will provide up to 20 hours of legal services, to the Company on any federal government contract matter(s). These hours of legal services may include any combination of legal consultation (by telephone or in [Inquirer's] Washington, D.C. office), legal research, or drafting and filing of documents.....
>
> If the Company requires services beyond the number of hours covered by the Plan, such services will be performed by [Inquirer] only with the advance written consent of the Company, and will be billed to the Company at [Inquirer's] regular hourly rates, plus all out-of-pocket expenses.
>
> Because the enrollment fee for the Plan is a retainer to ensure the availability of [Inquirer's] government contracts legal services, the fee is not refundable in whole or in part if the Company requests fewer than the applicable hours of legal services during the enrollment period (40 hours for one year of enrollment, 20 hours for a six-month trial period).

The Inquirer has asked for advice on two aspects of this plan:

A. Can the enrollment fee be non-refundable?

B. If such a fee must be refundable, must it be segregated and treated as funds of the client?

*Discussion*

*A. Refundability*

The refundability issue turns on whether the contemplated arrangement constitutes a special retainer, which is a species of fee advance, or a general retainer. A general (or "true") retainer is a "fee[] paid solely for availability and therefore do[es] not involve

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

Since, under the facts of this Inquiry, we have concluded that the entire litigaiton is the "matter," the lawyer's obligation to keep the client "reasonably informed about the status of a matter" would oblige him to keep the client informed about developments in the CPO modification proceeding.

[4] D.C. Op. 220 (1991) concerned a different aspect of Rule 8.4(g), to wit, whether the filing of disciplinary charges against a lawyer can be threatened in order to influence the settlement of a civil matter in which the lawyer is involved as a party or counsel.

an advance fee but a fee that is fully earned when paid."[1] In many jurisdictions, a general retainer is deemed earned when paid and therefore is not refundable.[2] The traditional justification for a general retainer is that the fee secures the lawyer's availability to perform legal services during a specified period, a commitment that normally requires the lawyer to forego other representations and commit exclusively to the cause of the retaining client.[3] A general retainer is paid solely for availability and a promise of exclusivity, and is not related to time expended on a particular matter. By contrast, a "special" retainer is an advance fee payment that is consumed by the performance of legal services. Such a retainer is not "earned" upon receipt but rather is tied to the performance of services.[4] Any part of the retainer that the lawyer has not earned by her services must be refundable to the client, in line with the general rule that a lawyer's normal remedy for unpaid fees lies in quantum meruit.[5]

Refusal to refund unused portions of a special retainer or fee advance traditionally has been thought to burden a client's right to discharge the lawyer. Our Rules allow a client broad rights to discharge counsel without financial penalty. Rule 1.16(d) thus states that "in connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned." Comment [4] to Rule 1.16 explains that "[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"* (emphasis added). Comment [4] to Rule 1.5 underscores the proposition that "[a] lawyer may require advance payment of a fee, but is obliged to return any unearned portion." If the liability of the discharging client is only for payment for the services actually rendered by the lawyer, the client is not liable for the full amount of a special retainer designed to encompass services that have not yet been rendered.

Courts in other states have concluded that nonrefundable special retainers violate public policy by burdening a client's right to discharge counsel. In *In re Cooperman*, 611 N.Y.S. 2d 465 (Ct. App. 1994), for example, the New York Court of Appeals concluded that a nonrefundable special retainer burdens the client's right to discharge her attorney because the client will be less likely to terminate the lawyer if the retainer is nonrefundable. The court therefore held that nonrefundable special retainers are against public policy:

> We hold that the use of a special nonrefundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer. . . . If special nonrefundable retainers are allowed to flourish, clients would be relegated to hostage status in an unwanted fiduciary relationship -- an utter anomaly. Such circumstance would impose a penalty on a client for daring to invoke a hollow right to discharge.

Another problem arising from nonrefundable special retainers arises under D.C. Rule of Professional Conduct Rule 1.5, which commands that "[a] lawyer's fee shall be reasonable," and enumerates a number of factors to be considered in determining the reasonableness of a fee, including, *inter alia,* the time and labor required. In the case of a nonrefundable special retainer, the fee may be unreasonable, and thus void, if it does not correspond to the actual services provided by the lawyer. For example, if a lawyer is discharged by his client shortly after receiving a nonrefundable special retainer, having performed very little legal work for the client, the retainer may constitute an unreasonable fee because it would bear little relation to the work performed. In the instant situation, for example, a dissatisfied client might end up paying an hourly fee of $4,500 if the Inquirer performs only one hour of legal work prior to discharge. Our ethical rules therefore preclude a lawyer from retaining all of a special retainer when the attorney-client relationship is quickly and unexpectedly severed.[6]

These principles compel the conclusion that special retainers or fee advances in this jurisdiction must be refundable. Moreover, we conclude that the retainer in question in this case is a special retainer which cannot be nonrefundable. The classic element of a nonrefundable general retainer is missing from the plan; the need to ensure the availability of a particular lawyer or law firm during a given period of time. There is no exclusivity inherent in Inquirer's proposed plan; instead, the plan makes the Inquirer's services available to a virtually unlimited universe of clients who seek representation. It is difficult to understand how a client, under this plan, could preclude a rival or competitor from also retaining the Inquirer for government contract representation during the relevant period, in the absence of a conflict of interest under our rules. The proposed plan does not require that the Inquirer commit its time and resources exclusively to a particular client, or forego any opportunities for further representation during the period in question.

Although not in itself determinative, we find it significant that the arrangement contemplates that a specific amount of time will be reserved, and a specific amount of legal work will be performed in exchange for the retainer: $4,500 for "40 hours of assistance on any federal government con-

[1] Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisted*, 72 N.C. L. Rev. 1,5 (1993). *See also* Alexander K. McKinnon, *Analytical Approaches to the Nonrefundable Retainer*, 9 Geo. J. Legal Ethics 583 (1996); 1 S.Speiser, ATTORNEY'S FEES §§ 1.4, 1:8 (1973) ("A true retainer is payment given to a lawyer to compensate for the client's right to the lawyer's services. The retainer is earned when received because the lawyer gives up the right to work for others and the client has received this promise of exclusively."); State Bar of Texas Professional Ethics Comm. Op. 431 (June 1986) ("[A] retainer is that non-refundable fee paid by a client to secure an attorney's availability over a given period of time. . ." (citing Wash. State Bar Ass'n Op. 173 (Oct. 1980)); 7A C.J.S. *Attorney and Client* § 282 (1980) ("A true retainer is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment."); Brickmann & Cunningham, *supra*, at 6 ("[A]n attorney must promptly refund any part of an advance fee that has not been earned except if the fee is identified as a true retainer, defined as a fee paid, *solely* for the purpose of ensuring the availability of the lawyer for a matter or for a given period of time.") (emphasis added) (citing Calif. Rules of Professional Conduct Rules 3-700(D)(2), 4-100(b) (1989)).

[2] *See, e.g,* State Bar of Tex. Professional Ethics Comm. Op. 431 (June 1986); Alaska Bar Ass'n Ethics Op. 87-1 (Sept. 1987); N.J. Advisory Comm. On Professional Ethics Op. 644 (1990).

[3] *See* note 2, *supra*. "Availability is the essence of a general retainer.," Restatement of the Law, The Law Governing Lawyers 46, cmt. e, at 213 (Tent. Draft No. 4, 1991), *cited in* Brickman & Cunningham, *supra* note 2, at 23. "Indeed, a primary justification for 'retainers' in any situation is the assurance that the lawyer's time will be available to the client if and when needed, an arrangement which may 'preclude other employment by the lawyer.'" D.C. Bar Legal Ethics Comm. Op. 155 (1985)(citing DR 2-106(B)(2)[Rule 1.5(a)(1)]).

[4] Brickman & Cunningham, *supra* note 1, at 5-6. Special retainers may take many forms, including an advance to be applied against hourly rates or a flat fee designed to cover provision of specified legal services.

[5] *See generally Kin Cheung Wong v. Kennedy* 853 F. Supp. 73, 79 (E.D.N.Y. 1994)(citing *In re Cooperman,* 1994 WL 84413 (N.Y.), at *3 (Mar. 17, 1994)).

[6] *See* N.C. State Bar Ass'n Ethics Comm Op. 106 (Apr. 11, 1991) (ruling that lawyer had to return any amount in excess of reasonable fee when state voluntarily dismissed charges against his client). *See also* McKinnon, *supra* note 1, at 588 (noting that prohibition on lawyer acquiring proprietary interest in a cause of action also may be implicated by certain nonrefundable retainers.)

tracts matter(s)," meaning payment for such legal services as "legal consultation . . ., review of documents, legal research, or drafting and filing of documents." The advance fee thus is not remitted "solely to ensure the availability" of the firm and its lawyers. Indeed, the draft brochure describing the legal plan states that "[t]he basic Plan fee of $4,500 represents a significant discount from [Inquirer's] regular rates for government contract legal services," indicating that the fee is actually targeted to compensate for services performed.[7] This conclusion is reinforced by the plan's provision allowing a potential client to enroll in a "trial plan" for twenty hours of services at a reduced fee, which provides further evidence that the payment is tied directly to time expended.

The Inquirer suggests that D.C. Bar Opinion 155 demonstrates that the fee in this case can properly be made nonrefundable. Opinion 155 concerned a prepaid legal services plan providing corporate, tax and general business law services on a reduced hourly fee basis to a non-profit organization's tax-exempt member organizations. The members paid a set monthly amount to reserve up to ten hours of legal services per month. A member requiring more than ten hours per month was charged an hourly rate based upon the member's yearly income. The members could accrue unused hours from month to month, but no refunds would be made for unused guaranteed hours.

Opinion 155 does not address the issue of refundability, and thus provides little guidance in the instant case. Instead, the Committee in Opinion 155 was concerned about the risk that under the plan clients might be charged an excessive fee, because the monthly amount was paid whether or not the member actually used the hours for which it had paid. The Committee found this risk mitigated by the small maximum hour limitation (ten hours) and because members could accrue unused hours and retain them. On this basis, plainly not applicable here, the Committee upheld the validity of the fee arrangement.[8]

Our conclusion is not inconsistent with freedom of contract, nor do we intend to inhibit lawyers from negotiating alternative fee arrangements that are meant in whole or in part to compensate for availability, exclusivity or concomitant lost opportunities. Although "'[s]ophisticated lawyers and clients ought to be able to use . . . a reasonable nonrefundable fee' as an alternative billing method . . .,"[9] authority in other jurisdictions establishes that when an attorney is employed under a contract stipulating a specific fee for specific services, the attorney is entitled to recover only in quantum meruit for services performed prior to discharge.[10] This conclusion harmonizes "the right of an attorney to recover for services he provided with the policy of instilling public confidence in the members of an honorable profession whose relationship to clients is personal and confidential."[11]

Although we conclude that a special retainer must be non-refundable when the lawyer's services are terminated before completion of the professional engagement, this does not mean that the refund must be a proportionate amount of the advance fee paid. In the inquiry before us, if a client who had contracted for 40 hours of legal services for $4,500 (i.e., $112.50 per hour) terminated the engagement after 20 hours of service, or half the engagement period, Rule 1.16(d) would not necessarily require a refund of one-half the retainer. Under these circumstances, it would not be unreasonable for the law firm to deny the client the benefit of the original "volume discount", and charge the client for 20 hours at its usual hourly rate. Other factors listed in Rule 1.5(a) could also be relied on in determining the fee in the event the contract is not completed. Of course, both the fee to be charged if the contract is not terminated and the fee chargeable on early termination must be reasonable under Rule 1.5(a). In addition, the basis of both fees must be communicated in writing to the client in advance under Rule 1.5(b). Reasonableness and the requirement of an advance writing may apply to general retainers as well. We do not address ethics limitations applicable to general retainers in this opinion, as the issue is not presented by this inquiry.

Finally, merely stating in a contract that the retainer fee is a general retainer or nonrefundable does not necessarily make it so.[12] In order to be considered a true general retainer, and hence nonrefundable, there must be a clear indication that the retainer fee in fact is being paid to secure the exclusive availability of the lawyer or firm and is not intended to pay for specific services to be rendered.

*B. Segregation of Funds*

In Opinion 113, the Legal Ethics Committee rejected the view that fee advances are "funds of a client" under DR 9-103, and therefore concluded that such advances do not need to be placed in a separate account. The Committee reasoned that the "funds" referred to in DR 9-103 did not include any fees paid to the lawyer, because that provision did not include any reference to "fees" despite the widespread usage of that term throughout the Code. The Committee added: "Any escrow or trust requirement over the fee advance would defeat the objective of the fee advance: to take the attorney away from the financial mercies of the client." Finally, the Committee noted that policy considerations, including the lack of discontent over the placing of advance fees in the law firm's general account, supported continuing the policy of allowing commingling of advance fees.

> Rule 1.15 makes this practice more explicit. Rule 1.15(d) states: Advances of legal fees and costs become the property of the lawyer upon receipt. Any unearned amount of prepaid fees must be returned to the client at the termination of the lawyer's services in accordance with Rule 1.16(d).

[7] In *In re Hathaway Ranch Partnership*, 116 Bankr. 208, 216 (Bankr. C.D. Cal. 1990), the court stated that:

> [a] true earned upon receipt retainer is one paid to a lawyer for which the only consideration exchanged is the promise to represent the client and no other party in the particular matter. The consideration cannot include logically the provision of future services if the retainer is truly earned upon receipt (citing *In re C&P Auto Transport, Inc.*, 94 Bankr. 682, 687 (Bankr. E.D. Cal. 1988)).

[8] D.C. Op. 155 also is distinct from this case in that the lawyer-client relationship was with an organization to which individual members belonged, rather than directly between the law firm and an individual client. Such arrangements commonly arise in pre-paid legal services plan maintained by labor unions, under which the union pays a specific fee to ensure the availability of its law firm to represent union members on certain matters. We are not confronted by that situation in this case, and do not address it. Inquirer also relies on D.C. Op. 113, which deals with the safekeeping of fee advances and not with refundability. We do not view D.C. Op. 113 as pertinent to the issue placed before us on this occasion.

[9] Edward A. Adams, *Fallout From Fee Decision: Some Arrangements Doomed*, N.Y.L.J., Mar. 21, 1994, at 1 (quoting Stephen Gillers).

[10] *Cohen v. Radio-Electronics Offices Union*, 645 A.2d 1248 (N.J. Super. 1994); *Jacobson v. Sassower*, 474 N.Y.S. 2d 107 (1983).

[11] *Cohen*, 645 A.2d at 1259.

[12] *Kin Cheung Wong V. Kennedy*, 853 F. Supp. 73, 81 (E.D.N.Y. 1994) ("Merely reciting the language 'shall be deemed earned' does not convert the Retainer Agreement into a general retainer . . there is nothing in the Retainer Agreement to indicate that the payment was made in exchange for [the lawyer's] availability."); State Bar of Tex. Professional Ethics Comm. Op. 431 (June 1986) ("A fee is not earned simply because it is designated as nonrefundable.")

It is clear from Rule 1.15(d) that any advance payment, regardless of whether it is denominated as a general retainer, or a special retainer or advance fee, becomes the property of the lawyer upon receipt and does not have to be placed in an account separate from the firm's general account. This conclusion in no way qualifies the duty to refund fees where appropriate, as Rule 1.15(d) itself states.

For this reason, in this jurisdiction fee advances and general retainers should not be commingled with client funds contained in a client trust account. Indeed, our Rule 1.15(a) specifically prohibits commingling. We would caution, however, that other jurisdictions may take the opposite approach and require that fee advances be placed in a trust account until earned. Therefore, where several jurisdictions are involved in the representation, prudent lawyers may wish to adopt a conservative approach and segregate fee advances from both the law firm's assets and from assets of other clients which may be contained in a client trust account.

Possibly conflicting approaches to this question highlight the need for a lawyer to decide which ethical rules apply to the situation. Our Rule 8.5 embodies the notion that traditional choice of law principles may apply to the determination of what ethical rules apply to a given situation. Where the lawyer is licensed to practice only in this jurisdiction, performs work only in this jurisdiction for clients in this jurisdiction, and both receives and maintains bank accounts within this jurisdiction, it is clear that the District of Columbia Rules of Professional Conduct apply and fee advances may be considered the lawyer's property upon receipt. As the situation diverges from this exclusively District of Columbia paradigm, however, members of our Bar should take care to ensure that they are in compliance with the rules of any other jurisdiction which may control the situation.

Inquiry No. 95-5-14
Adopted: February 14, 1996

*Opinion No. 265*

**Positional Conflicts of Interest in Simultaneous Representation of Clients Whose Positions on Matters of Law Conflict With Other Clients' Positions on Those Issues in Unrelated Matters.**

- When a lawyer is asked to represent an entity that takes positions on matters of law in a subject area in which the lawyer practices regularly on behalf of other clients, the lawyer may not, without the informed consent of all affected parties, accept simultaneous representation of both clients where such representation creates a substantial risk that representation of one client will adversely affect the representation of the other.

**Applicable Rule**

- **Rule 1.7** (Conflicts of Interest)

*Inquiry*

The inquirer is a lawyer in private practice who regularly represents children committed to the District of Columbia child welfare system. In addition, the inquirer from time to time represents foster parents who are interested in adopting their foster children. An association of foster parents has approached the inquirer and asked her to serve as their outside general counsel. The inquirer asks what ethical considerations bear upon her decision whether to undertake the general counsel engagement on behalf of the association client.

*Discussion*

The present inquiry raises subtle and difficult ethical issues. It does not focus on the more ordinary situation where the interests of two of a lawyer's clients may clash in the same matter; instead it focuses on situations where the conflicts arise because positions taken by two clients in two unrelated matters are at variance.

The problem that prompts the inquiry is at its heart a conflicts problem. The foster parents' association, which has asked the inquirer to be its outside general counsel, may from time to time wish the inquirer to take positions on matters of law that conflict with positions that the inquirer's individual clients – either neglected children or adopting foster parents – may wish to take in their individual cases. The rules of ethics make it clear that the inquirer could not take conflicting positions on behalf of the foster parents' association in the very same cases in which the inquirer's clients are involved. The more difficult question arises in the context of positions taken by the inquirer's proposed client in unrelated cases or in legislative activities that are inconsistent with positions taken by the inquirer's other clients in their cases. The inquirer asks what ethical precepts are relevant to her proposed conduct.

*1. The District of Columbia Conflicts Rules*

The inquirer's conduct in this instance is principally controlled by Rule 1.7. The format of the District of Columbia's Rule 1.7 is unique. It divides the world of conflicts into two broad categories – the waiveable and the nonwaiveable. Nonwaiveable conflicts are covered in subpart (a). Where a lawyer attempts to represent two or more adverse interests in the same matter, the conflict is said to be unwaiveable and therefore never ethically permissible regardless of whether the clients would consent if asked.[1] The present inquiry does not focus on this type of situation but, rather, on those situations where the adversity does not occur in a single matter.

The District of Columbia rule speaks of those conflicts that can be waived in Rule1.7(b). Three distinct concepts are involved. The first concept is embodied in Rule1.7(b)(1), which gives expression to the basic notion that a lawyer ought not, without the client's consent, to oppose the lawyer's own client, even where that client is represented by another lawyer in that matter. Rule1.7(b) applies to this situation even though the matter that the lawyer seeks to undertake is entirely unrelated to the other matter on which the lawyer represents the client. That notion is not involved here.[2]

The rules that control the question before us are Rules 1.7(b)(2-4). Those rules recognize a conflict of interest where, in the case of Rules 1.7(b)(2) and (b)(3),[3] the representation of the one client may interfere with the representation of another. Rules 1.7(b)(2) and 1.7(b)(3) express two faces of the same concept, which is that where the

[1] Rule 1.7(a) states: "A lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer."

[2] Rule 1.7(b)(1) is phrased in terms of the "positions" to be taken by the lawyer's client being adverse; the word "position" is not used in the remaining sections of Rule 1.7(b).

[3] Rules 1.7(b)(2) and (b)(3) state that without disclosure and consent: ". . . a lawyer shall not represent a client with respect to a matter if: . . .

> (2) such representation will be or is likely to be adversely affected by representation of another client: [or]
>
> (3) representation of another client will be or is likely to be adversely affected by such representation. . . "

representation of one client interferes in some substantial way with the representation of another, the lawyer is prevented from representing at least one and perhaps both of the clients unless there is full disclosure and unless both clients consent.

Finally, Rule 1.7(b)(4)[4] addresses itself more to the independence of a lawyer's judgment on behalf of the lawyer's client than to the unfettered effectiveness of the lawyer's representation, which is more directly addressed in Rules 1.7(b) (2 and 3).

*2. Positional Conflicts in General*

A traditional notion in the law of legal ethics holds that there is nothing unseemly about a lawyer's taking directly opposing views in different cases so long as the lawyer does not do so simultaneously. Thus, a lawyer who is a prosecutor may urge that the death penalty be imposed in appropriate criminal cases. If the lawyer then leaves the government and moves to a private firm, there would be nothing improper about the lawyer's subsequently urging that the death penalty was unconstitutional in all cases despite having argued the contrary as a prosecutor.

The movement from one office to another is not necessary to legitimize this change of positions on a particular issue. A lawyer engaged by a plaintiff in a particular personal injury case may be called upon to argue that punitive damages should be awarded in copious amounts. Once that engagement has been concluded, the same lawyer may urge on behalf of a subsequent civil defendant that punitive damages ought to be eliminated entirely. Lawyers are hired by clients to take positions and are not necessarily expressing their own personal views when they advocate on behalf of clients. *See* Rule 1.2(b).

However, a different sort of problem may arise when the lawyer simultaneously argues inconsistent positions on behalf of two different clients. The lawyer's credibility, and therefore the lawyer's ability to represent the lawyer's two clients effectively, may be undermined by the lawyer's appearing simultaneously, or virtually simultaneously, to argue two totally inconsistent positions. Moreover, a successful outcome for one client could prejudice the other.

The paradigm case is that of the lawyer who argues a case to a court of appeals, arguing that the court ought to reach a certain conclusion of law. In this paradigm, the oral argument in the first case is concluded, the clerk calls the next case, and the same lawyer returns to the podium representing another client, this time on the opposite side of the identical issue, to urge a position that is flatly inconsistent with the one that the lawyer took five minutes ago before the same appellate panel. In that situation, one or both of the clients is thought to have been deprived of effective representation.

While these concepts are fairly easy to perceive in the paradigm example given, they become more attenuated and less easy to define as one moves away from the paradigm example given above. Can a lawyer simultaneously urge inconsistent positions before two different appellate panels in the same court? Generally, it is thought that the lawyer cannot do so because of the communication that goes on between members of different appellate panels and because of the deference that one panel would give to the decision of another.

The commentary to the American Bar Association conflicts rule would seem to limit this problem to appellate courts. ABA Model Rule 1.7, Comment [9]. However, legal scholars have widely criticized this comment, pointing out that a functional analysis is more appropriate than one that turns entirely upon the nature of the court, Underwood & Fortune, *Trial Ethics* § 3.4.3 at 84 (1988), Wolfram, *Modern Legal Ethics* 355 n.41 (1986); the ABA's Ethics Committee has indicated that the comment cannot be read literally (*see* ABA Opinion 93-377); and the comment was dropped from the District of Columbia version of Rule 1.7.

What if one of the representations is in the trial court and the other is in a directly superior appellate court? It is possible that a lawyer may not be fully effective in this circumstance since a favorable decision for one client in the appellate court could directly undermine the lawyer's efforts on behalf of the other client in a subordinate trial court. A third and more difficult situation is posed where the lawyer simultaneously takes inconsistent positions before two different judges of the same trial court. Even in this case, simultaneous inconsistency may in some cases be undesirable because co-ordinate judges of the same trial court, while not strictly bound by the decisions of their fellow judges may, nevertheless, pay considerable deference to them, and one or the other of the lawyer's two clients may thereby be adversely affected.

The conflicts rules implement ethical norms that are contained in other rules. For instance, Rule 1.3 speaks of a lawyer being diligent and zealous on behalf of his client. It is difficult to know how a lawyer could be equally diligent and equally zealous on behalf of two clients when simultaneously taking inconsistent positions before the same court, where the results of the lawyer's representation of one client will directly and adversely impact another client of the same lawyer.[5]

The answer to the problem posed turns upon the likelihood that the representation of one client will, in some foreseeable and ascertainable sense, adversely affect the lawyer's effectiveness on behalf of the other. The mere possibility that a result in one representation will affect the outcome of another is not enough to trigger a conflict as to which waiver must be sought. But if an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other, then a cognizable conflict arises under our rules, and disclosure must be made and a waiver sought.

Central to deciding whether adverse effect, and therefore a conflict, exists will be issues such as: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a

[4] Rule 1.7(b)(4) states that without disclosure and consent: . . . a lawyer shall not represent a client with respect to a matter if: . . .

(4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

[5] Rule 1.1 requires a lawyer to be competent. Some commentators have raised the question whether it is possible to be fully effective on behalf of one client when the lawyer is at the same time advancing a contrary position on behalf of another client that will impact adversely on the first client even if the two matters are wholly factually unrelated. *See* Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457, 485 at n. 130 (1993).

question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation.[6] In sum, we believe that the focus of the analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients.[7]

*3. Application of the Rules to the Present Inquiry*

Turning now to the facts before us, the inquirer in this case may well be asked by the foster parents association to take positions on issues of law, either legislatively[8] or in litigation, that are inconsistent with positions taken by individual clients of the inquirer – whether neglected children or foster parents – in unrelated matters. As our discussion above indicates, under Rules 1.7(b)(2-4), the lawyer may not take such conflicting positions – even in unrelated matters – without making full disclosure and seeking the consent of all affected clients.

Inasmuch as the inquirer's practice is limited to the District of Columbia, most of her litigation is conducted in the Family Division of the Superior Court and, to a lesser extent, in the District of Columbia Court of Appeals. It would be ethically impermissible for her to take simultaneously inconsistent positions on issues of law on behalf of different clients in those two courts without the informed consent of all of her affected clients where the representation of one client creates a substantial likelihood that her success on behalf of that client might substantially impact another client adversely. On the other hand, in a wide variety of routine cases where no concrete adverse effect by one representation on another is foreseeable, the inquirer is not obliged to make disclosure or to seek consent. No general opinion from this Committee can anticipate every such eventuality. We can only direct the inquirer's attention to the factors set forth above and urge her to weigh them carefully in each case.

Even if no actual current inconsistency exists at the outset of the representation, the inquirer may be well advised to alert her individual clients at the time that they retain her (or that she is appointed by the court) that she regularly represents the association of foster parents and that she might in the future be asked to take a position on behalf of that group that would be inconsistent with a position that the individual client wished to take. Indeed, there may be some circumstances where such a disclosure would be required by Rule 1.4, governing a lawyer's obligation to keep her client reasonably informed. To the extent that such conflicts are likely to arise during the course of her representation and to the extent that the inquirer may become identified in the eyes of the court as the usual or ordinary spokesperson for the foster parents association, prospective clients may be entitled to be made aware of the circumstances at the time they are deciding whether to retain the inquirer.

Beyond simply informing the individual client that she might be asked to take an adverse position, the inquirer will need to consider whether she wishes to try to seek a prospective waiver from an individual client at the time she is retained. Such a prospective waiver is often, by definition, not fully informed since the precise nature of the future conflict may not be known at the time that the prospective waiver is obtained. *See* ABA Opinion 93-372. The enforceability of such a waiver is open to some doubt, especially where the client is not a sophisticated consumer of legal services and therefore not well equipped to foresee the future costs and benefits of such a decision.

On the other hand, a prospective waiver by the foster parents association may be of greater weight – if fully informed – inasmuch as the association may be better positioned to make judgments concerning the desirability of entering into a prospective waiver.[9]

*4. Relevance of ABA Model Rule 1.7*

We point out that even though District of Columbia Rule 1.7 – the general rule dealing with conflicts of interest – is, at least on its face, quite different from the ABA model rule on the same subject,[10] we would reach the same result under the language of that rule that we do under the District of Columbia's rule. The drafters of the District of Columbia conflicts rule found the ABA formulation unclear because they thought that the ABA Model Rule could be read to mean that all conflicts were potentially waivable. The design of the District of Columbia version of the rule was intended in part to emphasize that some conflicts are intolerable, even if full disclosure is made and even if client consent is obtained. *See* Paragraphs [38] and [39] of the Explanation of Committee and Board Revisions to Rule 1.7 of Submission in Connection with a Petition of the Board of

[6] Comment [3] to Rule 1.7 points out that Rule 1.7: "is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client." In other words, the positional conflict rule does not require that the lawyer make an inquiry of every one of the lawyer's clients as to every position that those clients may be taking in unrelated matters – an obviously impossible task for most, if not all, lawyers. The rule focuses on those conflicts that would be apparent to a reasonably conscientious lawyer.

[7] For a lawyer in a firm, the problems discussed here may be attenuated if two or more lawyers are involved. The analysis will depend in substantial part on the nature of the conflict. The representation of a client by a D.C. partner in a large national law firm might not be adversely affected by a representation of a client by the same firm's Los Angeles office where the problem arises because the D.C.. partner is a well-known spokesman for her client on a given issue as to which the Los Angeles client takes a contrary position. But if the California and D.C. clients are both in federal court racing to obtain the first ruling from the United States Supreme Court on an open question of substantive law, the imputed disqualification rules would clearly come into play.

[8] Comment [3] to the District of Columbia Rule 1.7 makes it clear that that rule applies to efforts "to influence policy or achieve a legislative result."

[9] To the extent that the general philosophy and the types of positions that the foster parents association tends to take are well known and predictable, more detailed advance disclosure may be possible, and the prospective waiver may to that extent have more force and effect. Beyond the scope of this opinion is the question of what the inquirer's responsibilities are where such a conflict later arises and is not fully consented to by all affected parties; specifically, we do not discuss here when the inquirer will be able to cure such a conflict by withdrawing form representing one of the parties as opposed to when she will be obliged to withdraw from representing both. Her prospective waiver agreement may attempt to address these issues by having the clients agree in advance that she may withdraw from representing one and continue on behalf of the other.

[10] ABA Model Rule 1.7 states:

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

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

(2) each client consents after consultation.

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

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

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

Governors of the District of Columbia Bar to the District of Columbia Court of Appeals, November 19, 1986.

Despite these facial differences, the drafters of the District of Columbia's Rule 1.7 were at some pains to point out that, although they took a different drafting approach than did the ABA, they did not believe that the different form of words they used would lead to significantly different results in actual cases fromthe results that would be achieved under the ABA's model rule or the old model code on conflicts.

"Indeed, we believe that the Rule we propose would lead to substantially the same conclusions in actual fact situations as would the ABA draft. We, likewise, do not believe that the general Rule we have proposed would result in any substantive changes in the results reached in the conflicts cases that have arisen under the present DR5-101 and in the application to date of the 'appearance of impropriety' test." Paragraph [33] of the Explanation of Committee and Board Revisions to Rule 1.7 of Submission in Connection with a Petition by the Board of Governors of the District of Columbia Bar to the District of Columbia Court of Appeals, November 19, 1986. Nothing to the contrary having been said during the process of adopting the rule, the District of Columbia Court of Appeals apparently had the same intention when it adopted the District of Columbia's unique Rule 1.7.

We make the point in the current context because the ABA's Legal Ethics Committee arrived at substantially the same conclusion that we take here today in its formal Ethics Opinion No. 93-377 (Oct. 16, 1993). Inasmuch as the District of Columbia rule and the ABA model rule are intended to achieve the same results, albeit through different drafting approaches, the ABA's Opinion No. 93-377 is persuasive in helping us to reach the result embodied in this opinion.

*5. Legislative History of District of Columbia Rule 1.7*

Interestingly, the draft of Rule 1.7 initially recommended to the Court by the District of Columbia Bar contained a Rule 1.7(b)(5) together with commentary. Proposed Rule 1.7(b)(5) would have required a lawyer to make full disclosure and to seek client consent where "other interests of a client will be or are likely to be adversely affected by the lawyer's assumption of such representation, and the proposed commentary said that the protected client interests could be as broad as business rivalry or personal difference[s] between two potential clients.

The publication of proposed Rule 1.7(b)(5) by the Court drew protest on the grounds that the rule would have erected an extremely broad positional conflict rule that would have hampered lawyers and firms from undertaking varied representations and would have given existing clients broad veto powers over their lawyers' ability to accept new clients, thereby endangering the independence of lawyers and their willingness and ability to represent unpopular and *pro bono* clients.

Upon further reflection, the Bar filed a second petition with the Court withdrawing its proposed Rule 1.7(b)(5) and the accompanying comment, and the Court did not include it in the final rule that was adopted. This legislative history convinces us that the Court did not intend to extend the positional conflicts rule in the District of Columbia beyond the effective reach of the ABA Model Rule and that for us to interpret the rule that the Court did promulgate any more broadly than we do today would be contrary to the Court's intention.

Inquiry No. 94-1-3
Adopted: April 17, 1996

*Opinion No. 266*

**Withdrawal from Representation Requiring Court Approval; Withdrawal Conditioned on Disclosure of Client's Whereabouts**

- Where the rules of a tribunal require a lawyer to seek leave of the tribunal before withdrawing from a representation, the Rules of Professional Conduct also require the lawyer to seek such approval. It is insufficient for a withdrawing lawyer merely to inform the client of upcoming proceedings in his or her case and to advise the client to secure new counsel.

Where the Immigration Court will grant unconditional leave to withdraw only if the lawyer discloses confidential client information, the lawyer may not disclose the information without client consent. Rather, the lawyer must remain in the case for acceptance of service on behalf of his client.

**Applicable Rules**

- **Rule 1.6**(Confidentiality of Information)
- **Rule 1.16** (Declining or Terminating Representation)
- **Rule 3.4(c)**(Obligation To Obey Tribunal Rules)

*Inquiry*

In 1986, the Immigration and Naturalization Service (INS) promulgated rules that require a lawyer who is seeking to withdraw from a case to obtain leave from the immigration judge. Before this rule change, the inquirer reports, some lawyers did not file withdrawal notices because it was thought that the notices might trigger the scheduling of a hearing, a result usually not desired by clients in deportation proceedings.

The inquirer asks what ethical obligations are imposed upon a lawyer who receives a hearing notice after he no longer represents the client but before he has formally withdrawn as counsel. The inquirer first asks whether the lawyer must seek leave from the Immigration Court to withdraw or whether his obligation to the former client is discharged upon informing the client of the hearing notice and date and recommending to the client that he or she secure new counsel. The inquirer also asks whether, in seeking to withdraw from a representation, a lawyer must comply with a Board of Immigration Appeals ruling that requires a lawyer to provide the client's last known address to the immigration judge before leave to withdraw will be unconditionally granted.

*Matter of Rosales,* Bd. of Immigration App. Interim Decision No. 3064 (April 21, 1988), articulates the requirements for granting a motion to withdraw from a representation before the Immigration Court. *Rosales* holds that a lawyer, when seeking to withdraw, must provide the court with the client's "last known address, assuming it is more current than any address previously provided to the immigration judge." The lawyer also must show that he attempted to advise his client, at the client's last known address, about the scheduled hearing. Provided both of these requirements are met, the lawyer's motion to withdraw will be unconditionally granted. If, however, the lawyer fails to provide the requisite information, the lawyer's withdrawal will be granted on the condition that the lawyer remain responsible for acceptance of service.

*Discussion*

The inquirer is unclear about his intention to file the notice of withdrawal required by the INS rules. For purposes of this opinion, we assume that the inquirer intends *not* to file a notice of withdrawal out of concern that the notice would trigger a hearing. Thus, the question is whether the Rules of Professional Conduct are violated if a lawyer fails to file a notice of withdrawal as required by agency or court rules.

Rule 1.16, Declining or Terminating Representation, provides the bases upon which a lawyer is required or permitted to withdraw from a representation and obligates a lawyer, whenever a representation is terminated, to take various steps "to protect [the] client's interests."[1]

The rule also obligates a lawyer to continue to represent a client if so ordered by the tribunal. Thus, subsection (c) states:

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

Rule 1.16 is the counterpart provision to former District of Columbia Code of Professional Responsibility Disciplinary Rule (DR) 2-110, Withdrawal From Employment. In particular, DR 2-110(A) provided:

> 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.

While the language of Rule 1.16(c) is less direct than that of former DR 2-110(A), it is clear that Rule 1.16(c) also was intended to require that leave to withdraw be obtained from a tribunal when so required by the tribunal's rules:

> [Rule 1.16(c)] allows for court rules which, in many instances, condition withdrawal by any counsel of record on court approval. DR 2-110(A)(1) of the predecessor Model Code expressly correlated the condition of court approval with the existence of rules of a tribunal (citations omitted).

Annotation, *ABA Model Rules of Professional Conduct,* 276 (2d ed. 1992).

We therefore conclude that Rule 1.16(c) requires a lawyer to seek leave to withdraw if the rules of a tribunal require such approval.[2] It is insufficient merely to inform a former client of a pending hearing date and advise him or her to secure new counsel. Whenever a representation has terminated and approval to withdraw is required, the lawyer's obligations are not discharged until he or she has secured such leave of the tribunal. *See In re McKennett,* 349 N.W.2d 29 (N.D. 1984) (notification of client and opposing counsel regarding withdrawal insufficient; local rules required lawyer to notify court as well); *compare with In re Coe,* 731 P.2d 1028 (Or. 1987) (lawyer's failure to seek permission was not an ethical violation since probate court rules did not require permission to withdraw).

The risk that a client may be harmed by his or her lawyer's compliance with the rules of a tribunal is not a consideration. *See* Rule 3.4(c) (lawyer cannot "knowingly disobey an obligation under the rules of a tribunal except for an assertion that no valid obligation exists"). In any event, where a lawyer does not know the location of his or her client, the client should not be harmed if, when the lawyer seeks leave to withdraw, the immigration judge asks the withdrawing lawyer for the client's location. The lawyer can truthfully answer "no."

The more difficult issue arises when the lawyer knows the client's whereabouts. Information regarding the client's location may, in some cases, be protected as a confidence and would, in many circumstances, be protected as a secret under Rule 1.6(b).[3] While "confidence" is defined by the more narrow attorney-client privilege, "secret" is given a broader meaning to include all "other information gained in the professional relationship...the disclosure of which would be embarrassing, or *would be likely to be detrimental, to the client*" (emphasis added). In the context of a deportation proceeding, where a deportation order cannot be effected without the authorities' knowing the client's whereabouts, it would be to the client's obvious detriment for his or her lawyer to disclose the client's last known address or where the client could be found.

In this regard, the ruling in *Rosales, supra,* does not, in and of itself, force a lawyer to reveal his client's last known address. Rather, it gives the lawyer who seeks to withdraw from a representation a choice: (1) to withdraw unconditionally, the lawyer must disclose the client's last known address; or (2) if the lawyer does not provide this information, the withdrawal will be granted only conditionally, *i.e.,* the lawyer must continue to accept service on his client's behalf.

Given this choice, we believe that the lawyer would violate Rule 1.6(a)(1) if he revealed his client's whereabouts without the client's consent. A lawyer in this position is limited to seeking conditional withdrawal, which does not require disclosure of a client confidence or secret.

Inquiry No. 87-9-49
Adopted: June 19, 1996

*Opinion No. 267*

**Disclosure of Billing Practices: Billings Based on Time and "Attorney Charge"**

- When a client is informed that he will be billed on a time basis, it is a violation of the Rules of Professional Conduct to impose additional fees that are not disclosed to the client and are not calculated on the disclosed basis. The proposed "attorney charge" billing procedure does not violate the Rules where the client is informed of the hourly rates of the attorneys likely to work on the client's matter, and he is given a range of estimated total charges and a statement that the range may be exceeded in certain circumstances.

**Applicable Rules**

- **Rule 1.5** (Fees)
- **Rule 7.1(a)(1)**(Communications Concerning a Lawyer's Services)

[1] These steps include giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. Rule 1.16(d)

[2] Rule 1.16(c) is not limited to court cases. The rule also applies to administration agency proceedings. *See* G.C. Hazard, Jr. & W.W. Hodes, *The Law of Lawyering* §1.16:401, at 484 (1996 Supp.) *quoted in* Annotation, *supra* at 275.

[3] Rule 1.6 states in relevant part:

(a) except when permitted under paragraph (c) or (d), a lawyer shall not knowingly:

(1) reveal a confidence or secret of the lawyer's client; . . . .

(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be helf inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client. . . .

(d) A lawyer may use or reveal client confidences or secrets:

(2) (A)(1) When permitted by these rules or required by law or court order; . . .

- **Rule 8.4(c)**(Misconduct)

*Inquiry*

The inquirer requests an opinion as to the ethical propriety of charging clients in the manner described in the following two hypothetical billing practices.

*1. Time Basis and Value Billing Practices*

Firm clients are provided with a written fee schedule. The schedule lists matters for which a flat or standard fee is charged and identifies some other matters that will be billed on a "time basis." The schedule does not identify the "time basis" rates that will be applied. When work is performed on a time basis, the client receives a statement for "services rendered." The statement gives only a brief generic description of these services. It then specifies an amount for services, a separate amount for expenses, and a total.

The amount charged for services may incorporate a number of different charges, in addition to the time charges of the responsible attorney(s), *i.e.*, the attorney(s) who actually worked on the matter. In one circumstance, the "services" amount includes a set fee that is described within the firm as an administrative or processing fee. This fee may amount to between 10-20% of the time charged amount, depending on the number of hours worked by the responsible attorney. The statement also may include a levy that is based on the hourly rate of the originating attorney (*i.e.*, the attorney who brought the client to the firm) although it may not reflect time actually worked on the matter by that attorney. In still other instances, the firm may employ a procedure it characterizes as "value billing." Under this procedure, a premium of 20-200% may be added to the "time basis" amount charged by the responsible attorney This additional amount is included in the services portion of the client's bill.

In all instances, the client is not informed that he is being charged for services on other than a time basis. The additional levies, whether described internally as an administrative fee, processing fee or value premium, are not identified or explained in the statement, and they are added to the statement, regardless of the amount of time, if any, that the originating attorney may actually have expended on the matter.

*2. "Attorney Charge" Basis*

In a different billling arrangement, the client receives a letter enclosing a written fee schedule. The schedule lists matters for which a flat or standard fee is charged and identifies some other matters or types of proceeding that will be billed on an "Attorney Charge" basis.

The letter explains the firm's procedures for handling client matters, e.g., it states that the originating attorney reviews and forwards incoming matters to the responsible attorney and the originating attorney's secretary checks to ensure that the work is performed in a timely manner. The letter then explains the manner in which fees are calculated for certain types of work. In particular the letter provides that the fees charged for this particular type of work will take into account the effort involved; the expertise and efficiency of the responsible attorney; whether the matter is handled on an expedited basis; and the originating attorney's charge for supervision or administration. (This charge is not based on time, if any, worked by the originating attorney.) The letter further advises that the resulting fee will be within a general range, e.g., $800-$2000, but that it may be higher depending on the complexity of the matter and whether there are issues that require unusual time and effort.

*Discussion*

The hypothetical billing practices described above raise two questions: what is an attorney obliged to tell clients about (1) the fees they are charged, and (2) the manner in which those fees are calculated? The answer is addressed in Rules 1.5, 7.1(a)(1), and 8.4(c) of the Rules of Professional Conduct (referred to hereinafter as "Rules"). In the circumstances presented, the time basis and value billing practices described in section 1. above violate the Rules. The billing practices described in section 2. are generally adequate, although in certain circumstances, they also may violate the Rules.

*1. Time Basis and Value Billing Practices*

(i) Rule 8.4 (c)

This Committee has stated previously that, "when a lawyer bills a client, there should be no hidden meaning." *See* D.C. Bar Opinion No. 185 applying DR 1-102(A)(4) (the predecessor to Rule 8.4) to an analogous billing question. This simple precept applies, as well, to the instant Inquiry. In the scenario presented, the client is informed that he will be billed on a "time basis." This term is commonly understood to mean that the bill will be calculated by multiplying the number of hours worked by the per hour charge. Accordingly, when the client receives a statement, the client is entitled to expect that the amount billed will reflect attorneys fees for time actually expended on legal work. The inclusion of unidentified administrative or processing fees, or any other unspecified or "value" billed levies that are not calculated on the agreed basis, violates the prohibition in Rule 8.4(c) against engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation."

(ii) Rule 7.1(a)(1)

The ethical impropriety of the hypothetical billing procedures is reinforced by Rule 7.1(a)(1). Rule 7.1 governs "*all* communications about a lawyer's services." *See* Rule 7.1, Comment [1] (emphasis added). It provides that "a lawyer shall not make a false or misleading communication about . . . the lawyer's services" and specifies that a communication is false or misleading if it contains "a material misrepresentation . . . or omits a fact necessary to make a statement considered as a whole not materially misleading. . . . " Rule 7.1. Comments to the Rule note the importance of ensuring that statements about a lawyer's services are accurate.

On the facts presented, the information given to the client is inaccurate and misleading. The bill is not based on time expended, and it does not apprise the client of this fact. The client is affirmatively misled because the bill fails to differentiate between the firm's time charges and other fees about which the client has not been informed. It merely describes the attorney's fees and other assorted surcharges as "services." The client, thereby, is left to assume, predictably and erroneously, that the total is calculated on the basis that was disclosed to him.

(iii) Rule 1.5(b)

Rule 1.5 recognizes that attorneys' fees may be calculated in many different ways. The Committee is not commenting here on the concept of "value billing."[1] Rather, the question at issue is whether the attorney properly may impose a premium that is not time based, when that premium is not disclosed to the client, and is contrary to the manner in which the client was told his bill would be calculated. ABA Formal Opinion

[1] The Committee also is not commenting on the reasonableness, under Rule 1.5(a), of the ultimate sum that a client may be asked to pay under the firm's value billing calculation, or as a result of the other unspecified levies that are added on.

93-379 (Nov. 3, 1993) concluded in analogous circumstances that:

> It goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis (i.e., hourly), and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client.

*See* ABA/BNA Laws. Man. on Prof. Conduct §1001:207, 213. This Committee agrees with that conclusion.

Rule 1.5(b) provides that the lawyer who "has not regularly represented the client" shall give written advice of the "basis or rate" of the fee the client will be charged. The Rules assume that lawyers regularly representing a client will have reached "an understanding concerning the basis or rate of the fee," i.e., the lawyer is not expressly required to provide such a client with written advice. *See* Rule 1.5, Comment [1]. Thus, all clients, whether new or existing, whether receiving fee advice orally or in writing, are entitled to know the basis or rate of the fee.

The information provided to the Inquirer's hypothetical clients does not satisfy this requirement. The term "time basis" is simply not an adequate description. Where the fee is based on an hourly rate, the client is entitled to know the rate or range of rates applicable to his work. Where the fee is calculated by reference to factors other than time, and for example, includes an additional administrative or processing charge, the attorney has an obligation to explain the basis of that fee – what the fee is for, and how it is calculated. Moreover, the client must be accorded an appropriate opportunity to consider this information.

In inquiries about fees and billing matters, this Committee has held, repeatedly, that the attorney owes his client the "utmost duty of candor and fair dealing" (D.C Bar Opinion No. 185); that "the attorney bears the responsibility for seeing that there is no misunderstanding as to fee arrangements. (D.C. Bar Opinion Nos. 4, 25, and 29); and that, when a lawyer seeks to impose "atypical requirements in a fee agreement, ... the lawyer must explicitly bring the matter to the attention of the client at the time the agreement is presented." D.C Bar Opinion No. 211. We reaffirm these guiding principles and conclude, with respect to the instant inquiry, that they have been violated.

*2. Attorney Charge" Basis*

Unlike "time basis" or value billing, the term "attorney charge" has no widely understood meaning. In the example posed in the inquiry, the letter to the client does supply some explanatory detail. It states that fees for matters described in the fee schedule as "Attorney Charge" will take into account several of the factors listed in Rule 1.5(a) and an administrative or processing fee. Additionally, it gives a range of possible costs and advises that, in unusual circumstances, that range may be exceeded.

Rule 1.5(b)

The ethical propriety of the "attorney charge" billing practice is determined by reference to Rule 1.5(b). The Committee's conclusion in this regard is premised on the assumption that the letter sent to the client accurately describes the manner in which fees are calculated. If the letter does not accurately describe the firm's billing practices, Rules 8.4(c) and 7.1(a)(1) would also apply, for the same reasons that were discussed in Section 1 above.

The information contained in the client letter, *i.e.,* the hourly rates of the attorneys likely to work on client matters, a range of estimated total charges, and a cautionary statement that, in certain circumstances, the range may be exceeded, satisfies the Rule 1.5(b) requirement that there be a clear communication of the basis or rate of the fee. It gives the client an adequate basis on which to decide whether he will pursue the matter or retain that particular attorney. With respect to the letter's advice that the estimated range of fees may be exceeded for matters that are unusually complex or time consuming, it should be noted that the attorney has an ongoing obligation to ensure that the client has a clear understanding with respect to the basis or rate of the fee. When a cost estimate becomes substantially inaccurate, "a revised estimate should be provided to the client." *See* Rule 1.5, Comment [1].

Inquiry No. 95-6-22
Adopted: September 18, 1996

*Opinion No. 268*

## Conflict of Interest Issues Where Private Lawyers Provide Volunteer Legal Assistance to the D.C. Corporation Counsel; Reconsideration of Opinion 92

• Under the D.C. Rules of Professional Conduct, a lawyer may give volunteer legal assistance to the D.C. Corporation Counsel and continue simultaneously to represent private clients against the City and its agencies, as long as the requirements of Rule 1.7 are met. Under Rule 1.7(b)(1), a lawyer who wishes to represent a private client against the same City government client that she is representing while working for the Corporation Counsel on an unrelated matter, may do so if she obtains the informed consent of both her private client and her City government client. Similarly, the lawyer may agree to volunteer her services to represent the same City government client that she or her firm are opposing on behalf of a private client in an unrelated matter, if both clients consent after full disclosure. Client notification and consent are not required, however, where the lawyer is not opposing her own City government client but some other agency of the City that is not her client.

The City government client is not always the City as a whole, but may be more narrowly defined as one of the City's constituent agencies. The identity of the government client for conflict of interest purposes will be established in the first instance between the lawyer and responsible government officials in accordance with the general precepts of client autonomy embodied in Rule 1.2. In agreeing to undertake a particular representation, the lawyer must take steps to recognize and respect the reasonable expectation of her other clients, protected by Rule 1.7, that they will receive a conflict-free representation.

Even if Rule 1.7(b)(1) does not apply, because the lawyer's government client is not considered the same government entity she is opposing on behalf of private parties, Rule 1.7(b)(2)-(4) may require that the lawyer obtain client consent if her representation of one client will be or is likely to be "adversely affected" by her representation of the other, or if the independence of her professional judgment will be or is likely to be adversely affected by her responsibilities to third parties or by her own personal interests.

**Applicable Rules**

- **Rule 1.2**(Scope of Representation)
- **Rule 1.7**(Conflict of Interest: General Rule)

*Inquiry*

The Committee has been asked to reconsider several conclusions of D.C. Bar Opinion 92 (1980)("Propriety of Private Attorneys Handling Municipal Cases on a Pro Bono Basis"). Opinion 92 examined the ethical propriety, under the D.C. Code of Professional Responsibility, of a program in which "private attorneys acting on a pro bono basis would assist the City in managing its severely crowded civil docket."[1] The Committee opined in Opinion 92 that the program would be ethically permissible as long as certain conditions were met. The inquirer has asked the Committee to reconsider the continuing validity of two of those conditions, given the intervening adoption in 1991 of the D.C. Rules of Professional Conduct.[2] The two conditions in question are as follows:

1. A lawyer or firm performing volunteer representational work for the City or any of its agencies may simultaneously represent a private party against the City or any of its agencies only with full disclosure to and consent of both the City and the private party; and

2. Under no circumstances may a lawyer or firm volunteer to represent a particular agency of the City government while at the same time handling a private matter involving the same agency, or another matter that is or appears to be "closely related," even with client consent.

*Summary of Conclusions*

For reasons discussed more fully in Part I below, the Committee believes that the conclusion in paragraph 2 above is no longer mandated under the Rules of Professional Conduct. Thus a lawyer may represent a particular City government agency in a matter at the same time she is opposing that agency on behalf of a private client in an unrelated matter, as long as she makes full disclosure to and obtains the consent of both the City government agency and the private client. *See* Rule 1.7(b)(1) and 1.7(c). Moreover, as explained in Part II below, we disagree with the assumption of Opinion 92 that the entire City and all of its constituent agencies must always and necessarily be considered the lawyer's client for conflict of interest purposes. Thus, a lawyer may under certain circumstances perform services for a particular City agency client without having to notify and obtain the consent of private clients that she is representing against another City agency that is not considered the same client. Nevertheless, even if Rule 1.7(b)(1) does not apply because the lawyer is not opposing her own client, she may be required by Rule 1.7(b)(2)-(4) to notify and seek the consent of one or both clients if her representation of one would substantially interfere with her representation of the other, or if her independent judgment in either client's behalf would be adversely affected by her responsibilities to a third party or by her own personal interests.

*Discussion*

*I. Prohibited Representation of Private Parties Against Particular City Agencies or in Particular Matters*

Opinion 92 imposed an absolute prohibition against a lawyer's representing a private party against the same particular City agency for which she is performing volunteer services, or in a matter "closely related" to the one she is handling for the City. This absolute prohibition was derived from the "appearance of impropriety" standard of Canon 9 rather than the "conflict of interest" rules of Canon 5. The "appearance" standard was dropped entirely from the Rules of Professional Conduct, and the conflict of interest rules provide that conflicts may generally be waived by the client. *See* Rule 1.7(b) and (c). Under the current rules, the only conflict that cannot be relieved by client consent is the one that arises where a lawyer seeks to take "adverse" positions on behalf of two different clients *in the same matter*. *See* Rule 1.7(a). We therefore conclude that the absolute prohibition on opposing one's own City agency client set forth in paragraph 2 above is no longer applicable.

While a conflict under Rule 1.7(b)(1) would arise if the volunteer lawyer attempted to represent a private client against the City in one matter at the same time she (or one of her partners) was representing the City for the Corporation Counsel in another matter, since the lawyer would in effect be opposing her own client, that conflict could in most circumstances be cured by making full disclosure to both affected clients and obtaining their consent. Thus, a lawyer may represent a private party against a City government agency while simultaneously representing that same City agency in an unrelated matter, as long as both the private client and the agency client are informed of the existence and nature of the lawyer's conflict and do not object to the continued representation. *See* Rule 1.7(b)(1) & (c). *See also* Rule 1.7(b)(2)-(4). A lawyer may not, however, represent both the City and a private client in the same matter if they are adverse to each other in that matter, even if both clients consent. *See* Rule 1.7(a).

The fact that the lawyer is volunteering her services to the City, as opposed to serving under a paid retainer, is irrelevant to these conclusions, as it is to the conclusions reached in the remainder of this opinion.

[1] Under the program described in Opinion 92, private law firms were encouraged to donate the services of attorneys to assist the Corporation Counsel in a variety of legal matters, generally on a part-time basis. This program reportedly yielded little by way of relief for the Corporation Counsel's Office, at least in part because of the conditions on lawyer participation (particularly the requirement of obtaining waivers from other clients) set forth in Opinion 92. In 1992, a second and more formal effort was made to encourage lawyers from private firms to volunteer their services to the City, this time by granting them a special dispensation from the imputation rule. The amendments enacted in that year to Rules 1.10 and 1.11 provided that conflicts resulting from one lawyer's voluntary service to the Corporation Counsel need not be imputed to all other lawyers in her firm. *See* Rule 1.10(e) and Comment [19]; Rule 1.11(h) and Comments [12] and [13]. (The 1992 amendments to Rules 1.10 and 1.11 were made permanent in 1994 and extended to the D.C. Financial Control Board in 1996). According to the commentary to Rule 1.10, this special dispensation from the imputation rule depends upon the volunteer lawyer's working full-time for the Corporation Counsel (there must be a "temporary cessation" of a volunteer lawyer's practice with the firm, "so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of Corporation Counsel"). Thus, when a private lawyer is detailed full-time to the Corporation Counsel's Office under the so-called "Rule 1.10 program," her firm will not be regarded as representing the City, and will not need to alert and obtain consent from those of its clients who "might reasonable consider the representation of its interests to be adversely affected" by the firm's representation of the City. *See* Comment [7] to Rule 1.7. (It follows by necessary implication that where a lawyer is volunteering for the City on a less than full-time basis, or does not otherwise meet the requirements of a "Rule 1.10 detail," the conflicts resulting from her government service are imputed to all lawyers in her firm." We understand that the Rule 1.10 program has attracted few volunteers, and has accordingly provided no more benefit for the Corporation Counsel Office that did the pre-1992 part-time details discussed in Opinion 92.

[2] Amendments to the Rules issued, by the D.C. Court of Appeals on October 16, 1996, make a number of revisions to the text and commentary of Rule 1.7, none of which affect the conclusions of this opinion. We would note, however, the extensive attention paid in new Comments [13] - [18] to conflicts of interest where the client is a "corporation, partnership, trade organization or other organization-type client." While not directly applicable to situations in which the client is a governmental entity, *cf.* , Comment [7] to Rule 1.13, we believe this discussion may provide a useful supplement to the discussion of conflicts under Rule 1.7(b)(2) - (4) in Part II B(2), *infra*.

*II. Conflicts of Interest Where Volunteer Services Are Performed for the City or One of its Agencies*

We now address the holding of Opinion 92 based on the then-applicable conflict of interest rules, described in numbered paragraph 1 above. Opinion 92 construed the conflict of interest provisions of the former Code, derived from Canon 5, to permit a lawyer to participate in the Corporation Counsel's volunteer program "notwithstanding his or her involvement in other matters affecting the City," as long as two conditions were met: first, it must be "obvious" that the lawyer can adequately represent "both the interests of the City and his or her other private clients;" and, second, "each affected client must consent to the multiple representation after full disclosure."

A. Defining the Client for Conflict of Interest Purposes

Before turning to an analysis of how the current conflict of interest rules apply in this situation, we must deal with one important threshold issue, involving an unexamined assumption made by the drafters of Opinion 92 about the identity of the City government client. That assumption is that the client of the volunteer lawyer working for the Corporation Counsel is always and necessarily "the City" as a whole rather than one or more of the City's constituent agencies.[3] This definition of the government client gives the conflict rules a considerably broader application and effect than they would have if the City government client were more narrowly defined. Under Rule 1.7(b)(1), a lawyer may not take a position in a matter on behalf of one client that is adverse to a position taken in the same matter by another client (not represented by her) unless she obtains consent from both clients.[4] If the client of the volunteer lawyer is the City as a whole, as opposed to one or more of its constituent agencies, Rule 1.7(b)(1) would require the lawyer to obtain consent to the City representation from each and every one of the private clients that she is currently representing against the City or any of its agencies, and from the City to each and every adverse private representation the lawyer may currently be involved in against it or any of its agencies, without regard to whether there is any real possibility that the substantive concerns animating the conflicts rules are implicated.[5]

Concerned that the breadth of this definition of the City government client will effectively discourage, if not preclude, private law firms from volunteering to assist the Corporation Counsel, the inquirer has asked the Committee to consider whether the volunteer lawyer's client may be defined as a particular City agency as opposed to the City as a whole, so as to ameliorate the sweeping requirement of notice and consent imposed by Rule 1.7(b)(1) read in the light of Opinion 92. We agree with the inquirer that the definition of the City government client contained in Opinion 92 is too broad, and that the City government client may sometimes be defined as narrowly as a single agency. As discussed more fully below, we also believe that the identity of the City government client depends upon a number of discrete considerations and must be decided on a case-by-case basis.

Simply as a matter of common sense it seems apparent that the client of the volunteer lawyer will not always be the entire City, but may sometimes be a smaller part of it. Much like a large modern corporation, the District of Columbia government is a complex and many-faceted entity that sometimes acts through its individual constituent parts (like the subsidiaries of a corporation) and sometimes acts as a single entity, depending upon the particular facts and circumstances. Sometimes a legal matter or issue is relevant only to a single City agency and is of no substantial interest to other agencies or the City as a whole. Sometimes a matter or issue directly affects or is otherwise significant to a number of agencies or the overall City government. In some situations the broad set of interests at stake will be apparent at the outset; in others the broader concerns may emerge during the course of the representation.

Whatever general principles about client identity in the government context can be drawn from our common sense analysis of the governmental interests implicated by particular cases, at bottom the identity of the City government client (like the identity of the corporate client) is not primarily a question of legal ethics. The identity of the government (or corporate) client for all ethical purposes is established in the first instance between the lawyer and responsible public (or corporate) officials in accordance with the general precepts of client autonomy embodied in Rule 1.2.[6] *Cf.* ABA Formal Opinion 95-390 ("Conflicts of Interest in the Corporate Family Context") (a corporate client may specify, when engaging a lawyer, whether or not "the corporate client expects some or all of its affiliates to be treated as clients for purposes of Rule 1.7").

The ethics rules provide at least one important limitation on what a lawyer can agree to with a client under Rule 1.2, and that is her other clients' right to be protected from conflicts of interest under Rule 1.7. In agreeing to represent a particular government client, a lawyer must take into account the countervailing rights of her other clients whose interests may be adversely affected by this new representation to know of and object to it — just as she must consider the similar rights of the new government client to know of and be able to object to any conflicting existing representations. In working with officials who are authorized to speak for the government client to define the scope of the representation (and hence the identity of the

[3] Opinion 92 does not say in so many words that the client of the volunteer lawyer is always and necessarily the entire City for Canon 5 conflict of interest purposes. Nevertheless, this has been the generally accepted interpretation of the opinion since its issuance more than 16 years ago, and there appears to be little support in the text for a contrary position. Moreover, the fact that the absolute bar under the "appearance" standard of Canon 9 is clearly applicable only to representations involving *particular* City agencies is further evidence that the drafters of Opinion 92 intended a very broad definition of the City client for conflict of interests purposes.

[4] Where a conflict arises under Rule 1.7(b)(1) because the lawyer is opposing her own client on behalf of another client, both clients are presumed to be "potentially affected" under Rule 1.7(c)(1) and both must therefore consent to the representation after full disclosure.

[5] Opinion 92 advises a firm wishing to participate in the Corporation Counsel's volunteer program to "send a standardized letter to all clients identified as having present of potential future dealings with the City, describing the program and explaining in general how the judgment of the firm's attorneys might or might not be affected by the firm's participation in the program." This suggests an even broader application for the condition, requiring the lawyer to obtain consent from clients with present *or potential* City business without regard to whether the lawyer or her firm is actually representing the client in connection with that City business. We see no basis in the current rules for such an expansive reading of the conflict of interest rules. Even in a case when the entire City is considered the lawyer's client, consent must be obtained only from clients who the lawyer is currently representing against the City (or one of its agencies) or those who have actually asked her so to represent them.

[6] We do not regard the definition of the government client contained in Rule 1.6(i) ("the client of the government lawyer is the agency that employs the lawyer") as dispositive for conflict of interest purposes. And, there is no indication that this or any other a priori definition of the government client was intended to apply in this context in the otherwise thorough consideration of the "government lawyer" issue by the Sims Committee in 1988. *See* Report by the District of Columbia Bar Special Committee on Government Lawyers and the Model Rules of Professional Conduct (1989).

government client for conflict of interest purposes), the lawyer may defer to the government client's wishes only as long as she is able to fulfill her basic responsibilities to her other clients under Rule 1.7, including in particular her obligation not to take a position adverse to them on behalf of another client without their consent. This is the basic right secured to every client by Rule 1.7(b)(1).

The lawyer may not, by agreeing to a narrow definition of the government client, seek to defeat the reasonable expectation of her other clients, arising from and protected by Rule 1.7(b), that they will get a conflict-free representation from their lawyer. Accordingly, the volunteer lawyer must assure herself that the definition of the government client ultimately arrived at in discussions with authorized government officials both recognizes and respects her private clients' right to object when their lawyer proposes to represent interests directly adverse to their own. Her government client has the same right to object to any potentially conflicting private representations.

Thus, we believe that the lawyer who wishes to perform volunteer work for the Corporation Counsel's Office has an obligation to work with that office to develop a clear understanding of the scope of her representation of the City, and to make certain that the agreed upon definition of the government client is a reasonable one in light of all the facts and circumstances, including in particular each of her clients' right to know about, and to give or withhold consent to, her representation of adverse interests.

Ideally, the identity of the government client should be specifically agreed upon between the volunteer lawyer and the government officials who are authorized to speak for the client at the outset of the representation, and committed to writing. In those instances where the identity of the client is not clearly defined, it may be inferred from the reasonable understandings and expectations of the lawyer and those officials. These in turn may be gleaned from such functional considerations as the organizational structure of the City and the extent to which its constituent parts are related in form and function, and from the facts and circumstances of the particular matter at issue in the representation — including the general importance of the matter to the City as a whole and to other particular components whose programs or activities are not directly involved.

There may be situations in which it can be agreed at the outset that the volunteer lawyer will represent only a single City agency in a relatively discrete matter (e.g., a particular contract) or in a relatively discrete category of cases (e.g., child abuse and neglect cases). In such a case, the lawyer would be free to agree to take on a private representation in which she would be opposing another City agency on an unrelated matter, without having to notify or obtain the consent of either her existing government client or her new private client. That is the easiest case. Another fairly clear case is the one in which the volunteer lawyer represents a City agency in a matter that plainly has City-wide impact or public importance, so that it can fairly be said to implicate the interests of the City generally. In such a case, it would be unreasonable not to regard the lawyer's client as the City as a whole, and she therefore could not undertake a private representation against any City agency without informing and obtaining the consent of the City and, subsequently, the private client. There are dozens of permutations on these basic scenarios, in which the general City-wide interest is sometimes clear and sometimes not so clear. However, the mere fact that a matter is captioned "X v. District of Columbia" is not dispositive of the identity of the government client. Rather, as noted previously, the answer depends upon the reasonable understanding reached between the volunteer lawyer and responsible public officials based upon all relevant facts and circumstances. Of course, as with all representations, the lawyer must be alert to the need to deal with any conflicts that may arise during the course of the representation.[7]

The Corporation Counsel — as chief legal officer for the District and controller of its litigation — asserts that he has legal responsibility for determining the identity of the City government client for purposes of the conflict of interest rules. The Corporation Counsel has indicated his intention to issue guidelines for dealing with conflict issues posed by the volunteer program, that will address the identity of the client and the circumstances in which the District will waive any potential conflicts. We expect that these guidelines, when issued, will be useful to volunteer lawyers not only in determining what kinds of legal assistance they may give to the Corporation Counsel without creating a conflict with their existing private representations, but also in determining the scope of any conflicts. The guidelines may also be useful in determining what new private clients or matters a lawyer may subsequently take on in light of her responsibilities to her City government client(s).

In summary, we conclude that the Rules of Professional Conduct do not identify the City government client, and for the most part provide only general guidance for the lawyer and responsible government officials in reaching an understanding in this regard. The one clear limitation on the lawyer in this context derived from the ethics rules is her other clients' reasonable expectation that they will be allowed to object to their lawyer's representation of interests that would impinge upon her ability to zealously represent their own. Thus we believe that the private lawyer who wishes to perform volunteer work for the Corporation Counsel's office must work with that office to develop a clear understanding of the scope of her representation of the City, and hence the identity of the government client for conflicts purposes, and must take steps to protect all of her clients' right to know about and withhold consent to their lawyer's representation of interests that are adverse to their own.

B. Applicable Conflict of Interest Rules

Assuming that the relevant City government client has been identified, it remains to explain how the current conflict of interest rules apply in this situation.

*1. Direct Conflicts under Rule 1.7(b)(1)*

As noted, Rule 1.7(b)(1) prohibits a lawyer from taking a position on behalf of one client that is directly adverse to a position taken by another client in the same matter (represented of course in this matter by another lawyer) without the consent of both clients. *See* note 4, *supra.* Thus, if a lawyer wishes to undertake a volunteer representation of a particular City agency that she or her firm is already opposing on behalf of a private client, the lawyer may do so only if she informs both the private client and the new City agency client of the "existence and nature of the possible conflict and the possible adverse consequences of such representation," and they give their consent. Rule 1.7(c)(1). The conflicts of each lawyer in a firm are imputed to all other lawyers in the firm. Rule 1.10.

[7] The provisions of Rule 1.7(d)(1996 amendment) govern conflicts arising after the representation commences that are "not reasonably foreseeable at the outset of a re-presentation." As we read this provision, it subjects such unforeseeable late-arising conflicts to the provisions of Rule 1.7(b)(2) through (4) only, and not to those of Rule 1.7(b)(1).

For example, if a volunteer lawyer is considering taking on a matter for the Corporation Counsel that involves defense of a suit brought against the Mayor and/or the City Council, or a suit attacking some City-wide program or regulation (so that the client must be deemed to be the City as a whole), the lawyer must make full disclosure to and seek consent from each of her firm's private clients who have matters pending against the City or any of its agencies. She must also inform the Corporation Counsel of any conflicting private representations being pursued by her or by other lawyers in her firm. Conversely, if a volunteer lawyer is working on a City-wide matter and is then asked to represent a private party against the City or one of its agencies, she must inform the Corporation Counsel and seek his consent.[8] Consent must also be obtained from the new client.

On the other hand, Rule 1.7(b)(1) does not apply, and client notification and consent are not required, if a lawyer is not opposing her own City government client but some other agency of the City that is not her client. For example, if a lawyer hired to defend a program or action of a particular City agency, such as the Housing Department, were representing only the Housing Department in this matter, she would be required to disclose the fact of her Housing Department representation and seek consent from those of her firm's private clients who had matters pending against the Housing Department or against the City as a whole.[9] But she would not be required to disclose her Housing Department representation to private clients who had matters pending against other particular City agencies whose functions were unrelated to the Housing Department and that otherwise had no interest in the issues involved in the Housing Department representation and would be unaffected by its outcome.

Thus, in a case where a lawyer is representing the City as a whole, she is obliged to obtain the City's consent before opposing one of its constituent agencies, as well as the consent of any of her private clients who have interests adverse to the City (or, of course, the particular agency she would be representing). Similarly, if the lawyer is representing a private client against the City as a whole, she must obtain the private client's consent before undertaking any City government representation, even one involving a discrete agency program with no functional or programmatic relationship to the City-wide matter she is otherwise involved in. The only situation in which the lawyer may cabin her conflict and avoid having to conduct a broad canvass of all clients with City-related business is where both her public and her private representations involve discrete agency programs with no City-wide implications.

*2. Indirect Conflicts under Rule 1.7(b)(2)-(4)* - Even if Rule 1.7(b)(1) does not apply because the lawyer's City government client is not considered to be the same City client that she is opposing, her representation of a City agency may still raise an "indirect" conflict of interest under subsections (2) through (4) of Rule 1.7(b) if it "interferes in some substantial way with the representation of another" client. D.C. Bar Opinion 265 (1996) ("Positional Conflicts"). This would as a practical matter result in the same need to determine that both clients could be adequately served, and then to make full disclosure to and obtain the consent of "each affected client" to the multiple representation. Under Subsections (2) and (3) of Rule 1.7(b), if the lawyer believes that her representation of the City agency "will be or is likely to be adversely affected" by her representation of a private client, or vice versa, the lawyer must obtain the consent of the affected client or clients. Under subsection (4), client consent must be obtained if the lawyer believes that the independence of her professional judgment on behalf of a client "will be or reasonably may be adversely affected" by her responsibilities to a third party or by her own personal interests.

In contrast to the situation involving a direct conflict under Rule 1.7(b)(1), where disclosure and informed consent are mandatory once it is apparent that the lawyer will be opposing her own client, a lawyer has some discretion in deciding whether an indirect conflict under Rule 1.7(b)(2)-(4) exists. Whether a particular volunteer representation will "adversely affect" the lawyer's representation of another client (or vice versa) depends upon the particular facts and circumstances and is in the first instance essentially a matter for the lawyer to decide. Likewise, the existence of a conflict arising from the lawyer's responsibilities to third parties or her own personal interests is primarily a question of fact. The lawyer may decide that she should make disclosure to and seek consent from one client but need not do so from the other.

The "adverse effect" inquiry under subsections (2) through (4) is primarily a functional one, generally involving both the relative importance of the representation to the respective clients or to their lawyers and the directness of the adverseness between them. It may require inquiry into the nature of the issues, the amount of money at stake, and the likelihood that either client would otherwise be substantially and foreseeably affected by the outcome of the other's matter. Sometimes, the "adverse effect" inquiry will also involve the particular role the volunteer lawyer is expected to play in the matter, and the "intensity and duration" of her relationship with the lawyers she is opposing. *Cf.* Formal Opinion 1996-3 of the Committee on Professional and Judicial Ethics of The Association of the Bar of the City of New York (1996)(conflicts of interest where one lawyer represents another lawyer).

Without attempting to exhaust the kinds of situations that would give rise to an adverse effect under Rule 1.7(b)(2)-(4), we offer the following examples to illustrate the kinds of circumstances that in this Committee's view could require a lawyer to obtain consent from one or both clients under these provisions. 1) A volunteer lawyer whose firm is handling a matter for private clients against one City agency, and who is subsequently asked by the Corporation Counsel to defend another City agency in a matter whose outcome will have a substantial and foreseeable impact on the outcome of the firm's private clients' matter, may be required to obtain one or both clients' consent. 2) A volunteer lawyer who represents one City agency and wishes to make certain arguments about that agency's authority that are inconsistent with arguments she is making on behalf of a private client against another City agency in an unrelated matter, may be required to obtain consent from one or both clients if the success of her arguments on behalf of

[8] The government client can generally decide what information it needs or wants about the volunteer lawyer's potentially conflicting representations, in the context of deciding its own identity. Thus, the process of self-definition functions for the government client as a way of consenting to the volunteer lawyer's conflicting private representations to which it would be entitled to object if it chose to define its identity more broadly. In this fashion, the government client may decide that it has no interest in knowing about any conflicts that might otherwise be imputed to the volunteer lawyer under Rule 1.10 by virtue of representations by other lawyers in her firm.

[9] Given the decision-making structure of government entities, we believe that the conflicts of the City are necessarily attributed to its constituent parts, and that the conflicts of the constituent parts of the City are necessarily attributed to the City as a whole — though the conflicts of one of the City's constituent agencies may or may not be attributed to other City agencies.

one client "will, in some foreseeable and ascertainable sense, adversely effect the lawyer's effectiveness on behalf of the other" client. *See* Opinion 265, *supra.* 3) A volunteer lawyer performing work for one City agency who wishes to take a leading role representing a private party in a controversial matter involving another City agency should anticipate having to obtain consent from both clients if she believes it likely that one representation will have an adverse effect on the independence of her professional judgment or her credibility in the other. 4) A volunteer lawyer who works closely and for extended periods of time with full-time Corporation Counsel lawyers, or is closely supervised by Corporation Counsel lawyers, may find it difficult to exercise independent professional judgment in opposing the same lawyers with whom she is working or who are supervising her, and in such a situation she may decide that she should not accept a private representation in which she would be opposing her colleagues, without notifying and seeking the consent of both the Corporation Counsel and her private client.[10]

The above examples are not intended to be exhaustive, but merely to suggest the possibilities for "indirect" conflicts to develop in the context of a volunteer program such as the one described in Opinion 92.

*Conclusion*

The conclusion of Opinion 92 that, under the former Code of Professional Responsibility, a lawyer may never oppose a City agency that she is also representing on behalf of another client in an unrelated matter, is no longer mandated by the Rules of Professional Conduct. Under Rule 1.7(b)(1), a lawyer may oppose her own City government client on behalf of a private client in an unrelated matter as long as she makes clear the nature of the conflict to both clients and obtains their consent.

Moreover, we believe that in certain limited situations a lawyer may represent a City agency without having to notify or obtain the consent of private clients that she is representing against other discrete City agencies. Opinion 92's apparent assumption that the client of the Corporation Counsel lawyer is always and necessarily the City as a whole is incorrect, and in any event has no foundation in the ethics rules. The rules contemplate that the identity of the City government client for conflict of interest purposes will be decided on a case-by-case basis between the lawyer and responsible government officials, taking into account the reasonable expectation of the lawyer's other clients that they will receive a conflict-free representation. Their decision will generally be based on functional considerations derived from the structure and relationship of the government entities involved and from the facts and circumstances of the particular matter at issue in the representation. Even if the lawyer would not be opposing her own client, she may be required by Rule 1.7(b)(2)-(4) to obtain client consent if her representation of one client would interfere in some substantial way with her representation of the other, or if the independence of her judgment in either client's behalf would be compromised by her responsibilities to or interests in a third party or by her own personal interests, including her personal and professional relationships with the lawyers on the other side.

Inquiry No. 95-5-17
Adopted: October 31, 1996

*Opinion No. 269*

## Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation

- A lawyer retained by a corporation to conduct an internal investigation represents the corporation only, and not any of its constituents, such as officers or employees. Corporate constituents have no right of confidentiality as regards communications with the lawyer, but the lawyer must advise them of his position as counsel to the corporation in the event of any ambiguity as to his role.

A corporation may hire and pay the fees of a lawyer to represent corporate constituents, so long as there is no interference with, or diminution of, the lawyer's obligations to his constituent client. Where the lawyer proposes to represent the corporation and a constituent, or two or more constituents, the general conflict provisions of Rule 1.7 must be applied to determine the propriety of the dual representation, and appropriate client disclosures must be made and consents received.

**Applicable Rules**

- **Rule 1.7**(Conflict of Interest: General Rule)
- **Rule 1.8(e)**(Conflict of Interest: Prohibited Transactions)
- **Rule 1.13**(Organization as Client)
- **Rule 4.3**(Dealing with Unrepresented Person)

*Inquiry*

This inquiry presents several questions concerning the obligations of a lawyer conducting an investigation of possible wrongdoing by a corporate client or its employees. Such investigations are not uncommon today. A corporation may, for example, investigate itself as part of a routine regulatory compliance program, it may do so in response to information received from some source suggesting that a violation of law may have occurred, or it may do so in the course of, or in anticipation of, a government proceeding. During such an investigation, counsel for the corporation will likely review records and files maintained by various corporate officials and employees, and may interview such persons at various levels of seniority within the corporation.

The inquirer asks whether an attorney-client relationship is created between the corporate counsel performing the investigation and corporate employee-interviewees; what professional obligations, if any, are owed by the lawyer to the employees in such a circumstance; and what is the nature and extent of confidentiality which applies to information acquired by the lawyer from the employees. The inquiry also raises, inferentially, a question about the general obligations of counsel retained by the corporation to represent the interests of its employees.

Although the inquiry poses its questions in the context of outside counsel performing the legal work, in-house counsel may perform similar activities. Our opinion extends to both types of counsel.

*Discussion*

*Attorney-Client Relationship*

Under the former Code of Professional Responsibility, the relationship of a lawyer for a corporation to corporate officials was addressed in Ethical Consideration (EC) 5-18, but not in the Code itself. EC 5-18 read, in relevant part, that:

[10] Because this conflict is in the nature of a personal conflict, as opposed to one derived from the lawyer's representation of another client, we doubt that is would be imputed to other lawyers in the firm. *See* ABA Formal Opinion 96-400 ("Job Negotiations with Adverse Firm or Party") (Rule 1.10 "cannot be construed so broadly as to require that all lawyers in a firm be presumed to share their colleague's personal interest in joining the opposing firm in a matter," though each lawyer must individually evaluate whether his "'responsibilities to . . . a third person' — *i.e.,* his colleague — or his own interest in her colleague's interest, may materially limit the representation.")

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, representative or other person connected with the entity.

That ethical principle was elevated in stature in the Rules of Professional Conduct, where it (and related principles) were incorporated in Rule 1.13.[1]

Subpart (a) of Rule 1.13 makes clear that, when a lawyer is retained to represent a corporation, the lawyer's client is the corporation *only*, acting through its duly authorized constituents (such as its officers and employees).[2] The situation was no different under the Code of Professional Responsibility. *See* Opinion No. 159. In this circumstance, then, the lawyer does not have, by reason of the lawyer's representation of the corporation, attorney-client responsibilities to the corporate constituents with whom he may be dealing in the course of his investigation.

Nevertheless, in some settings, a lawyer for the corporation may have an incentive, grounded in the lawyer's desire to further his client's interests, to minimize any perception by the corporate constituent that the corporation and the constituent may have differing interests in the subject matter of the representation, lest such perception affect the willingness of the constituent to be candid and forthcoming with the lawyer. While a lawyer's obligation to represent a client zealously (Rule 1.3(a)) might suggest that the client's need for information from the constituent is the lawyer's only concern, the Rules specifically require that the lawyer be mindful of the interests of the constituent.

Subpart (b) of Rule 1.13 makes clear the obligation of the lawyer to inform corporate constituents of the identity of the lawyer's client when there is a potential for conflict between the position of the corporation and that of the constituent. Such a potential for conflict is a possibility where, for example, the person being interviewed was more than a passive observer of some act or omission which may be attributable to the corporation, but was instead a person who may have been directly or indirectly responsible for the questioned conduct. Such person's interests may be in conflict with those of the corporation, which may want to discipline or terminate him/her or which may, *vis-a-vis* a third-party (such as a government agency or a civil litigant), endeavor to distance itself from the person's conduct, such as by acknowledging the conduct but denying responsibility for it, or by characterizing the conduct as that of an employee acting contrary to company policy or direction.

The corporate constituent being interviewed by a lawyer for the corporation, however, may consider the lawyer as also representing the employee's personal interests, absent a warning to the contrary. The employee could understandably conclude that, since he is employed by the corporation and the lawyer has been retained to serve the interests of the corporation, the lawyer would not be pursuing interests adverse to those of the employee. Rule 1.13(b) specifically addresses this potential for misunderstanding by the corporate constituent by requiring the lawyer to explain the identity of the lawyer's client "when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing." [3] Comment [8] to Rule 1.13 advises the lawyer in such a situation to

> advise any constituent . . . of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain separate 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 representation for that constituent individual, and that the discussions between the lawyer for the organization and the individual may not be privileged.

Disclosure is required not just when an actual conflict exists between the interests of the corporation and those of the employee (for example, when the corporation has already confided to the lawyer that it will concede wrong-doing by the employee but will attempt to avoid corporate responsibility for any illegality). Disclosure is also required when there "may be" an adverse between the interests of corporation and employee. There "may be" an adverse when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee. Such a possible adversity would almost always arise, then, when the corporation is able to take a position adverse to the employee.

On the other hand, Rule 1.13(b) applies only when the possible conflict is "apparent," which we interpret to mean actually apparent to the lawyer or apparent to a reasonable lawyer under the circumstances.[4] As so interpreted, the obligation of disclosure would not arise in those situations where the lawyer had no reason to believe that there was any possibility of adversity

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[1] District of Columbia Rule 1.13 reads as follows:

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

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

(c) 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.

[2] Such constituents may, however, hire counsel to represent *their* interests in matters concerning the corporation. A plant manager, for example, may obtain personal representation during an investigation of possible illegal waste disposal at a facility under his supervision.

In the event of any ambiguity concerning whether the lawyer is being hired by the constituent to represent the corporation or constituent, the lawyer should clarify the client's identity at the outset of his dealings with the constituent, as any uncertainty is likely to be resolved in favor of a reasonable expectation of the constituent that an attorney-client relationship has been established with it. *Cf., Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F. 2d 1311 (7th Cir. 1978).

A representation of the corporation does not preclude representation of a constituent, and vice versa, even in the same matter. *See* Rule 1.13(c). Such additional representation, discussed later in this Opinion, would be governed by the conflicts provisions of the Rules of Professional Conduct, including Rules 1.7 and 1.9.

[3] That disclosure obligation derives, in part, from Rule 4.3, concerning a lawyer's obligations when dealing with unrepresented persons generally. Under that Rule, a lawyer representing a client shall not give advice to an unrepresented person (other than advice to secure counsel) where the interests of that person may be in conflict with the interests of the lawyer's client, and shall not, even with respect to a person whose interests are not in conflict with those of the lawyer's client, leave the impression that the lawyer is disinterested. Thus, even apart from any special circumstances that might exist when a lawyer for a corporation interviews a corporate employee, Rule 4.3(b) requires the investigating lawyer to clarify his position "[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter . . . ."

[4] Limiting the disclosure obligation of Rule 1.13(b) to situations where the possible conflict was actually apparent to the lawyer would frustrate the protective purpose of the Rule by allowing a lawyer to be willfully blind to certain circumstances to avoid their "appearance" to him.

between corporation and employee when the interview was conducted.[5]

*Confidentiality*

As Comment [3] to Rule 1.13 notes, communications between the lawyer and the person being interviewed are protected by Rule 1.6 (Confidentiality of Information), but the protection accorded is for the benefit of the client corporation, not the interviewee. *See also Upjohn Co. v. United States*, 449 U.S. 383 (1981). Thus, the interviewee has no right to expect that disclosure or use of the information provided by him or her to the lawyer will be subject to his/her control under Rule 1.6, as the corporation will have the right to use the information to serve its purposes. In this regard, it makes no difference whether the interviewee is an employee performing routine services, or a corporate director or officer entrusted with more significant responsibilities. Both are persons with interests potentially separate from those of the corporation.

Notwithstanding the law on this subject, a corporate interviewee might reasonably conclude that the information she provides to the investigating lawyer will be treated as confidential by the lawyer, perhaps because she mistakenly believes that the lawyer is representing her also. This, then, is another situation in which Rules 4.3(b) and 1.13(b) may require the lawyer to clarify his role and the status of the information to be provided by the interviewee.[6]

*Representation of Constituents*

A further question presented in the inquiry concerns the obligations of a lawyer who is retained by a corporation to represent one of its constituents, such as a corporate officer, director or employee. Such retentions, under which the corporation is typically responsible for the lawyer's fees, are not unusual when the representation concerns a matter arising from the constituent's work for the corporation. One aspect of the ethical concerns in such an arrangement is addressed in Rule 1.8(e), which permits a lawyer to accept compensation from someone other than the client (which, in this case, is the corporate employer of his client), but only where the client consents to the arrangement, where the arrangement does not interfere either with the exercise of the lawyer's professional judgment on behalf of his client or with the attorney-client relationship, and where client confidences are protected.

Where such representation is of the constituent alone, that person is the lawyer's sole client, just as the lawyer representing the corporation has that entity as his sole client. The lawyer has no attorney-client relationship with the person paying the lawyer's fees, and the lawyer must take care that his activities on behalf of his client are not influenced by that person. *Id.* And as regards attorney-client confidentiality, that obligation is owed to the constituent-client only, and not to the person paying the lawyer's fees. *Id.*

The lawyer retained by the corporation to represent the employee also may have a conflict of interest concern under Rule 1.7(b)(4), which applies when the lawyer's work on behalf of a client will or reasonably may be affected, not by obligations to another client, but by the lawyer's financial or personal interests. Such interests could include continuing referral or unrelated other work for the corporation, which could be influenced by the manner in which the lawyer represents the employee. For example, it is not unthinkable that a lawyer who is regularly paid by a stock brokerage to represent its brokers individually may have a financial disincentive to represent a broker in a manner which implicates the brokerage in wrong-doing. Where a situation like that will or may arise, the lawyer could represent the individual client only with the client's informed consent to this potential conflict of interest.[7]

*Multiple Representation*

Finally, where the lawyer is asked to represent in the same matter a constituent *and* the corporation, or two constituents, the same types of conflicts may arise as in any other situation where a lawyer (or law firm) represents more than one party in the same matter.[8] Where the potential clients are directly adverse (or become directly adverse after commencement of the dual representation), the dual representation is absolutely prohibited under Rule 1.7(a). But even where the parties are nominally aligned together, there may be a risk that the representation of one will adversely affect the representation of the other. For example, one client may wish to settle a matter in litigation, while the other may not and might perceive his/her litigation position to be prejudiced by a settlement by the other client. In such a situation, the clients represented by the same lawyer are not advancing interests adverse to one another so as to invoke the unqualified prohibition of dual representation under Rule 1.7, but Rules 1.7(b)(2) and (3) are clearly implicated in such a situation, since one client's interests cannot be zealously pursued without likely adverse effect on the interests of the other client. Such dual representation could only be accomplished, then, with the consent of both clients, "after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation . . . ." Rule 1.7(c). The nature and content of the disclosure will obviously be determined by the facts and circumstances of the matter and the lawyer's representation of the potentially adverse clients. Among the subjects of disclosure that may be unique to a lawyer's representation of a corporation and an employee, or two employees of the same corporation, are the lawyer's pre-existing relationship with the two clients, whether one of the clients is an expected source of additional, unrelated legal work for the lawyer, and who will be paying the lawyer's fees (if not the client).

The disclosure should also address the fact and consequences of a possible disqualification of the lawyer from further representation of the client in the event the dually-represented clients later plan to take positions actually adverse to each other in the same matter. One of those consequences could be the inconvenience, expense and possible legal risk associated

[5] The only Rule 1.13 Comment relevant to the obligation to make a disclosure to corporate constituents is [9], which is not particularly helpful: "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."

[6] Where the lawyer, through act or omission, reasonably leaves the constituent with the impression that there is an attorney-client relationship between them, the constituent's communications will be given protection under Rule 1.6. That was the situation in *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F. 2d 1311 (7th Cir. 1978), where lawyers for a trade association gave some individual members of a trade association the impression that they were also representing them when collecting information from the members. When a matter later arose for another client in which the information collected from the members might be used against them, the law firm was required to withdraw from representation because of its conflicting confidentiality obligations to the members.

[7] Conflict of interest issues are similarly raised when representation of the corporate constituent is being provided by an in-house lawyer. The in-house lawyer, like outside counsel, has a concern under Rule 1.7(b)(4), in this case whether his representation of the corporate constituent will or reasonably maybe affected by his personal employment interests with the corporation. He also has a multiple-client concern under Rules 1.7(b)(2) and (3), because of his continuing service as counsel to the corporation. *See* discussion herein under "Multiple Representation."

[8] Rule 1.13(c) specifically authorizes the representation of a corporation and one or more constituents, subject to satisfaction of the requirements of Rule 1.7, concerning conflicts of interest generally.

with the need for the client to retain new counsel.

It would not be impermissible for the lawyer in such a dual representation to seek the consent of one of the clients to continue representation of the other client in the event of an actual adversity under Rule 1.7(a) that requires termination of the dual representation. But such consent must be based on disclosure of the consequences to that client of granting such consent, and disclosure to the client for whom the representation would continue of any limitations on that continued representation. Perhaps the most significant area to be addressed in disclosures to both clients is how the lawyer's confidentiality obligation to the client to be terminated will be protected, and how the representation of the continuing client will be affected by the lawyer's continuing confidentiality obligation to the terminated client. In circumstances where the dual representation cannot be continued, Rule 1.9 (Conflict of Interest: Former Client) may prevent the lawyer from continuing to represent either client unless one of the clients has granted this particular consent.

On the other hand, there may be many dual representations where the interests of the two parties have no reasonable likelihood of becoming adverse, in which case Rules 1.7(b)(2) and (3) would not be applicable, and client consent would not be needed. But the existence of the Rule 1.7(b) criteria may not always be apparent or readily determinable at the outset of a representation, and a lawyer should be careful not to resolve unilaterally close conflict questions against the interests of clients or prospective clients. Comment [7] to Rule 1.7 describes the situation as follows:

> The underlying premise [of Rule 1.7(b)] is that disclosure and consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

Thus, in judging whether one representation is "likely" to affect adversely another representation, the lawyer must look at the proposed dual representation from both an objective perspective and from the perspective of the potentially affected client's reasonable expectation of loyalty. Each case will, obviously, turn on the particular facts and circumstances presented.

Inquiry No. 96-2-3
Adopted: January 15, 1997

*Opinion No. 270*

**Whether Subordinate Lawyer Must Alert Client and Report Superior's Misconduct After Lawyer Has Left Practice**

• Where a subordinate lawyer learns that an employing lawyer has sent a client what purports to be copies of correspondence written on the client's behalf, but where the letters were, in fact, never sent, the subordinate lawyer has a duty to assure that the client is informed of the deception and to report the employing lawyer to disciplinary authorities. These duties continue after the subordinate lawyer resigns upon learning of the deception.

**Applicable Rules**

- **Rule 1.4**(Communication)
- **Rule 1.16**(Declining or Terminating Representation)
- **Rule 5.2**(Responsibilities of a Subordinate Lawyer)
- **Rule 8.3**(Reporting Professional Misconduct)
- **Rule 8.4**(Misconduct)

*Inquiry*

Inquirer, a lawyer, was hired through a temporary employment agency to work for a sole practitioner on a particular matter. In the course of the first few days of inquirer's work, the employing lawyer informed her that his client in the matter had recently insisted that he write an aggressive letter to a third party, despite the lawyer's advice that sending such a letter was imprudent. The employing lawyer further advised inquirer that when the client made such demands in the past, his practice was to draft a letter that would satisfy the client's wishes but not send it to the addressee. Instead, the employing lawyer sent a copy of the letter to the client to make it appear to the client that the letter had been sent to the addressee. The employing lawyer did not explain when these events had taken place and did not ask inquirer to draft a fictitious letter.

Inquirer informed the employing lawyer that she felt uncomfortable about this practice, and at the end of the first week of her placement withdrew from the matter and resigned the temporary position. Some weeks later inquirer informed the employing lawyer that she believed that he had committed a serious violation of the Rules of Professional Conduct, and requested that the client be informed of the deceptions. As a result of these conversations, the employing lawyer informed the client of the falsity of the prior letters and withdrew from representation of the client.

Inquirer raises two questions: 1) After leaving the firm, does inquirer have a duty to assure that the client is informed of the employing lawyer's misrepresentations? 2) Upon leaving, does inquirer have a duty to report the violation to disciplinary authorities? In our opinion, the answer to both questions is yes.

*Discussion*

The conduct of the employing lawyer destroyed the heart of the lawyer-client relationship. A client must be able to trust a lawyer and be confident that the lawyer is sharing relevant information and dealing forthrightly and honestly with the client. Deceiving the client about the lawyer's own actions in the matter destroys this fundamental aspect of the lawyer-client relationship.

Dishonesty and deceit are professional misconduct under Rule 8.4(c). Rule 1.4, moreover, enshrines a lawyer's duty of honest communication with the client.[1] It demands that the lawyer keep the client "reasonably informed of the status of a matter." In this case, the failure to keep the client informed took the form of deliberately misleading the client about the lawyer's actions in the case.

Lawyers sometimes have clients who are obstreperous or demand that the lawyer take actions that are inconsistent with the lawyer's best judgment. There are accepted ways of responding to the difficulties such clients present, but affirmatively leading the client to believe the lawyer has taken an action he has not in fact taken is not among them. The harms that could befall a client who has received a fictitious letter from a lawyer are easily imagined. But even if no specific harm occurs, sending a fictitious letter to the client so damages the profes-

[1] A lawyer's duty not to make false statements of material fact extends as well to third parties. *See* Rule 4.1.

sional relationship as to require condemnation of the lawyer's conduct.

*1. Disclosure to the client.*

Had inquirer remained in the employ of the offending lawyer and continued to represent the client beyond the mere week she did, she would have had an obligation to assure that the client was represented consistent with the Rules of Professional Conduct, including the duty of open and honest communication under Rule 1.4.[2] The requirement of truthfulness in the representation that is part of the Rule 1.4 obligation would have required her to take action to see to it that no further fictitious letters be sent and that the client be informed about the fictitious letters sent in the past.

Inquirer, however, no longer represents the client, and we must ascertain what duty to inform, if any, she owed to the client upon her withdrawal. Usually, withdrawal from representation terminates the relationship with the client, leaving only limited residual obligations, such as to protect client confidences and to avoid certain conflicts. *See* Rules 1.6(f) and 1.9. The duty of communication is not among these residual obligations. Inquirer did, however, have the duty upon withdrawal to "take timely steps to the extent practicable to protect a client's interests, . . ." Rule 1.16(d). In the unique circumstances presented in this case, we believe that one of those timely and practicable steps is to assure that the client is informed of the deceptions. The brevity of the representation by inquirer left little time to fulfill the duty to notify the client of the misrepresentation during the course of inquirer's participation in the representation. The only way to remedy the wrongdoing and prevent disadvantage to the client was to act promptly to assure that the client became aware of the deception.

We recognize that Rule 1.16(d) seems intended to address the common situation where a lawyer or entire firm terminates representing a client, not the instance where a single lawyer among two or more on a matter withdraws. Nevertheless, both the language and what we discern as the underlying purpose of the rule — to assure that the client is not disadvantaged by the lawyer's departure — apply equally in both instances. Comment [10] of the Rule states that even when a lawyer is unfairly discharged by a client, the lawyer still must take "all reasonable steps to mitigate the consequences." Surely, then, a lawyer who leaves on account of another lawyer's misconduct has a similar duty to mitigate. Mitigation here means assuring that the client learn the truth about the fictitious letters.

Inquirer should, however, exercise her obligation under Rule 1.16(d) in a manner least disruptive to the existing lawyer-client relationship. Here, inquirer acted appropriately by approaching the employing lawyer and securing his commitment to disclose his acts to the client. If the employing lawyer had refused to inform the client or raised substantial doubt in inquirer's mind whether he would do so, inquirer would have had a duty to inform the client directly.

*2. The obligation to report to disciplinary authorities.*

The next question is whether inquirer has any additional obligation to report the employing lawyer's misconduct to Bar Counsel. Rule 8.3 requires reporting of violations of the Rules of Professional Conduct "that raise a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer . . ." In Opinion 246, we adopted the four-part test adopted by other jurisdictions for determining whether this standard is met: (1) whether the reporting lawyer has knowledge of the violation; (2) whether reporting can be accomplished without disclosure of client confidences or secrets; (3) whether the violation involves a disciplinary rule; and (4) whether the violation raises a substantial question as to honesty, trustworthiness or fitness to practice law.

All four elements are met in this case. The first element —whether a lawyer has "actual knowledge" of a violation — turns on two factors: a "clear belief" that misconduct occurred and "actual knowledge of the pertinent facts." Opinion 246. There is no question here that inquirer clearly believed misconduct occurred. The fact that inquirer left the temporary placement after just a week because of her discomfort with the employing lawyer's conduct confirms that she believed the employing lawyer had in fact engaged in serious wrongdoing.

We also conclude that inquirer had "actual knowledge" of the violation through the admissions the employing lawyer made directly to her. One might argue that inquirer did not have "actual knowledge" in the sense of witnessing first-hand the behavior of the employing lawyer whom she would be reporting. She did not see the letters or know when and to whom the letters were written, or what they said. But we do not interpret the requirement of "actual knowledge" in Rule 8.3 to require direct observation of the underlying facts that constitute a violation. One of the purposes of Rule 8.3 is to require that lawyers report misconduct when the victim is not in a position to discover it. Rule 8.3 does not require that a lawyer report every hunch about wrongdoing. But neither should it require a lawyer to conduct an independent investigation. The frank and unambiguous admission by the employing lawyer that he had sent multiple fictitious letters to this client in connection with this litigation is sufficient.

The remaining elements of the test are easily met. It is clear that the subordinate lawyer could report the violation without disclosing client confidences or secrets. The only "secret" here was that the employing lawyer was deceiving the client. The third and fourth tests, involving the violation of a disciplinary rule that affects the lawyer's honesty, trustworthiness, or fitness to practice, are also clearly met. The employing lawyer's agreement to notify the client of the fictitious letters does not alter this conclusion, since the violation involved the very serious offense of deliberately lying to the client. Inquirer therefore must report the employing lawyer to Bar Counsel.

*Conclusion*

In Opinion 246, we recognized that the judgment whether another lawyer's conduct raises a substantial question as to that lawyer's honesty, trustworthiness or fitness is a "solemn and unenviable task." Here, inquirer's knowledge of serious misconduct not only required that such a judgment be made, but imposed additional duties on her.

Inquiry No. 96-3-9
Adopted: March 19, 1997

*Opinion No. 271*

**Inactive Members: Business Cards and Letterhead**

• A lawyer who is licensed to practice in three jurisdictions, including the District of Columbia, and who plans to become an inactive member of the D.C. Bar cannot indicate that he is admitted to the D.C. Bar on his letterhead and business cards without further elaboration. To avoid misleading

[2] Rule 5.2 binds a subordinate lawyer to comply with the Rules even when under the direction of another lawyer.

the public about his present ability to practice law in the District of Columbia, the lawyer must note his inactive status once it becomes effective.

**Applicable Rules**

- **Rule 7.1**(Communications Concerning a Lawyer's Services)
- **Rule 7.5**(Firm Names and Letterheads)

*Inquiry*

A lawyer is currently an active member of the New Jersey, Pennsylvania and District of Columbia bars. The lawyer is considering becoming an inactive member of the District of Columbia Bar in order to be exempt from the annual District of Columbia Professional License Fee. The lawyer has never had the occasion to practice law in the District of Columbia since becoming a member of the D.C. Bar.

The lawyer inquires whether he can state "Admitted to N.J., P.A. and D.C. bars" on his business cards, business announcements, and letterheads after he becomes an inactive member of the D.C. Bar.

*Discussion*

This inquiry poses the question whether the D.C. Rules of Professional Conduct permit an *inactive* member of the D.C. Bar to indicate "Admitted to N.J., P.A. and D.C. bars" on his business cards and letterhead without any further explanation. The Committee concludes that it would be misleading if the lawyer does not indicate his inactive status on his business cards and letterhead. This omission would violate Rules 7.1 and 7.5.

Rule 7.5 prohibits lawyers from using firm names, letterheads, or other professional designations that violate Rule 7.1. Rule 7.1, in turn, prevents a lawyer from making a false or misleading communication about the lawyer or his services. A communication that is false or misleading "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading" or "contains an assertion about the lawyer or the lawyer's services that cannot be substantiated." Rules 7.1(a)(1); 7.1(a)(2).

In Opinion 244, this Committee held that the name of a nonlawyer partner may be included in the name of a law firm so long as business cards and letterhead clearly indicate that the nonlawyer partner is not a lawyer. Similarly, in ABA Informal Opinion 89-1527 (Feb. 22, 1989), the ABA Committee on Ethics and Professional Responsibility determined that the listing of nonlawyer personnel on a law firm's letterhead and business cards is permissible so long as these materials make it clear that the nonlawyer personnel are not licensed to practice law and do not exercise control over the law firm's professional legal practice. The rationale underlying both Opinion 244 and ABA Informal Opinion 89-1527 is that failing to distinguish those persons who are presently permitted to practice law and those who are not, is misleading under Rule 7.1(a)(1).

Similarly, in Nevada Ethics Opinion 14 (Oct. 8, 1993), the Standing Committee on Ethics and Professional Responsibility held that a lawyer may list the states where she is currently inactive on her letterhead so long as it includes a qualification indicating the lawyer's inactive status. The Standing Committee recognized that it would be potentially misleading to the public for the lawyer not to note her inactive status.

The same rationale applies to the present inquiry. Once a lawyer becomes an inactive member of the D.C. Bar, it would be misleading to state, on his letterhead and business cards, that he is "Admitted to N.J., P.A. and D.C. bars" because this statement implies a present ability to practice law in this jurisdiction. Rule II, sec. 4, of the District of Columbia Court of Appeals Rules Governing the Bar, provides that "[n]o judicial or inactive member shall be entitled to practice law in the District of Columbia." The statement "Admitted to N.J., P.A. and D.C. bars" suggests that the lawyer is presently permitted to practice in all three jurisdictions. As Rule II indicates, however, once the lawyer opts for inactive status, he will no longer be permitted to practice law in the District of Columbia. It would be misleading for the lawyer to state that he is admitted to the D.C. Bar without saying anything more. This would create the impression that the lawyer is presently permitted to practice in D.C. when indeed he is not. Therefore, a lawyer must note his inactive status on letterhead and business cards so as not to violate Rule 7.1 and Rule 7.5.

Inquiry No. 95-11-34
Adopted: April 16, 1997

*Opinion No. 272*

**Conflict of Interests: "Hot Potato"**

- A law firm may continue to represent a client, which it has long counselled on regulatory matters, in an adversary proceeding before the relevant administrative agency, even after a second client that it represents on unrelated matters hires separate counsel and unexpectedly initiates adversary litigation in that administrative agency against the first client and refuses to waive the conflict.

Where a lawyer-client relationship is on-going, conflict of interest issues involving that client are governed by Rule 1.7(b), not Rule 1.9, and thus the lawyer may not take a position adverse to that client on behalf of another. However, the lawyer may withdraw from the representation of the client if he may do so in accordance with the provisions of Rule 1.16, and after he has done so, the lawyer's obligations to that client are governed by Rule 1.9.

**Applicable Rules**

- **Rule 1.7**(Conflict of Interest: General Rule)
- **Rule 1.9**(Conflict of Interest: Former Client)
- **Rule 1.16**(Declining or Terminating Representation)

*Inquiry*

A law firm has requested our opinion concerning its ability to represent two clients of the firm who are adverse in an administrative proceeding. The firm has represented Client A for a considerable period of time with respect to matters that are regulated by that agency. The firm successfully represented Client A in a completed, non-adversarial matter before the agency and thereafter continued to provide advice regarding matters regulated by that agency. The firm also represents Client B in unrelated contract matters, but has not done any work for Client B in some months. Client B represented by separate counsel, has initiated an adversarial action against Client A before that administrative agency. Client B refuses to consent to the law firm's representation of Client A in the administrative matter.

The question posed is whether and under what conditions the law firm, consistent with the D.C. Rules of Professional Conduct, may represent Client A in the administrative proceeding initiated by Client B. The Committee concludes that the law firm may represent Client A in that proceeding if the firm is ethically permitted to withdraw from the separate, unrelated representation of Client B. We find that in the circumstances presented by this inquiry withdrawal is permitted under Rule 1.16.

*Discussion*

The inquiry focuses on the conflict between the firm's two clients, A and B, in the regulatory proceeding, a conflict that arose through no action of the law firm and that was not reasonably foreseeable at the outset of the firm's representation of either of the two clients. Fundamental to the resolution of the questions presented is the difference in the standards applicable under the Rules where a lawyer wishes to oppose a present client and where he wishes to oppose a former client. The first issue to be addressed is whether the lawyer may consider his representation of Client B as having ended for purposes of the conflict of interest rules. The second issue, assuming the answer to the first is in the negative, is whether the lawyer may withdraw as counsel to Client B in order to be free to litigate against that party under the less stringent rules governing conflicts of interest with former clients.

*Governing Conflict of Interest Rules*

Rule 1.7(b)(1) of the D.C. Rules of Professional Conduct provides that, without the fully informed consent of the affected clients, a lawyer may not represent a client in a matter if a position to be taken by that client in that matter is adverse to a position of another client in the same matter. This rule deals with a situation in which the lawyer is representing one client in a matter, such as a litigation or an administrative proceeding, in which another client, which the lawyer represents only in unrelated matters, takes a position adverse to the first client. Rule 1.7 is designed to ensure that an attorney will act with undivided loyalty to all existing clients. Undivided loyalty to a client is, of course, a fundamental tenet of the attorney-client relationship. *See* Wolfram, *Modern Legal Ethics*, 146 (1986).

A lawyer's duty to a former client is somewhat different and is governed by Rule 1.9. Under this rule, a lawyer may sue or otherwise take positions antagonistic to a former client, without disclosure and without the former client's consent, if the new representation is not substantially related to the matter in which the lawyer had represented the former client. The purpose of this rule is to assure the preservation of attorney-client confidences gained in the prior representation and to preserve the reasonable expectations of the former client that the attorney will not seek to benefit from the prior representation at the expense of the former client.

If the fact situation presented by the inquiry were governed by Rule 1.7(b), it is clear that the law firm could not undertake the representation of Client A in the regulatory proceeding in which the firm's Client B was a party with separate representation, without the informed consent of both Clients A and B. On the other hand, if the firm's representation of Client B were at an end at the time Client A sought the firm's assistance against B, the situation would be governed by Rule 1.9 instead of Rule 1.7. In that situation, there would be no impediment to the firm's representing Client A against former Client B as long as the regulatory proceeding was unrelated to the firm's prior representation of former Client B.

*Whether Client B Should Be Regarded as a Current Client*

In light of the difference in the conflict of interest rules governing present and former clients, it is important to determine at the outset whether B should be regarded as a current or a former client. In many instances, such a question can be easily answered from objective facts. If the lawyer had previously withdrawn from the representation of Client B under Rule 1.16, the withdrawal would have terminated the relationship and converted the client into a former client. Or, if the firm had completed the single discrete task for which it had been retained, the client is a former one. Such is the situation envisioned in Comment [8] to Rule 1.3: "If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved." That could be the situation presented to us in this inquiry, as the law firm completed all tasks for Client B and there has been no communication between them for some months.

On the other hand, certain facts are presented which suggest that the attorney/client relationship is continuing in this situation with respect to Client B. We are informed that the inquiring law firm is from time to time consulted by B on contract matters, which may indicate a continuing relationship punctuated by periods of inactivity. B appears to have a subjective belief that it continues to be a client of the firm. Since a reasonable subjective belief can be the basis for the formation of an attorney/client relationship (*see Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978)), it may also be the basis for the continuation of the relationship. The inquirer, moreover, refers to B as a client in its inquiry, and the inquirer sought B's consent to the representation of A in the administrative proceeding. With additional facts which may or may not be present here, another sentence of Comment [8] to Rule 1.3 could apply and lead to the conclusion that B remains a client:

> 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 eliminated 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.

While additional facts might affect our determination, we assume, on the facts presented and for purposes of this analysis, that B is a current client of the inquiring law firm.

*Whether the Lawyer May Withdraw From Representing Client B*

If B is a current client, the question then arises whether the lawyer may withdraw from representing Client B and invoke the more lenient conflict of interest provisions of Rule 1.9 to determine his obligations to his former client. Rule 1.16(b) provides, in relevant part, that a lawyer may withdraw from representing a client only if withdrawal can be accomplished without "material adverse effect" on the interests of the client.

Under the facts presented here, we conclude that the firm may withdraw under Rule 1.16(b) because it appears that withdrawal as counsel from Client B can be accomplished without "material adverse effect" on Client B. All projects for Client B have apparently been completed; no work had been done on the unrelated contract matters for several months; no outstanding projects appear to be contemplated imminently; and Client B was able to obtain different counsel, as reflected by the fact that B retained other counsel to represent it in connection with the administrative proceeding.

*Relevance of Rule 1.7(d)*

Our conclusion respecting the permissibility of the firm's representation of Client A against Client B is consistent with newly promulgated D.C. Rule 1.7(d). While this provision does not in terms apply in this situation, we believe it provides guidance and support for our resolution of this matter under Rule 1.16.

Rule 1.7(d) deals with the situation in which a law firm is representing two clients simultaneously in unrelated matters, and thereafter adversity between the clients' positions in a particular matter develops or for

the first time becomes apparent.[1] Thus, under this Rule, if the law firm had been representing Client A in an ongoing administrative proceeding and Client B, represented by separate counsel, unexpectedly intervened in the administrative proceeding taking positions adverse to Client A, then the law firm would be able to continue both representations so long as it reasonably concluded that neither representation would interfere with the other.[2]

If the lawyer is currently representing both Client A and Client B, why then does Rule 1.7(d) not control in this situation, since one client has retained other counsel and preemptively sued the other? The answer is that when Rule 1.7(d) speaks in terms of a conflict not foreseeable "at the outset of a representation," we believe that this means representation in a particular discrete matter, as contemplated in Rule 1.7(b).

While it would not be unreasonable to interpret the phrase "outset of a representation" to mean the client's initial retention of the lawyer on any matter, it is clear from the context of Rule 1.7(d) that the drafters had in mind the outset of representation in the discrete matter in which the unforeseen conflict arises. The narrow exception to Rule 1.7(b) carved out by the new subsection (d) addresses the situation in which one client potentially has the power to disable the law firm from its ongoing representation of another client in a particular matter already in progress, simply by intervening in the proceeding with separate counsel, which would of course result in substantial prejudice to the client deprived in midstream of its lawyer.[3]

It would be a considerable step beyond this narrow class of "thrust upon" conflicts to extend Rule 1.7(d) to situations where, as here, there is a current general "representation" of a client but the matter in which adversity develops has not yet begun. Such an expansive reading of Rule 1.7(d) would, we believe, make a larger inroad into the protections of Rule 1.7(b) than the drafters of Rule 1.7(d) intended. Thus, we believe that Rule 1.7(d) does not apply where a law firm represents two clients on unrelated matters and thereafter one client decides to sue the second client in a new matter. In this situation, the law firm may represent one of the clients in the new matter only with the informed consent of both clients.

We believe the facts of the instant inquiry take it outside the terms of Rule 1.7(d), since there was no discrete matter in existence prior to the time that Client B initiated the proceeding against Client A. On the other hand, the concerns underlying the enactment of Rule 1.7(d) are clearly implicated here, since Client B's initiation of an action against Client A in a forum in which Client A would reasonably have expected to be able to avail itself of the services of its long-standing lawyers, would work precisely the same sort of "substantial prejudice" towards Client A about which the drafters of the "thrust upon" rule were concerned. We are thus reassured that our conclusion in this situation, that the firm should be able to represent Client A by withdrawing from its representation of Client B if allowed by Rule 1.16, is consistent with the overall policies of the rules.

In sum, we believe that the law firm should be able, under the circumstances presented, (i) to withdraw as counsel to Client B, rendering it a former client; and (ii) to continue thereafter, consistent with Rule 1.9, to represent A in the administrative proceeding, taking positions adverse to former Client B provided that the matter is not substantially related to the work that the law firm did for Client B.

*Analysis of Precedents*

In reaching our conclusion, we are mindful of a line of judicial authority and opinions of Bar committees in other jurisdictions that severely limit a lawyer's ability to terminate a client once a potential conflict arises in order to be able to take positions adverse to the erstwhile client. *See, e.g., Picker Intl., Inc. v. Varian Assoc., Inc.*, 869 F.2d 578 (Fed. Cir. 1989); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Penn Mutual Life Ins. Co. v. Cleveland Mall Associates*, 841 F. Supp. 815 (E.D. Tenn. 1993); *Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F. Supp. 419 (S.D. Fla. 1987). These cases have been cited for the broad proposition that "a law firm may not withdraw from a representation where the purpose is to undertake a new representation adverse to the first client, even in an unrelated matter, and apparently even if the withdrawal would not have an adverse impact on the client." Hazard & Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, p.480.1 (1996). As noted in the Hazard & Hodes handbook, this rule has come to be called the "hot potato" rule as a result of the colorful statement by District Court Judge Aldrich in *Picker Intl., Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd* 869 F.2d 578 (Fed. Cir. 1989): "A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."

We believe this line of authority does not govern the instant inquiry, for several reasons. In the first place, none of these cases was decided by a District of Columbia court; none was interpreting the D.C. Rules; and none of the cases arose in the District of Columbia. We are not aware of a District of Columbia court decision that addresses the issue. Second, and more important, we believe that the cases and bar opinions from the other jurisdictions are distinguishable on the facts presented by this inquiry, as well as by differences in the applicable rules.

We believe that the facts presented here make clear that the broadest statement of the so-called "hot potato rule" is too categorical to apply in all circumstances and is inconsistent with the optional withdrawal provisions of the D.C. Rules. As Professors Hazard and Hodes noted: "The ['hot potato'] rule will not wash if applied uncriti-

[1] Made effective by the D.C. Court of Appeals as of November, 1996, Rule 1.7(d) provides:

> If a conflict not reasonably foreseeable at the outset of a representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

[2] Under new Rule 1.7(d) and its commentary, the law firm should promptly inform both clients of the situation and seek their informed consent. Comment [22] to the Rule states: "Where a conflict is not foreseeable at the outset of the representation and arises only under Rule 1.7(b)(1), a lawyer should seek consent to the conflict at the time that the conflict becomes evident, but if such consent is not given by the opposing party in the matter, the lawyer need not withdraw."

Accordingly, even if the client/opposing party does not consent, the law firm may continue both representations if it concludes that neither representation will be adversely affected by the simultaneous representation of the clients in the separate matters. Of course, either client is free to terminate the representation of it by the law firm.

[3] The prototypical situation covered by Rule 1.7(d) is where a lawyer represents a client in a litigation in which a second client, represented on unrelated matters, is at the outset neither a party nor a contemplated party. If, without any reasonable foreseeability, the second client takes an adverse position in that litigation, it would be quite unfair to disqualify the lawyer from representing the client that he had been representing in the ongoing litigation. Thus, under Rule 1.7(d), even if the second client refuses to consent, the lawyer may continue to represent the first client in the litigation.

cally, *whenever* a lawyer drops a client for the purpose of suing that client on behalf of someone else." Id. at 480.2 (emphasis in original). These noted ethics professors further observe that the approach is "certainly inconsistent with the permissive withdrawal scheme of Rule 1.16(b)" and that a definition of loyalty broad enough to encompass the mere act of dropping a client "would convert the client-lawyer relationship into one of perpetual servitude." *Ibid*

In each of the cited cases in which a lawyer was disqualified from continuing a representation of a client, the lawyer had affirmatively undertaken action — such as initiating a law firm merger — which created the potential conflict. In each of the cases, the representation of the client, whose termination was proposed, was active. Further, each jurisdiction involved had adopted Canon 9, of the former Code of Professional Responsibility, which provides that in all matters an attorney must avoid even the "appearance of impropriety." The D.C. Rules deliberately do not include any provision focusing on the appearance of impropriety. *See* Paragraph [32] Explanation of Committee and Board Revisions, Rule 1.7 of Proposed Rules of Professional Conduct submitted to the District of Columbia Court of Appeals, Nov. 19, 1986, by the Board of Governors of the District of Columbia Bar. Finally, none of the jurisdictions had a "thrust-upon" conflicts rule like D.C.'s Rule 1.7(d), which allows an attorney to remain in a matter after an unforeseeable conflict has arisen. In all of these respects, these cases from other jurisdictions are distinguishable.

It does not appear from the facts of this Inquiry that the law firm had any role in creating the conflict between the two clients, and indeed it had no reason to anticipate that such a conflict would develop when it undertook the representation of A in the administrative agency matters. Nor was the firm currently actively engaged in representing Client B in any particular matter, such that its withdrawal might work some prejudice to Client B.

We believe that the approach taken by the Alabama Supreme Court in *AmSouth Bank v. Drummond Company, Inc.*, 589 So.2d 715 (Ala. 1991) is instructive. In that case, a firm represented Client A in a litigation and Client B, a bank, in unrelated securities matters. During the course of the litigation, Client B, in its fiduciary capacity as a trustee, retained separate counsel and joined the lawsuit against Client A. Client A agreed to waive the conflict, but Client B refused. The law firm promptly withdrew as counsel for Client B and continued to represent Client A in the lawsuit. Former Client B then moved to disqualify the law firm. The Alabama Supreme Court held that the law firm had acted properly in withdrawing as counsel to Client B in the suit because the litigation was not related to the matters on which the firm had represented Client B.

In considering the interplay among Rules 1.7, 1.9 and 1.16 of the Alabama Rules of Professional Conduct — which are similar, but not identical, to the provisions under which we operate in the District of Columbia — the *AmSouth* Court stated that the Rules of Professional Conduct are "rules of reason," and that it had always employed a "common sense" approach to questions concerning the professional conduct of lawyers. The Court emphasized four factors in reaching its conclusion that the law firm acted properly in withdrawing as counsel to Client B and thereby treating Client B as a former client for purposes of the conflict rules:

1. The law firm did not by its actions create the conflict of interest; rather, Client B had taken the initiative;

2. Client A would be substantially prejudiced by the withdrawal of the law firm, which had already devoted hundreds of hours to the defense of A in the litigation

3. The law firm, after failing to obtain consent, promptly withdrew from representing Client B; and

4. Client B would not be materially prejudiced by the withdrawal of the firm as its counsel on the unrelated matters which had consumed very few hours to that point.

While the fact patterns are diverse, a number of other courts have taken a common sense approach to conflict issues in analogous circumstances, permitting the matter to be resolved by withdrawal from representation of a client, where little or no prejudice will result to that client. *See, e.g., Monaghan v. S2S 33 Associates, L.P.*, 1994 WL 623185 (S.D.N.Y. Nov. 9, 1994); *In Re Wingspread Corp.*, 152 B.R. 861 (Bankr. S.D.N.Y. 1993); *Pearson v. Singing River Medical Center Inc.*, 757 F. Supp. 768 (S.D. Miss. 1991); *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 738 F. Supp. 1121 (N.D. Ohio 1990); *Hartford Accident & Indemnity Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534 (S.D.N.Y. 1989); *Penwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980).

In responding to the instant inquiry, we adopt the "common sense" approach of the Alabama Supreme Court in *AmSouth*, encouraged in this course by the recent adoption of D.C. Rule 1.7(d). We believe that the same four factors used by the *AmSouth* Court should be analyzed and balanced in cases when the conflict between two clients is unforeseen and does not arise during the course of a discrete ongoing matter.

On the other hand, we also strongly agree that the important values of client loyalty and confidence of the public in the bar preclude an interpretation of the rules that would enable a lawyer or a law firm to abandon a client during an active representation in anticipation of pursuing another, perhaps more lucrative, conflicting representation. If, for example, a lawyer were in the midst of representing a client when a prospective client came along seeking the lawyer's assistance in bringing a potentially rewarding lawsuit against the existing client in an unrelated matter, we believe that withdrawal from the existing representation under those circumstances would not be permissible under Rule 1.16. Our analysis of such a situation would be that virtually by definition the existing client would suffer material adverse harm by the withdrawal.

Thus we would view the situation quite differently if A were a prospective new client who had approached the law firm to seek the firm's services in a suit against B, an existing client of the firm. In that situation, there is the specter that the law firm was chosen precisely because it had represented the prospective defendant and thus the firm may presumptively be aware of certain facts or attitudes of the prospective defendant that could be useful to the potential new client. Second, in such a situation there is by definition no prior relationship between the prospective client and the law firm and thus there would be no apparent prejudice in requiring the prospective client to find other counsel. Third, the withdrawal of the firm from providing ongoing services for the existing client would almost certainly result in some prejudice, disruption or additional expense for the existing client. Each situation must be analyzed on its facts. In general, we suggest that the more the potential conflict was caused by the actions of the attorney for the benefit of the attorney and/or a prospective or other client, the less justifiable will be the firm's

effort to withdraw and to treat the conflict under the principles applying to former clients. If, as a result, the firm is unable to withdraw, the conflict will have to be analyzed under Rule 1.7. Where, however, as here, A is an existing client with a legitimate and longstanding claim to his lawyer's loyalty and services; where the unrelated matters for Client B had been completed, and the withdrawal can be made without material adverse effect on Client B; where the conflict was precipitated by Client B without any participation by the law firm; and where Client A would suffer material adverse effect by withdrawal, we believe a common sense reconciliation of the competing principles of professional responsibility permits the lawyer to terminate representation of Client B and to treat B as a former client under Rule 1.9. Of course, the withdrawal would have to be effected in a manner conforming to Rule 1.16, which includes a clear communication to the former client. It is also assumed that no confidential information obtained from Client B would be used in any way in the representation of Client A.

It is important to emphasize that in the question presented by the inquiry it is clear that the law firm was required to withdraw from at least one representation. The law firm either had to forego representing Client A in the administrative proceeding or cease representing Client B in the unrelated matters. Because the firm faced that choice and because at least one client was going to lose the firm's services for some purposes, it is pertinent to consider the competing equities, including the relative potential prejudice to each client from withdrawal of the representation of that client.

*Practical Considerations*

The inquiry highlights the importance of distinguishing between existing and former clients. We are aware that in many situations the relationship between an entity and a lawyer or law firm is ambiguous. For example, a corporation, not providing a retainer, may call upon a law firm from time to time for legal advice, paying on a per hour basis for services rendered. During the hiatus between the last call and before another possible request for advice, it may be unclear whether the corporation is an existing client or simply a former and prospective client. Absent an express termination, a court will likely examine the subjective expectations of both parties, as evidenced by their relevant conduct, to determine whether the attorney-client relationship continues. *See, e.g., Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188 (D.N.J. 1989); *Derrickson v. Derrickson*, 541 A.2d 149 (D.C.App. 1988).

For a variety of reasons, including but not limited to the differing conflict rules applicable to existing and former clients, lawyers would be well advised to take steps to delineate the relationship clearly. This may be addressed in part by clearly defining in writing the project or services to be rendered at the outset of the retention. A termination clause may be included in the engagement letter, providing that upon completion of the described services and payment, the attorney-client relationship will be concluded. Alternatively, a law firm may deem it advisable to send close-out letters, politely concluding the relationship, when the assignment is completed. Similarly, it may be prudent for a law firm to comb its client list periodically and advise in writing entities or individuals for whom it has not performed legal work for a substantial period of time that the law firm deems the person or entity to be a former client. While such clarity, even if diplomatically communicated, may not always serve the best business interests of the law firm, an unambiguous statement of the relationship prior to the development of a potential conflict will serve both parties' interests better when a potential conflict is raised in the courts or before an ethics committee.

*Conclusion*

For the reasons discussed above, we believe that after Client B initiated an administrative proceeding with separate counsel against Client A, the law firm was entitled to withdraw from the unrelated representation of Client B, to treat Client B as a former client under the conflict rules and to continue to represent Client A, which it had long counselled in this area of the law, in the administrative proceeding.

Inquiry No. 96-5-14
Adopted: May 21, 1997

*Opinion No. 273*

## Ethical Considerations of Lawyers Moving From One Private Law Firm to Another

• Lawyers who depart one law firm for another, and those law firms, must be attentive to ethical concerns arising from such changes in affiliation. Most importantly, client files must be made available to the lawyer or law firm continuing the client representation, clients must receive suitable notification of their lawyer's change in professional affiliation, and conflict of interest inquiries must be made by the new law firm based on the new lawyer's current and prior representations.

**Applicable Rules**

- **Rule 1.4**(Communication)
- **Rule 1.7**(Conflict of Interest: General Rule)
- **Rule 1.8(i)**(Conflict of Interest: Prohibited Transactions)
- **Rule 1.10(b)**(Imputed Disqualification: General Rule )
- **Rule 1.16(d)**(Declining or Terminating Representation)
- **Rule 7.5(a)**(Firm Names and Letterheads)
- **Rule 8.4(c)**(Misconduct)

*Inquiry*

The increasing movement of lawyers between firms creates a number of ethical issues that are the frequent subject of inquiries to the Bar's ethics counsel. These issues, addressed in this Opinion, principally concern communications and relations with clients, possession and custody of files, conflicts of interest, confidentiality and recruitment of legal and other personnel.

*Discussion*

*Communications and Relations With Clients*

The questions most frequently asked of the Bar's ethics counsel in this area concern what communications with clients of the law firm may be had by the departing lawyer prior to the departure. Typically, a lawyer planning to change law firms will be interested in having the clients to whom the lawyer has provided professional services accompany him/her to the new law firm, and may want to make arrangements to that end before the actual departure.

Under the Rules of Professional Conduct, a lawyer responsible for a client's matter would be obligated to inform that lawyer's clients of his/her planned departure and of the lawyer's prospective new affiliation, and to advise the client whether the lawyer will be able to continue to represent it. Rule of Professional Conduct 1.4, "Communication", obligates a lawyer to keep a client informed "about the status of a matter" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." In most situations, a lawyer's change of affiliation during the course of a representation will be material to a client, as it could affect such client

concerns as billing arrangements, the adequacy of resources to support the lawyer's work for the client, and conflicts of interest. *See, e.g.*, D.C. Bar Ethics Op. 221 (1991); D.C. Bar Ethics Op. 181 (1987); D.C. Bar Ethics Op. 97 (1980). *Accord* North Carolina Bar Ethics Op. RPC 200 (1995); Oregon Bar Ethics Op. 1991-70 (1991); Illinois Bar Ethics Op. 84-13 (1985).

Thus, not only does Rule 1.4 require the lawyer to communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue the representation by the departing lawyer and, if not, to make other representation arrangements.

Advance communication is also necessary when the departing lawyer does not intend to continue a representation in his post-departure affiliation, as Rule 1.16(d) requires a lawyer, when terminating a representation, to give "reasonable notice to the client", and to allow "time for employment of other counsel . . . ." (This discussion assumes that the departing lawyer's withdrawal is otherwise proper under Rule 1.16(a) and (b).)[1]

The lawyer's communication to the client should include the fact and date of the change in affiliation, and whether the lawyer wishes to continue the representation. The lawyer should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm. The client would also need to be informed of any conflict of interest matters affecting its representation at the new firm. Any communication which exceeds that required by ethical rules — for example, an active solicitation of the client to leave the lawyer's current firm and join the lawyer at the new firm — could run afoul of the lawyer's obligations under partnership law (for departing partners), corporate law (for shareholders of a professional corporation) and the common law of obligations of employees (for lawyers who are employees of a firm). For example, solicitation of clients by a departing partner (*i.e.*, activity going beyond neutrally informing a client of the lawyer's planned departure and new affiliation) may be a breach of a partner's fiduciary obligations to other partners and may constitute tortious interference with the law firm's business relations. *See, e.g., Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A. 2d 1175 (Pa. 1978); *Graubard, Mollen, Dannett & Horowitz v. Moskovitz*, 653 N.E. 2d 1179 (N.Y. 1995). Under partnership or other law, a departing lawyer may also be obliged to inform the lawyer's firm, at or around the time the lawyer so notifies clients, of his/her planned departure from the firm. (There appears to be no ethical significance to whether the client or the law firm is first informed of the lawyer's planned departure.)

We note these other legal considerations without commenting on their applicability, as they are not questions of ethics law. There may be a cloudy area between communications required by ethics principles and communications that violate the lawyer's obligations under other law. Because we cannot opine on the nature and limits of such other law, we can do no more than note that such a hazy border exists.

*Files and Other Documents*

Lawyers departing a firm to practice elsewhere will often have an interest in bringing with them files and other documents. These documents may relate directly to client representations, such as litigation pleadings, fact memoranda or transactional materials. Or they may be of a more general nature, such as name and address lists, general research memoranda or correspondence unrelated to specific client representations. May the departing lawyer take these materials with him/her when the lawyer leaves the firm?

This question is only partially answered by the Rules of Professional Conduct. Regarding client files - materials relating to the representation of a client - an initial inquiry is who will continue to represent the client after the lawyer's change of affiliation. That inquiry is important because if the change of affiliation involves the termination of one representation (whether by the departing lawyer, or by the lawyers he/she leaves behind), then the lawyer(s) terminating a relationship must "surrender. . . papers and property to which the client is entitled . . . " (Rule 1.16(d)), meaning that the client files must remain with or be transferred to the lawyer(s) who will be continuing the representation. *See also* D.C. Bar Ethics Op. 168 (1986) (decided under DR 2-110(A)(2), the predecessor of Rule 1.16(d)). *Accord* Utah Bar Ethics Op. 132 (1993); Oregon Bar Ethics Op. 1991-70 (1991).

Where the lawyer or law firm whose relationship with the client is being terminated in this process is owed money for legal services provided, a retaining lien against client files is available only to a very limited extent in the District of Columbia. Under Rule of Professional Conduct 1.8(i):

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

*See also* D.C. Bar Ethics Op. 250 (1994) ("it seems clear to us that retaining liens on client files are now strongly disfavored in the District of Columbia, that the work product exception permitting such liens should be construed narrowly, and that a lawyer should assert a retaining lien on work product relating to a former client only where the exception is clearly applicable and where the lawyer's financial interests . . . 'clearly outweigh the adversely affected interests of his former client.' ") (citing D.C. Bar Ethics Op. 59 (undated)). Thus, a retaining lien may be asserted against client files only in the narrowest of circumstances — against unpaid work product where the client is able to pay and where assertion of the lien will not risk irreparable harm to the client.[2]

It would not be unethical for the lawyer terminating the representation to retain copies of documents from the client's file, although these (like any documents of a former client that contain confidential or secret information under Rule 1.6) would need to continue to be accorded the status and protection due them. We have pre-

[1] If neither the departing lawyer nor the former firm wishes to continue the representation of a client after the lawyer leaves the firm, the lawyer responsible for the representation must insure that such complete withdrawal from representation can be accomplished consistent with Rule of Professional Conduct 1.16. Most importantly, such withdrawal must be capable of being accomplished "without material adverse effect on the interests of the client...." Rule 1.16(b).

[2] The availability in the District of Columbia of retaining lien against client files is substantially narrower that under the ABA Model Rules of Professional Conduct. ABA Model Rule 1.8(j)(1) permits a lawyer to "acquire a lien granted by law to secure the lawyer's fee or expenses" and ABA Model Rule 1.16(d) permits a lawyer, when terminating a relationship with a client, to "retain papers relating to the client to the extent permitted by other law."

viously opined that a law firm may, at its expense, make and retain copies of documents that it is obligated to provide to a former client. D.C. Bar Opinions 168 (1986) and 250 n.2 (1994).

Other questions of ownership of files *vis a vis* a client, and questions of ownership of files and other written materials as between departing lawyers and their former law firms, are not governed primarily by the Rules of Professional Conduct. Some ownership and control questions may be resolved by reference to statutory and common law rules of personal property. And, where the departing lawyer is a partner, partnership law principles would be relevant. Our Committee does not opine on such questions of law. Nevertheless, a lawyer should think carefully about whether the lawyer may take such materials with him/her, because a lawyer's removal or copying, without the firm's consent, of materials from a law firm that do not belong to the lawyer, that are the property of the law firm, and that are intended to be used by the lawyer in his new affiliation, could constitute dishonesty, which is professional misconduct under Rule 8.4(c).

*Conflicts of Interest*

When a lawyer departs one firm to affiliate with another, conflict of interest issues are raised for both firms. For the firm that the lawyer joins, conflict of interest concerns are raised whether the lawyer arrives with or without clients. The relevant Rules of Professional Conduct are 1.10(b) and 1.7. For the lawyer who arrives without clients, the work the lawyer performed at the former firm may affect the ability of the new firm to represent its clients. Rule 1.10(b) extends a variation of the "former client" provisions of Rule 1.9 to the new firm by prohibiting it from representing a person in a matter:

> which is the same as, or substantially related to a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 [Confidentiality] that is material to the matter.

The Rule applies a four-part conjunctive test for disqualification based on the newly arrived lawyer's former legal work: (1) the lawyer must have formerly represented the client; (2) the new matter must be the same as or substantially related to the prior representation; (3) the position of the prospective new client must be adverse to that of the former client; and (4) the lawyer must actually (not just imputedly) have learned information confidential to the former client which is material to the new representation. One notable feature of the Rule is that it leaves open the possibility that a lawyer, such as an associate who had only a peripheral involvement in a matter (as by preparing a research memorandum on a point of law), would not subject his new law firm to a disqualification under Rule 1.10(b) because that lawyer did not learn any client confidences in the course of the representation.

As we noted in D.C. Bar Opinion 174 (1986) (decided under the former Code of Professional Conduct), a conflict of interest disqualification of a firm cannot be cured by screening from a matter the lawyer whose prior representation created the conflict. The affected former client may, however, consent to the new law firm's representation of the new client (Rule 1.10(d)), and might seek such screening as a condition to its consent. *See also Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 48-49 (D.C. 1984) (en banc) for a discussion of the meaning of "substantially related" as that term is used in Rule 1.10.

A different conflict scenario is presented with respect to clients who accompany a lawyer to a new firm. The new firm must treat each of those representations as new ones for it, testing its ability to undertake those representations against the requirements of Rules 1.7 and 1.9.

Finally, the firm from which the lawyer departed is subject to an ethical constraint in respect of the representations of persons who became former clients when the lawyer departed. Under Rules 1.9 and 1.10(c), the firm may not represent persons with interests materially adverse to those of a former client in matters which are the same or substantially related to those in which the formerly associated lawyer represented the client while at the firm. The firm also has continuing obligations under Rule 1.6 to preserve the confidences of its former clients.

*Confidentiality*

Former clients, whether they become so because a representation has been completed, because the client terminates the relationship or because the lawyer departs the firm at which the representation arose, are entitled to the same protection of secrets and confidences as current clients. *See* Rule 1.6(f). And so, where a lawyer who departs one firm for another, leaving the representation of certain clients with the former firm, that lawyer must insure that he/she continues to guard against unauthorized use or disclosure of information protected under Rule 1.6. Where the lawyer brings files of a former client to the new law firm, care must be taken not to reveal confidential information in those files to others, including the lawyer's new professional colleagues.

*Efforts to Interest Other Lawyers or Staff in Changing Firms*

Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations.[3]

*Law Firm Name*

Lastly, what must the departing lawyer's firm do if that lawyer's name appears in its firm name and/or on its stationery? The answer is found in Rule 7.5(a), which prohibits the use of a firm name or letterhead which is false or misleading. Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications. *See* Rule 7.5, Comment [1]: "[I]t is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm."

Inquiry No. 97-1-1
Adopted: September 17, 1997

*Opinion No. 274*

## Government Agency Attorneys May Participate in a Public Meeting at Which Claimants Who Are Represented By Counsel Are Present

• A government agency has a practice of conducting public meetings for people who have claims under the agency's program. The purpose of these meetings is to

[3] In an extreme case, where deception and/or dishonesty were employed by the departing lawyer in inducing other law firm personnel to depart their current employer, the lawyer's conduct might run afoul of Rule 8.4(c), under which it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Recruiting activity, however, would not ordinarily constitute an ethics violation.

explain the program, explain agency policies, and respond to questions.

A lawyer who represents a group of claimants cannot prevent the agency from conducting the meeting on the ground that the meeting constitutes an unauthorized contact by the agency's counsel with represented parties under Rule 4.2(a). This is true regardless of the fact that the agency's lawyers may attend, and even participate in, the meeting.

**Applicable Rule**

- **Rule 4.2(a)**(Communication between lawyer and opposing parties)

*Inquiry*

The Pension Benefit Guaranty Corporation ("PBGC") is a corporation owned by the United States Government and established pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1302. PBGC administers, among other things, a pension plan termination insurance program. When an under-funded pension plan terminates, PBGC is generally appointed as a statutory trustee of the plan. As trustee, PBGC has powers analogous to those of a trustee under Section 704 of the Bankruptcy Code, 11 U.S.C. §704, and PBGC is responsible for paying benefits under the plan in accordance with requirements of Title IV of ERISA. 29 U.S.C. §1342(d)(3).

In the circumstances giving rise to this inquiry, PBGC was appointed to be trustee of a Colorado-based plan having approximately 4300 participants at the time of its termination. Pursuant to the agency's established practice, PBGC sent a notice to the known plan participants inviting them to attend a meeting convened by PBGC.

The purpose of the meeting was to provide general information about the PBGC insurance system, to describe the general limitations of the ERISA guarantee, and to answer questions. At meetings of this type, PBGC employees discuss the procedures for filing claims, the nature and extent of these types of benefits that are guaranteed by PBGC, and the agency's policies and procedures for handling claims. The meetings are thought to be an efficient method of disseminating information to claimants and of answering recurrent questions that claimants tend to raise with the agency.

Before the time of the meeting, 300 of the plan beneficiaries retained counsel to assist them in obtaining payment of certain specific claims. PBGC had responsibility for determining in the first instance whether the beneficiary's claims would be paid.

The attorney representing 300 of the beneficiary/claimants wrote to PBGC and demanded that the agency not hold the meeting. Counsel asserted that the proposed meeting was an attempt to side-step or undermine her representation of her 300 claimant clients in violation of Rule 4.2(a). Counsel demanded that PBGC deal directly and exclusively with her with regard to the claims of her clients.

PBGC meetings of this type are conducted by a non-lawyer employee of PBGC. However, a PBGC staff attorney attends the meeting for the purpose of providing advice to the non-lawyer concerning the conduct of the meeting. The staff attorney typically does not address the meeting, although it is possible that if a question beyond the legal competence of the non-lawyer PBGC employee who is conducting the meeting were asked, the PBGC staff attorney might give part or all of the response to the question.

The Inquirer, a staff attorney for PBGC, has requested the Committee's opinion on the application of Rule 4.2(a) to the circumstances described above. Specifically, the Inquirer asks whether: (1) PBGC was obliged to cancel the meeting in response to counsel's demand; (2) PBGC was required to direct its attorneys not to attend the meeting; and (3)PBGC should invite or direct counsel's 300 beneficiary/claimant clients to leave the meeting.

The Inquirer has also requested the Committee's opinion on the application of Rule 4.2(a) to PBGC's practice of using contractors to perform administerial functions for PBGC. These contractors operate as "field benefit administrators" in locations where PBGC does not have employee representatives. The contractors work under the supervision of non-lawyer employees of PBGC and provide most of the front-line services to plan participants. For example, such services may include collecting of plan records, applications, and personal data from claimants and explaining plan provisions and PBGC guarantee limitations. In this capacity, the contractors receive numerous telephone inquiries and office visits from participants who may, or may not, be represented by counsel.

*Discussion*

Rule 4.2(a) provides that:

> During the course of representing a client, a lawyer shall not communicate, or cause another to communicate, about the subject of the representation with a party known to be represented by a another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such party or is authorized by law to do so.

It is first worth noting the purpose of the rule at issue here. Rule 4.2(a) is designed to prevent a lawyer from communicating directly with opposing counsel's client. Among its main purposes is the protection of the adversary system. A client who receives a communication from opposing counsel without the participation of his own counsel may not be able to evaluate the correctness of statements of law made by opposing counsel. Without the participation of his lawyer, an unprotected client may be induced by opposing counsel into making admissions, waiving confidentiality, or taking positions detrimental to the client's interest without the client's realizing it because the client's lawyer is not aware of, and not participating in, the communication. *See* D.C. Bar Op. 258 (1995), particularly text at nns. 5-10. Rule 4.2(a) is, by its very terms, waivable by counsel (and only by counsel) in the sense that, in appropriate circumstances, a lawyer can authorize opposing counsel to contact his client without the lawyer's participation.

There are a number of reasons why the Committee believes that Rule 4.2(a) does not prevent PBGC's conduct at issue in this inquiry. In the first place, the meetings that are described by Inquirer are initiated by PBGC itself as part of its functions as trustee, and the attendance of the PBGC's staff attorney is incidental. There is no indication that PBGC's staff attorneys are using non-lawyer employees of the agency to accomplish indirectly anything that the staff attorneys would themselves be prevented by Rule 4.2(a) from accomplishing directly.

The rule does not by definition apply to non-lawyers and therefore by extension does not apply to the clients of lawyers unless there is some indication - not present here -that lawyers are using non-lawyers to circumvent the rules. To the extent that PBGC is the client of its in-house lawyers in this situation, the ethics rules for lawyers would not prevent the non-lawyer employees of the agency from conducting meetings of this type.

The inquiry, seen in this light, resolves into a question of whether the non-lawyer employees of PBGC who conduct these meetings can be accompanied to the meetings by the agency's counsel when some (but probably not all) members of the audience may be represented by counsel. We discern no valid reason why PBGC's non-lawyer employees should be deprived of the advice of the agency's counsel in these circumstances.

Finally, when the lawyer representing the claimants is aware in advance of the meeting - which she undoubtedly was in this case - the lawyer representing the claimants has a number of choices: she can consent to her clients' attendance at the meeting; she can attend the meeting with her clients; or she can counsel her clients not to attend. The lawyer for the claimants, however, seeks to convert a prophylactic rule, which prevents unconsented contact with her clients by opposing counsel, into an offensive weapon by which the lawyer can prevent PBGC from conducting its public meeting.

PBGC does not discuss the facts and circumstances of individual claimants at such meetings. Rather, as we understand it, the purpose of these meetings is to give general information concerning the outlines of the agency's program and the types of benefits that the agency guarantees and to answer general questions along these lines. The rules of ethics for lawyers should not interfere with the right of non-lawyer employees and staff attorneys for a government agency from communicating this kind of useful information to the interested public absent a very clear reason to do so.

It may be possible to imagine circumstances in which a question from the floor was so specifically idiosyncratic to the questioner in a particular case where the agency staff attorney knows that the questioner is represented by counsel, that prudence would dictate deferring a response to such a question to the ordinary course of the claims adjudication process.

However, so long as the focus of the meeting remains on the provision of general information to the interested public, nothing in Rule 4.2(a) impinges on the conduct of non-lawyer employees of the agency, and lawyer employees of the agency can participate in the process unless they know that they are being drawn into a discussion of an individualized subject as to which a potential claimant is represented by counsel.

As to the second branch of the inquiry concerning the field benefit administrators, these contractors are, by definition, not lawyers, and therefore nothing in Rule 4.2(a) impinges on their conduct. Only in a circumstance where an agency attorney sought to communicate with a represented client through the intermediary of a field benefit administrator with the purpose of circumventing the claimant's attorney would Rule 4.2(a) come into effect. However, on the facts of the inquiry presented to us, there is no indication that such conduct is present here.

Inquiry No. 94-8-33
Adopted: September 17, 1997

*Opinion No. 275*

**Receipt of Confidential Information Bars Subsequent Representation of Another Client in the Same or a Substantially Related Matter Unless Screen Can be Erected**

- A law firm which is contacted by a potential class action plaintiff and which receives confidential or secret information from the potential client may not, after the law firm and the potential client fail to agree on the terms of the engagement, seek to identify another client to represent in the same or substantially related matter unless the attorneys who received the confidential information from the first potential client can be screened from the subsequent representation or the first potential client consents to the subsequent representation.

**Applicable Rules**

- **Rule 1.6** (Confidentiality)
- **Rule 1.10** (Imputed Disqualification)

*Inquiry*

A law firm was contacted by a potential client interested in serving as a representative of a plaintiff class in a contingent fee antitrust class action. The potential client and various firm lawyers had discussions concerning the facts on which the client's claim might be based, and the potential client provided the firm with numerous materials relating to the client's claim. Most of these materials were publicly available, consisting in part of litigation pleadings, public reports of governmental regulatory bodies, and newspaper articles. However, not all of the materials were publicly available; some of them consisted of the prospective client's business records, correspondence, and handwritten notes. The client has emphatically stated in writing that he expected the inquiring firm to hold the materials he provided to the firm in confidence.

Negotiations with the potential client concerning fees were unsuccessful, and the law firm now wishes to seek a different person to represent the class on whose behalf the firm could undertake litigation in the same subject area. The law firm has asked if it may do so consistent with its obligations under the ethics rules.

*Discussion*

The point of departure for our analysis is Rule 1.6, which states in part:

> (a) [A] lawyer shall not knowingly ... (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.
>
> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Comment [6] to Rule 1.6 further states that the rule of attorney-client confidentiality applies not merely to matters communicated in confidence by the client, but also to all information gained in the course of the professional relationship that the client requests be held inviolate. "This ethical precept . . . exists without regard to the nature or source of the information or the fact that others share the knowledge." *Id.*

*The Law Firm Received Confidential Information*

The inquiry in this case focuses heavily on the notion that many of the materials presented to the law firm by the first potential client are "publicly available." Because there is no attorney-client privilege as to publicly available materials, the inquirer contends that there is no ethical proscription against the law firm's use of those materials in connection with the second representation.

However, the confidentiality rule of ethics is broader than the attorney-client privi-

lege. *See* Rule 1.6, Comments [5] and [6]. The Rule also protects "secrets," which can include information divulged by a client to a lawyer that the client asks be kept confidential. For the reasons set forth below, we conclude that, on the particular facts of this inquiry, the confidentiality rule prevents the inquiring attorneys from seeking or accepting a second representation on behalf of the class that was identified for the law firm by the first potential client.

First, the facts of the inquiry before us argue strongly that the inquiring lawyers have bound themselves to keep the information divulged by the first potential client confidential. Unlike many other obligations of an attorney that arise only after the attorney-client relationship is fully formed, a lawyer's confidentiality obligations begin as soon as a potential client consults with a lawyer. Rule 1.6, Comment [7]. Thus, the fact that the potential client never became an actual client of the inquiring law firm does not release the inquiring law firm from its confidentiality obligations. Second, not all of the information imparted by the first potential client was publicly available. Among the records provided to the law firm and reviewed by it were business records, handwritten notes, and correspondence, none of which were "publicly available" as that term is used in Rule 1.6.

Furthermore, the potential client, in the course of discussing the claim that he wished to assert with the assistance of the inquiring firm, divulged to the firm's lawyers facts and circumstances that the potential client had developed through other litigation. Thus, the potential client had paid for assembling and developing material that indicated the potential of a cause of action on behalf of a class of plaintiffs. The potential client wished to become a named plaintiff on behalf of the class with the possibility of being compensated for serving as such, and he clearly stated in writing that he expected the firm to keep the materials that he submitted to it confidential. The materials are therefore "secrets" of the potential client under our Rules. It follows that the inquiring lawyers may not, after failing to reach an agreement on fees with the potential client, exploit information developed at the potential client's expense for the advantage of the law firm or the law firm's subsequent client.

Of course, what a lawyer learns about the law in general, about how a particular industry operates, or about how legal principles may apply to certain kinds of cases in the course of doing professional work for a client may be used by the lawyer in representing another client. *See* our Opinion No. 175 (1986).[1] The general principles announced there do not apply to this case because the law firm in this inquiry is not proposing to use general knowledge, but instead wishes to use a specific set of facts brought to the firm's attention and developed in part by the potential client. The assembly and presentation of those facts is the product of the first potential client's efforts. To allow the firm to appropriate that knowledge and exploit the specific body of information assembled by the potential client to his detriment is not the sort of generalized use that is contemplated by the principles discussed in Opinion No. 175.

*Imputed Disqualification*

We turn now to the question whether the whole of the inquiring law firm is disqualified because of the contact of some of the firm's lawyers with the first potential client. Rule 1.10 addresses the imputation of a disqualification to all members of the same firm. The Rule does not explicitly refer to Rule 1.6 as one of the rules that gives rise to an imputed disqualification, but new Comments[7] through [9] make it clear that there is an interplay between Rule1.10(a) and Rule1.6. Those comments make explicit that the loyalty obligations of each lawyer in the firm, which are imputed under Rule 1.10(a), would be implicated when individual lawyers had acquired confidential information from a potential client but, because of Rule 1.6, could not share that information with another client as to whose matter the information is relevant. The lawyers who met with the first potential client and reviewed his materials would be disqualified from representing a second class plaintiff and, by operation of Rule 1.10, so would all of the firm's lawyers.

As of November 1, 1996, however, the District of Columbia Court of Appeals amended Rule 1.10(a). The new proviso in Rule 1.10(a) establishes an exception to the imputation rule, which would otherwise disqualify all lawyers in the law firm from representing a client simply because a single lawyer or a specific group of lawyers in the firm acquired confidential information during an initial interview with a prospective client. Thus, even if the firm cannot share the confidential information of the potential client with an existing or future firm client, in those situations where the integrity of the confidential information can be maintained by walling off the lawyer or lawyers who interviewed the prospective client, the firm may continue to represent its existing client or may thereafter acquire other adverse clients in the same matter.

But the new proviso does not cover the present inquiry because the inquiring firm cannot now effectively wall off the lawyers who consulted with the first potential client. As we understand the facts, given the amount of time that passed between the initial interview and the end of the fee negotiations (several months), too many lawyers (virtually the whole litigation section) had been exposed to the potential client's confidential information, and too many discussions around the firm had occurred before the firm broke off its negotiations with the potential client to make walling off a practical and effective solution. Therefore, the inquiring firm cannot avail itself of the new exception to Rule 1.10.

We believe that the law firm must honor its confidentiality obligations to the first potential client and must refrain from seeking a second client to initiate the very same litigation that was presented to it by the first client, absent an informed waiver from the first client. The same result could apply even if a second client sought out the firm without its taking any initiative. The information that the firm received from the first potential client is: (1) protected by the confidentiality rule; (2) directly relevant to the representation of the second client; but (3) may not be used by the law firm or revealed to the second client, a limitation that could conceivably violate the firm's duties of zeal and loyalty to the second client. Furthermore, the use of the confidential information in the representation of the second client would arguably disadvantage the first potential client who wishes to be the class representative, thereby violating Rule 1.6(a)(2).

Inquiry No. 96-11-32
Adopted: November 19, 1977

*Opinion No. 276*

**Lawyer Mediator Must Conduct Conflicts Check**

• Rule 1.7 of the District of Columbia Rules of Professional Conduct requires that a lawyer acting as a mediator conduct a conflict check as to the immediate par-

[1] *See also* Comment [10] to Rule 1.7, which points out that: "The fact that two clients are business competitors, standing alone, is usually not a bar to simultaneous representation." The same principle would apply a fortiori to sequential representations.

ties to the mediation in order to ensure that the lawyer's exercise of professional judgment on behalf of her clients is not adversely affected by service as a mediator. Our Rules do not require, however, that a lawyer/mediator conduct a conflict-of-interest investigation of officers, directors, or stockholders of affiliated corporate entities when serving as mediator in a case involving corporate parties. Rule 8.4, which forbids misrepresentation, further requires that a lawyer holding herself out as a neutral in a mediation must disclose to the parties the results of the required conflict check, if the lawyer or her firm represents one of the parties before her or a client adverse to one of the parties to the mediation.

**Applicable Rules**

- **Rule 2.2** (Intermediary)
- **Rule 1.7** (Conflict of Interest)
- **Rule 8.4** (Misconduct)

*Inquiry*

The Inquirer, a law firm, has been asked by the District of Columbia Superior Court to make its lawyers available to mediate cases under the court's Alternative Dispute Resolution ("ADR") program. Lawyers participating in the ADR mediation program provide their professional services to the Superior Court for a nominal fee, paid by the court, to assist the court with its congested docket. Lawyers in the inquiring firm wish to participate in this program.

As stated by the Inquirer, the attorneys participating in this program do not provide legal services or representation to either side in the dispute. They are assigned by the court rather than chosen by the parties. An attorney assigned to a case is supposed to act "as a neutral third party" to assist "parties in a dispute to communicate their positions on issues and to explore possible solutions or settlements. The mediator does not give an evaluation or opinion of the case, but rather prompts the parties to assess their relative interests and positions and to evaluate their own cases by the exchange of information, ideas and alternatives for settlement." 1996 Program Summary on Alternative Dispute Resolution, Superior Court of the District of Columbia, at 5. In this task, they do not receive confidential information from the parties in the context of a lawyer-client relationship. They may, however, receive confidential information from the parties in the context of the mediation, and they agree to keep that information confidential.

The Inquirer states that its firm has found it "extremely burdensome" to conduct a conflict-of-interest check for the parties in the mediation and also as to the officers, directors, and stockholders of corporate parties, and for the affiliated entities, spouses, and partners of non-corporate entities. In lieu of such a procedure, which the Inquirer apparently conducts in connection with the firm's engagements for its clients, the Inquirer seeks to conduct a less extensive conflict-of-interest search that would determine only if the firm is currently representing any party to the mediation or any client whose interests are adverse to one of the parties to the mediation. The lawyer would advise the parties to the mediation that no effort has been made to determine if the firm is representing any officer, director, or stockholder of a corporate party, any affiliated entity, or any spouse or partner of a party. The Inquirer asks whether the firm's attorney's obligations under the Rules are met by this less extensive conflict-of-interest check.

*Discussion*

Our Rules address primarily the duties of a lawyer representing clients, and not the duties of a lawyer acting as a mediator or arbitrator between non-clients.[1] Our Rules require, however, that a lawyer avoid client conflicts arising from "the lawyer's responsibilities to . . . a third party . . ." Rule 1.7(b)(4); *and see* Rule 1.3. Because service as a mediator in a case involving a client or a client's adversary could easily compromise a lawyer's ability to represent existing clients, we believe that some form of conflict check is required prior to service as a mediator.[2]

The potential for conflict in such a situation is evident. For example, in order to serve effectively, mediators normally become privy to confidential information about the positions of the parties to the litigation. Should the mediator acquire confidential information through the mediation that would be helpful or harmful to her firm's existing clients, she (as well as other members of her firm) might be obliged to use such information in order to satisfy her ethical duty of zealous representation. *See generally* Rule 1.3; *and see* Rule 1.10: Rule 1.6 (protecting from disclosure only client confidences).

Yet the lawyer/mediator would be barred from using that information by virtue of her promise of confidentiality to the parties to the mediation. The standard Statement of Understanding applicable to the civil mediation program in the Superior Court, executed prior to mediation by the parties and the mediator, provides that "[t]he parties, individuals and attorneys whose signatures appear below [including the mediator] agree that all proceedings . . . including any statement made or document prepared . . . are privileged and shall not be disclosed in any subsequent proceeding or document . . . ."[3]

Given the substantial potential for adverse impact upon the interests of existing firm clients, we believe that a lawyer is required by Rule 1.7 to conduct a conflicts check to ascertain whether she or her law firm represents any party to the mediation or any party whose interests are adverse to the parties to the mediation.

We do not believe that a conflicts check of corporate constituents is normally required of lawyer/mediators under our Rules, however. Rule 1.13 provides generally that a lawyer representing an organization represents the organization and not the directors, officers, shareholders, or employees of that organization. Where this is true, the possibility of obtaining confidential information through service as a mediator and yet being unable to use that information on behalf of one's clients affects only the client organization, and not its non-client constituents. In such situations, no broader conflict check is required.

[1] Rule 2.2 (Intermediary) specifically addresses the role of a lawyer acting as mediator, but it applies only to situations in which a lawyer attempts to mediate between two or more of the lawyer's clients with actual or potentially conflicting interests. Lawyers participating in the ADR program do not represent as clients the parties who appear before them and therefore do not intermediate between clients.

[2] We note that our Rules prohibit conflicts of interest but do not by their express terms require a law firm to have a conflicts checking system. In a firm of any size, some system for avoiding conflicts would seem mandatory under Rules 1.7 and 1.10. *Cf.* DR 5-105(E) of the Lawyer's Code of Professional Responsibility of the New York State Bar Association (requiring lawyers to have a conflicts checking system in place). We assume for purposes of discussion that the firm in question is of sufficient size to require a conflict check system.

[3] When acting as an arbitrator or a mediator, confidentiality also may be required by applicable codes of ethics, such as the American Arbitration Association/American Bar Association Code of Ethics for Arbitration in Commercial Disputes and the Commercial Mediation Rules of the American Arbitration Association. Such codes impose more extensive ethical requirements, as discussed in subsequent portions of this opinion.

Our Rules, however, recognize situations in which some particular structure of the client or the reasonable expectations of the constituents of the client alters the normal organizational representation principle set forth in Rule 1.13. *See* Comments [13], [14] and [15] to Rule 1.7. In such cases, because the lawyer represents a broader range of interests and of clients, a broader conflict check would be ethically required to avoid compromising the interests of the lawyer's clients.[4]

If the conflict check required by our Rule 1.7 discloses that the mediator or her firm represents or is adverse to any of the parties to the mediation (whether those parties are the organizations directly involved or their officers, directors, and stockholders in appropriate situations), that information must be disclosed to the affected client(s) unless the mediator withdraws of her own accord, and client consent is sought to the activity that raises a conflict under Rule 1.7(b)(4).

Additionally, Rule 8.4(c), which precludes a lawyer from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation," prevents a lawyer from misrepresenting her status as a neutral if she knows in fact that she is not neutral due to representation of a client which is a party or adverse to a party, involved in the proceeding, or knows of some other circumstance (such as a personal relationship with a party to the arbitration) which could affect her neutrality. To avoid misrepresentation of neutral status, this Rule requires disclosure of the results of the conflict check to the parties to the mediation.[5] We do not believe, however, that Rule 8.4(c) requires every lawyer acting as a mediator to investigate information about law firm clients of which she is not actually aware that arguably could call into question her "neutrality."[6]

Thus we conclude that, absent unusual circumstances, a lawyer/mediator satisfies her ethical duties by conducting a conflicts check as to the immediate parties to the mediation and by disclosing the results to the parties.

Inquiry No. 93-2-5
Adopted: November 19, 1997

*Opinion No. 277*

**Retention by Former Law Firm of Withdrawing Partner's Name**

- A law firm may retain in its name the name of a former partner, except where the former partner is practicing law elsewhere or where the firm is prohibited by law from retaining the name.

**Applicable Rules**

- **Rule 7.1** (Communications Concerning a Lawyer's Services)
- **Rule 7.5** (Firm Names and Letterheads)

*Inquiry*

Lawyer B was a founding partner of the law firm "A & B", and now plans to sever her relationship with the firm. She is unsure whether she will continue to practice law after she resigns from "A & B" but, regardless, wants her name removed from the firm's name after she departs. She inquires whether the Rules of Professional Conduct require the law firm, at her request, to remove her name from the firm name once she resigns.

*Discussion*

This inquiry presents a particular aspect of a broader question concerning the circumstances under which a law firm may ethically retain in its name the name of a lawyer no longer associated with the firm. The pertinent Rule of Professional Conduct is 7.5(a), providing that:

> 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.

The relevant portion of Rule 7.1 incorporated in Rule 7.5(a) is as follows:

> (a) 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:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

Taken together, these provisions can be distilled to a prohibition on the use of a law

[4] For mediators serving in other contexts and for arbitrators, a broad conflict check might be required by other ethical rules governing mediators and arbitrators. The Commercial Mediation Rules of the American Arbitration Association provide, for example, that no person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties, Commercial Mediation Rule 5, and that prior to accepting appointment as a mediator, the prospective mediator shall disclose any circumstance likely to create a presumption of bias. *Id.* A similar requirement is imposed upon arbitrators under the Code of Ethics for Arbitrators in Commercial Disputes promulgated by a Joint Committee of the American Arbitration Association and the American Bar Association. Canon II of that Code requires that "[a] n arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias," and further specifies that disclosure should extend to "relationships involving members of their families or their current employers, partners or business associates." While lawyers acting as mediators and arbitrators should consult and observe all governing ethical codes, we decline to find embedded in our Rules of Professional Conduct any blanket ethical obligations to comply with such codes.

[5] Situations may arise in which the lawyer's confidentiality obligations to her firm's clients may preclude disclosure of relevant results of a conflicts check to the parties to a mediation. The firm's representation may in and of itself be confidential or the nature of the representation may be confidential. In such a case, the lawyer/mediator would have no choice but to resolve the problem by withdrawing as mediator without further comment.

[6] We note that in commercial arbitration,where the arbitrator generally acts as a private judge with substantial authority to bind to parties, the extent of mandatory investigation and disclosure has been litigated frequently. Even so, no clear line exists between relationships likely to affect an arbitrator's neutrality and trivial or irrelevant relationships. *See generally Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 151-52 (1968) (distinguishing between relationships likely to affect arbitrator's judgment from relationship that are merely "trivial"); *and see* A.A.A./A.B.A. Code of Ethics Canon II (noting that the "provisions of the Code are intended to be applied realistically so that the burden of detailed disclosure does not become so great that it is impractical for persons in the business world to be arbitrators, thereby depriving the parties of the services of those who might be best informed and qualified to decide particular types of cases." *See also Al-Harbi v. Citibank, N.A.*, 85 F.3d 680 (D.C. Cir. 1996); *Oversees Private Investment Corp. v. Anaconda Co.*, 418 F. Supp. 107, 112 (D.D.C. 1976); *but see Schmitz v. Zilveti*, 20 F. 3d 1043 (9th Cir. 1994) (vacating arbitration award where arbitrator's law firm had extensively represented parent company of entity involved in arbitration and arbitrator had run conflict check only on the subsidiary entity, in case arising under NASD rules specifically requiring investigation of possible conflicts of interest). We do not decide whether and to what extent these principles apply to mediation, a non-binding procedure that is substantially different from arbitration. We merely conclude that the lawyer's duty under Rule 8.4 to avoid misrepresentation does not require that every mediator in every case investigate and disclose every conceivable relationship that a party might claim affects her neutrality.

firm name that is false or misleading. As regards lawyers who have departed a law firm, Comment [1] to Rule 7.5 states that, "it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm."

From Comment [1], and its apparent premise that the use of a lawyer's name in a firm name would imply the presence there of that lawyer, one could conclude that it is unethical to include in a firm name the name of *any* lawyer no longer associated with the firm, whether by withdrawal, retirement or death. In each of these situations, the firm may be falsely implying that such lawyer remains associated with the firm.

But at least as regards retired or deceased partners, ethics law has been clear since at least the time of the predecessor Code of Professional Responsibility that the names of such partners could ethically be included in law firm names. Former Disciplinary Rule 2-102(B) provided that "if otherwise lawful, a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or a predecessor firm in a continuing line of succession." Former EC (Ethical Consideration) 2-11 expanded on this provision as follows:

> For many years some law firms have used a firm name retaining one or more names of deceased or retired partners and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

The current Rules of Professional Conduct continue this acknowledgement that it is not false or misleading *per se* to include in the firm name the name of a partner no longer associated with the firm, although they do so by characterizing such usage as a trade name. Rule 7.5(a) specifically recognizes that a lawyer may practice under a trade name, and Comment [1] thereto notes that "any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification."

So, at least for deceased and retired "name partners", Rule 7.5(a) recognizes that its concern about falsely implying the presence of a lawyer no longer associated with the firm does not cover all situations, and must yield in some circumstances to another consideration — that a firm name often only identifies a group of lawyers practicing together in a definable group, and does not necessarily imply that the name partners are themselves practicing there.[1]

Ethics opinions, in the District of Columbia and elsewhere, have long recognized that it is permissible for law firms to use trade names that include the names of deceased or retired partners. In Opinion No. 224 (Dec. 17, 1991), this Committee determined that a lawyer is not precluded from continuing to use a former partnership name, where his partners had retired or otherwise left the firm. Similarly, in Formal Opinion No. 90-357 (1990), the ABA recognized that if a lawyer, who is a name partner in a law firm, is retiring to become "of counsel," the lawyer's name may be retained in the firm's name. Other jurisdictions have reached the same conclusion. *See* Ethics Comm.of the Mass. Bar Assoc., Op. No. 81-5, (April 14, 1981); and Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-1001 (April 30, 1984).

To fall under the "trade name" exception, however, the use of the deceased or retired partner's name must be permitted under the law applicable to one's property value in the commercial use of his or her name. Such use could, depending on the circumstances, be governed by common law or partnership or corporate law. *See, e.g., Nercessian v. Homasian Carpet Enterprises, Inc.,* 60 N.Y. 2d 875, 458 N.E. 2d 822 (1983). If the law firm, under such law, does not have the legal right to use the deceased or retired lawyer's name, then inclusion of the lawyer's name in the firm name would not be lawful, and it would therefore be misleading for the firm to use it as such. *See, e.g., Cunetto House of Pasta v. Tuma,* 689 S.W. 2d 690 (Mo. Ct. App. 1985); *Saltzberg v. Fishman,* 462 N.E. 2d 901 (Ill. App. 1984). *See also* Code of Professional Responsibility EC 2-11 (quoted above).

In this regard, the consent of a retired partner or the estate of a deceased partner to continued use of the lawyer's name is an ethical consideration only if such consent is necessary to provide the law firm with the necessary legal authority to continue to use the name. Such specific consent may not be required under the applicable law if, for example, a partnership agreement gives the law firm the continuing right to use the lawyer's name after his departure from the firm, or the firm has acquired a common law right to continued use of the lawyer's name.

The continued use of the name of a withdrawn partner not practicing elsewhere is akin to that of a deceased or retired partner — neither is associated with the law firm, and neither is practicing law. If it is ethical to include the name of a deceased or retired partner in the firm's name, we cannot see why the situation is otherwise for a withdrawn partner. In both situations, the law firm's name is a trade name, and not one which asserts the presence of the name partners as practicing lawyers with the firm.

It is, however, misleading (and therefore a violation of Rule 7.5(a)) to include in a firm name the name of a lawyer practicing elsewhere. Under such circumstances, according to the Rule, the possible identifying value of the firm name as a trade name yields to the greater possibility that the public will be misled by retention of the departed lawyer's name in the firm name.

In the specific inquiry before us, then, the ethical propriety of the law firm's continued use of the inquirer's name after her departure from the firm (and over her objection) would depend on:

(1) whether such use was authorized under common law, the firm's partnership agreement or otherwise, and

(2) whether the lawyer did not practice elsewhere.

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[1] The New York Court of Appeals even rejects the premise that inclusion of a lawyer's name in a firm name implies anything about that lawyer's practice. In *New York Criminal and Civil Courts Bar Ass'n v. Jacoby,* 472 N.Y.S. 2d 890 (1984), New York bar authorities sought to restrain the use in New York of a law firm name that did not include the name of any lawyer licensed to practice in New York, contending that it was misleading to do so. The court rejected the contention:

> We . . . conclude as a matter of law that use of a firm name comprised of surnames, without more, does not constitute any holding out that there are individual partners bearing those surnames who are admitted to practice in New York, or indeed that there are partners in the firm who bear such surnames,wherever admitted. . . . *[T]he firm name is an institutional description and its use constitutes no representation that anyone bearing a surname corresponding to the names in the firm title is available to render professional services. Id.* at 893. (Emphasis added.)

If both conditions are satisfied, then the inquirer's lack of acquiescence in the use of her name is ethically irrelevant.

Inquiry No. 97-2-7
Adopted: November 19, 1997

*Opinion No. 278*

**Partnership with Foreign Lawyer**

• A lawyer who is licensed to practice in the District of Columbia may join in a partnership or in other forms of professional association with a foreign lawyer who is not licensed to practice in any jurisdiction in the United States so long as the partnership or association will not compromise the D.C. lawyer's ability to uphold ethical standards.

**Applicable Rules**

• **Rule 5.1** (Responsibilities of a Partner or Supervisory Lawyer)
• **Rule 5.5** (Unauthorized Practice of Law)
• **Rule 7.5(b)** (Firm Names and Letterheads)
• **Rule 7.5(d)** (Implying Practice in a Partnership)

*Inquiry*

A member of the D.C. Bar inquires whether, under the D.C. Rules of the Professional Conduct, he and other members of his firm may join in a partnership to practice law with a lawyer licensed to practice law only in Sweden. The lawyer licensed in Sweden will be resident and practicing in the firm's London office, which, the inquiry asserts, the lawyer may do in accordance with the rules of practice governing the provision of legal services in the United Kingdom.

This inquiry requires us to determine whether a member of the D.C. Bar may practice law in a partnership or other form of professional association with a foreign lawyer who is licensed to practice law in a non-U.S. jurisdiction but is not licensed to practice law in any jurisdiction in the United States.

*Discussion*

In the United States multi-jurisdictional law firm partnerships — formed by attorneys licensed to practice and physically located in more than one state — are accepted without question. As the practice of law increasingly assumes an international dimension, it is becoming equally commonplace to encounter multinational law firm partnerships and other forms of professional associations that cross international borders. Because of their international scope, these partnerships may involve affiliations with attorneys licensed only by jurisdictions outside the United States.

Just as our ethical standards have evolved to permit multi-jurisdictional law partnerships involving U.S. lawyers, they also, with appropriate safeguards, similarly accommodate partnerships or other forms of professional association with foreign lawyers. For the reasons explained below, we conclude that members of the D.C. Bar may practice law in partnership with foreign lawyers who are not licensed in any jurisdiction in the United States so long as appropriate steps are taken to ensure the association will not compromise the D.C. Bar member's ability to uphold ethical standards.[1]

In this jurisdiction, we have long accepted, without ever expressly addressing the issue, the existence of partnerships between D.C. Bar members and attorneys who are admitted only in U.S. jurisdictions other than D.C. Such associations are permissible, however, only to the extent that they do not impair the D.C. Bar member's ability and obligation to uphold ethical standards. For example, when a D.C. lawyer practices law in association with others, he or she must ensure that all individuals involved in providing legal services adhere to fundamental ethical requirements such as client confidentiality. *See, e.g.*, Rules 5.1, 5.2, 5.3.

The same considerations are equally applicable in reviewing the ethical implications of partnerships with foreign attorneys who are not licensed to practice in any U.S. jurisdiction.[2] The critical inquiry will be whether any aspect of the association is likely to impair the D.C. attorney's ability to satisfy the applicable ethical requirements that govern the delivery of legal services.

In this regard, it would be necessary to consider the general similarity of the foreign lawyer's educational requirements as well as the compatibility of the standards of professional conduct and discipline that govern the foreign lawyer's provision of legal services. If the foreign lawyer's education and training were materially less than that of a U.S. lawyer or if the professional standards governing the foreign lawyer's conduct were so incompatible with those established by the D.C. Bar, any partnership with such an attorney might impair the D.C. lawyer's ability to uphold the D.C. Rules of Professional Conduct or to adhere to ethical standards such as the need to maintain client confidentiality and to avoid conflicts of interest. Cf. Rule 5.1(a) (law firm partner "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").

This is an inquiry that must be undertaken on a case by case basis. By identifying issues relating to client confidentiality and conflicts of interest as areas of special concern, we do not mean to suggest that these are the only ethical issues that need to be considered. Rather, the D.C. attorney must ensure that the proposed association does not in any way impair or frustrate his ability to meet his ethical obligations.

Another basic requirement that must be satisfied in forming any professional association with a foreign-licensed attorney is that the association not conflict with any of the D.C. attorney's ethical obligations. Lawyers not admitted to practice in the District of Columbia are, of course, subject to restrictions against the unauthorized practice of law in this jurisdiction (D.C. App. R. 49), and Rule 5.5(b) prohibits D.C. lawyers from assisting a person who is not a member of the bar in the performance of an activity constituting the unauthorized practice of law. Any partnership with a foreign attorney must comply with these obligations.

In addition, D.C. lawyers and law firms must continue to satisfy the ethical requirements relating to use of letterheads and firm names. *See* Rule 7.5(b) ("a law firm with offices in more than one jurisdiction may use the same name in each jurisdic-

[1] This opinion assumes without deciding that the proposed arrangement described in the inquiry complies with all aspects of D.C. substantive law and with applicable Swedish and United Kingdom law and ethical rules; it therefore addresses only the ethical issues under the D.C. Rules of Professional Conduct presented by the proposed arrangement.

[2] Of course, a foreign attorney who also is admitted to practice in one or more U.S. jurisdictions is subject to the supervisory authority and disciplinary system of the U.S. jurisdiction(s) in which he is admitted. Because of this fact, it is unnecessary to consider such attorneys as "foreign" lawyers for purposes of this analysis.

tion, 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."). Thus, like any multi-jurisdictional partnership, a partnership with foreign attorneys must ensure that its letterhead identifies appropriately the jurisdictions in which individual attorneys are licensed to practice.

Finally, members of the D.C. Bar may state or imply that they practice in a partnership or other organization only when that is the fact. Rule 7.5(d). In forming a partnership with a foreign attorney, the D.C. lawyer should confirm, both as a matter of U.S. and foreign law, that the relationship created is properly described and held out to clients.

In reaching the conclusion that a D.C. lawyer may join in a partnership or other form of professional association with a foreign lawyer not licensed to practice in any jurisdiction in the United States so long as the partnership or association will not compromise the D.C. lawyer's ability to uphold ethical standards, we join several other jurisdictions that have considered similar issues and reached the same result. *See, e.g.*, N.Y. State Op. 658 (Feb. 14, 1994) (New York law partnership may enter into a partnership with a Swedish firm provided the partnership will not compromise the lawyers' ability to uphold ethical standards); Utah Op. 96-14 (Jan. 24, 1997) (lawyer may form partnership or otherwise associate with non-Utah lawyers who are authorized to practice law in other jurisdictions within the United States or to engage in the functional equivalent in a foreign country). We are aware of no jurisdiction that has concluded otherwise.

Inquiry No. 97-7-33
Adopted: February 18, 1998

*Opinion No. 279*

**Availability of Screening as Cure for Imputed Disqualification**

• Screening of a disqualified lawyer can cure imputed disqualification of her law firm only where the disqualified lawyer (1) was not a lawyer when involved in the previous matter on behalf of the now-adverse party, (2) was a government employee (including volunteer service in certain District of Columbia offices) when involved in the related representation, or (3) acquired information regarding the now-adverse party in connection with a prospective client who did not become a client. Even where available, a screen is effective only if established in a timely manner.

*Applicable Rules*

- **Rule 1.7** (Conflict of Interest: General Rule)
- **Rule 1.8(b)** (Gifts to Lawyers Not Related to Donor)
- **Rule 1.9** (Conflict of Interest: Former Client)
- **Rule 1.10** (Imputed Disqualification: General Rule)
- **Rule 1.11** (Successive Government and Private Employment)
- **Rule 2.2** (Intermediary)

*Inquiry*

The District of Columbia Rules of Professional Conduct disqualify an individual lawyer from participating in a matter in a number of circumstances. Under many of these circumstances, the disqualification of an individual lawyer is imputed to all the other lawyers in that lawyer's firm. The Committee has received numerous inquiries as to when, if ever, such imputed disqualification can be cured or avoided by the erection of a screen (sometimes referred to as an "ethical wall") between the disqualified individual lawyer and the matter in question.

*Discussion*

We address below the circumstances in which individual lawyers are disqualified,[1] the subset of circumstances in which such disqualification is imputed to the lawyer's entire firm, the three instances where imputed disqualification can be cured by screening, and the requisites of such a screen.

*1. Individual Lawyer Disqualification*

An individual lawyer is disqualified from participating in a matter where—

(1) the interests that the lawyer would advance on behalf of one client conflict, or are likely to conflict, with those of another existing client or of the lawyer, Rule 1.7, D.C. Rules of Prof. Conduct (hereinafter "D.C. Rule ____");[2]

(2) the representation would involve preparation of an instrument giving the lawyer or her relative a substantial gift or legacy from a client who is not her relative, D.C. Rule 1.8(b);

(3) the lawyer's opposing counsel is her parent, child, sibling, or spouse, D.C. Rule 1.8(h);

(4) the interests that the lawyer would advance on behalf of one client are materially adverse to those of the lawyer's former client and the matter is the same as, or substantially related to, a matter in which the lawyer represented that former client, D.C. Rule 1.9;

(5) the matter is the same as, or substantially related to, a matter involving a specific party or parties in which the lawyer participated while a government employee or a volunteer in several D.C. government offices, D.C. Rules 1.11(a), (h);

(6) the lawyer participated personally and substantially as a neutral arbitrator in the same matter, D.C. Rule 1.12;

(7) the representation will result in a violation of law (including the Rules of Professional Conduct), D.C. Rule 1.16(a)(1);

(8) the proposed representation is as an intermediary between two or more clients and one or more of the conditions in Rule 2.2(a) cannot be met; or

(9) the lawyer is likely to be a necessary witness at trial, in which case the lawyer, with limited exceptions, is disqualified only from serving as an advocate at trial. D.C. Rule 3.7; D.C. Bar Ethics Op. 228 (1992).

Some of these causes for disqualification can be waived by clients after full disclosure of the existence, nature, and possible consequences of the conflict or other impairment. *E.g.*, D.C. Rule 1.7(c); D.C. Rule 1.9 & Comment [3].

*2. Imputed Disqualification—Currently Associated Lawyers*

[1] This opinion does not address situations where an individual lawyer is not disqualified even though in a conflict situation. *See, e.g.*, D.C. Rule 1.7(d) (midstream conflicts); D.C. Bar Ethics Op. 272 (1997) (situation wherein representation of one client can be terminated to avoid conflict with another).

[2] Disqualification for this reason can include instances where the lawyer's inability (because of the strictures of Rule 1.6) to impart or make use of secrets or confidences gained from another client or potential client substantially inhibits the lawyer's ability to represent her client. *See* D.C. Rule 1.10 cmt. [7]; D.C. Bar Ethics Op. 237 (1992).

Where currently associated lawyers[3] are involved and an individual lawyer is disqualified under Rule 1.7, 1.8(b), 1.9, or 2.2, the disqualification is imputed to the lawyer's entire firm.[4] D.C. Rule 1.10(a) & Comment [6]. Imputed disqualification thus does not extend to all the individual disqualification situations set out above. In the remaining situations listed, there is no imputation of the individual lawyer's disqualification to the rest of the firm, though the voluntary erection of a screen may help ensure that a disqualified individual lawyer does not inadvertently participate in, or disclose confidences or secrets relating to, a matter from which she is disqualified.

Disqualification of an individual lawyer as trial counsel because that lawyer is likely to be a necessary witness, *see* D.C. Rule 3.7(a); D.C. Bar Ethics Op. 228 (1992), is imputed to the lawyer's firm only if the individual lawyer also is disqualified by reason of conflict of interest Rule 1.7 or 1.9 (for example, the individual lawyer is expected to give testimony that is adverse to the client). D.C. Rule 3.7(b).

*3. Imputed Disqualification—Lawyers Changing Jobs*

*Private sector job to private sector job.* Imputed disqualification also may occur when a lawyer moves from one private sector position to another. First, a law firm with which a disqualified lawyer is newly associated is disqualified in a matter where the disqualified lawyer *personally* represented the adverse party while a lawyer at a different firm, *and* the disqualified lawyer actually acquired confidences or secrets of the adverse party in that capacity that are material to the matter at the new firm, *and* that matter is the same as, or substantially related to, the matter at the former firm. D.C. Rule 1.10(b) & Comments [16], [19].[5] Second, where the individual lawyer subject to disqualification has left a law firm, that firm is disqualified in a new matter that is the same as, or substantially related to, the matter in which the departed lawyer represented the firm's now adverse former client. D.C. Rule 1.10(c) & Comment [20]. Where the disqualified lawyer was a nonlawyer at the time of the prior representation, there is no imputed disqualification, D.C. Rule 1.10(b) & Comment [21], but a screen must be established between the disqualified lawyer and the other lawyers in the firm, D.C. Bar Ethics Op. 227 (1992). In the case of both currently associated lawyers and lawyers changing jobs, imputed disqualification under Rule 1.10 can be waived "under the conditions stated in Rule 1.7" (for example, full disclosure of the conflict and potential adverse consequences thereof). D.C. Rule 1.10(d).

*Public sector to private sector.* When the move is from a public sector to a private sector job, imputed disqualification of the private firm occurs where the disqualified lawyer participated personally and substantially while a public officer or employee (including work as a volunteer for the D.C. Corporation Counsel or the D.C. Financial Responsibility and Management Assistance Authority)[6] in the same or a substantially related matter involving a specific party or parties, even if the private firm is not adverse to the lawyer's former agency. D.C. Rule 1.11. Imputed disqualification does not occur, however, if the disqualified lawyer's involvement with the now-adverse party was solely as a judicial clerk. D.C. Rule 1.11(b) & Comment [6]. There accordingly is no screening requirement in such a situation, D.C. Rule 1.11 Comment [6], though erection of a screen nevertheless may be prudent.

*4. Screening as a Cure for Imputed Disqualification*[7]

Screening over the objection of an affected client generally cannot cure a firm's imputed disqualification where the disqualified individual attorney was in private practice when the disqualifying representation occurred.[8] Screening typically is available where the disqualified individual lawyer was a government employee when the disqualifying representation occurred.

*Disqualification under Rule 1.10.* With two exceptions, screening does not avoid imputed disqualification under Rule 1.10. The first exception occurs where:

> the individual lawyer's disqualification results solely from the fact that the lawyer consulted with a potential client for the purpose of enabling that potential client and the firm to determine whether they desired to form a client-lawyer relationship, but no such relationship was ever formed.

D.C. Rule 1.10(a) (eff. Nov. 1, 1996).[9]

To avoid disqualification of the entire firm in such a situation, the firm:

> must take affirmative steps—as soon as an actual or potential conflict is suspected—to prevent the personally disqualified lawyers from disseminating any information about the potential client that is protected by Rule 1.6, except as necessary to investigate potential conflicts of interest, to any other person in the firm, including non-lawyer staff.

D.C. Rule 1.10 Comment [9] (eff. Nov. 1, 1996).[10]

The disqualification of individual lawyers will extend not only to those who met with the potential client but also to all firm lawyers who have received confidences or secrets of the potential client. *Id.* Comment [8]. In some instances, disqualification of a substantial proportion of a firm's lawyers

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[3] The Rules regarding imputed disqualification distinguish between lawyers and nonlawyers, *e.g.*, D.C. Rule 1.10(b); D.C. Rule 1.6(g); D.C. Bar Ethics Op. 227 (1992), but do not distinguish among partners, associates, and of counsel. For a discussion of imputation where the disqualified lawyer is a temporary or contract lawyer, see our Opinion 255.

[4] Outside the private practice context, a "firm " includes the legal department of a corporation or other organization and the lawyers in a given unit of a legal services organization (though not necessarily the entire legal services organization), but not necessarily the entire government or even an entire government agency. D.C. Rule 1.10 cmts [1]-[4].

[5] We address the treatment of this issue under the now-superseded D.C. Code of Professional Responsibility in our Opinions 164 (1986) and 174 (1986).

[6] Rule 1.11 applies regardless of whether the government position was nominally as a lawyer.

[7] As noted above, certain individual and imputed disqualification can be waived by the affected clients. D.C. Rule 1.10(d). Firms sometimes erect screens voluntarily in connection with such waivers.

[8] This is the rule in most United States jurisdictions. Task Force on Conflicts of Interests, Section on Business Law, A.B.A., *Conflicts of Interest Issues*, 50 BUS. LAW. 1381, 1402 (1995). A recent survey suggests that the contrary probably is the case only in Illinois, Michigan, Oregon, Pennsylvania, and Washington, and possibly is the case in Louisiana, Ohio and Tennessee. THOMAS D. MORGAN & RONALD D. ROTUNDA, 1998 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 143-53. Massachusetts recently altered its rules to permit screening where the lateral arrival (a) "has no material information protected by Rule 1.6 or Rule 1.9" or (b) neither had substantial involvement nor acquired substantial material information about the matter while with her previous firm. Rule 1.10(d), Mass. Rules of Prof. Conduct (eff. Jan.1, 1998). The draft Restatement of the Law Governing Lawyers would permit screening where the client confidences or secrets communicated to the individually disqualified lawyer are "unlikely to be significant" in the new matter. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 204(2) & cmt. d (Prop. Final Draft No. 1, 1996). The Comments concede that this is not the majority rule, *id.* cmt. *d*, but a Reporter's Note contends that "[t]he developing case law . . . seems to be consistent" with the proposed Restatement rule. *Id.* reporter's note to cmt.*d*.

[9] This exception also is available where the individually disqualified lawyer acquired her knowledge while associated with another law firm. D.C. Rule 1.10(b) (eff. Nov. 1, 1996).

[10] The current draft of the Restatement would permit screening in this context. RESTATEMENT OF THE LAW COVERING LAWYERS, § 27(1)(b) (Prop. Final Draft No. 1, 1996).

may require disqualification of the entire firm. *See* D.C. Bar Ethics Op. 275 (1997); *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St. 3d 1, 10, 688 N.E.2d 258, ___ (1998); *Watson v. Ameredes*, C.A. No. 03-A-01-9704-CV-00129, 1997 Tenn. App. Lexis 884 (Ct. App. Dec. 10, 1997) (small size of firm increases chances of inadvertent breach of screen) (alternative holding); Mass. Rule of Prof. Conduct 1.10 Comment [10] (eff. Jan. 1, 1998) (may be difficult to screen information successfully in small firm).

The second circumstance in which screening cures imputed disqualification under Rule 1.10 is where the disqualified individual was not a lawyer when she acquired the confidences or secrets of the now-adverse party. D.C. Rule 1.10(b) (cross referencing D.C. Rule 1.6(g) & Comment [21]). Screening is required whether the disqualified individual subsequently has become a lawyer, D.C. Rule 1.10(b) & Comment [21], or remains a nonlawyer (e.g., a summer law clerk, a paralegal, or a clerical employee), D.C. Bar Ethics Op. 227 (1992) (citing ABA Informal Op. 88-1526 (1988)). In the latter case, screening is required to protect client confidences and secrets. In the former case, issues regarding loyalty are present as well.

Rule 1.10 does not indicate what specific actions constitute a sufficient screen. Our Opinion 227 suggests the use of one or more of the techniques that are discussed later in this opinion. A screen created under this exception generally must be erected at or before the time the conflict—whether caused by the arrival of a lateral lawyer or nonlawyer or by the acceptance of a new matter—occurs. *LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 259 (7th Cir. 1983); *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1451 (E.D. Wis. 1993).

*Disqualification Under Rule 1.11.* Disqualification of a former government employee, including someone who worked as a volunteer for the D.C. Corporation Counsel or the D.C. Financial Responsibility and Management Assistance Authority, is imputed to her firm only upon failure to follow the requirements set out in paragraphs (c) through (f) of Rule 1.11. D.C. Rule 1.11(b) & Comment [3]. First, the personally disqualified lawyer must be "screened from any form of participation in the matter . . . and from sharing in any fees resulting therefrom." D.C. Rule 1.11(c). This "does not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement," but it does prohibit a firm from "directly relating the attorney's compensation in any way to the fee in the matter in which the lawyer is disqualified." D.C. Rule 1.11 Comment [11]. That is, where a lawyer's percentage share of a firm's profits is determined or decided upon after the fact, the total firm profits need not be recalculated by subtracting the fee for the particular matter but the determination of her percentage should not take that fee into account.

Second, the disqualified lawyer and her firm must notify the lawyer's former agency and the parties to the matter in writing before the firm begins the representation. D.C. Rule 1.11(d) & Comment [6]. The individually disqualified lawyer must state that she will not participate in, discuss with any other lawyer in her firm, or share in any fees for, the matter. D.C. Rule 1.11(d)(1). One other firm lawyer must state that all affiliated lawyers are aware of the screen and must "describ[e] the procedures being taken to screen the personally disqualified lawyer." D.C. Rule 1.11(d)(2). Paragraphs (e) and (f) prescribe an alternate procedure for instances where the client "requests in writing that the fact and subject matter of a representation" not be disclosed as required by paragraph (d).

As with the second exception under Rule 1.10, a Rule 1.11 screen should be in place not later than the time the conflict—whether occasioned by the arrival of a lateral lawyer or nonlawyer or by the acceptance of a new matter—occurs. D.C. Rule 1.11 Comment [7]; *LaSalle Nat'l Bank*, 703 F.2d at 259; *Schiessle*, 717 F.2d at 421; *Nelson*, 823 F. Supp. at 1451.

"Compliance with the Rules of Professional Conduct does not necessarily constitute compliance with all of the obligations imposed by conflict of interest statutes or regulations." D.C. Rule 1.11 Comment [13]. The Rules note the potential applicability of such other provisions of law as 18 U.S.C. §§ 207 and 208 to the conduct of former government employees. D.C. Rule 1.11 Comment [13]. Some agencies also have their own separate rules. *E.g.*, 16 C.F.R. § 4.1(b) (1997) (FTC).

*5. Particular Elements of a Screen*

Beyond the requirements of Rule 1.11(d)(1) that a disqualified individual lawyer not participate in the matter, discuss the matter with her colleagues, or share in the fees for the matter, neither any reported decision of the District of Columbia Court of Appeals[11] nor the D.C. Rules of Professional Conduct[12] specify the particular elements of a screen when one is required or permitted under the Rules.

Our Opinion 227 and court decisions elsewhere, however, suggest that a screen should prohibit (1) involvement in the matter by the individually disqualified lawyer, (2) discussion of the matter between the individually disqualified lawyer and any firm personnel involved in the representation, (3) access by the disqualified lawyer to any files (including electronically stored files) of the matter from which she is screened, and (4) access by the lawyers working on the matter to any files of the disqualified lawyer relating to the matter. *See, e.g., LaSalle Nat'l Bank*, 703 F.2d at 259; *Armstrong v. McAlpin*, 625 F.2d 433, 442-43 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 214 Ct. Cl. 124, 555 F.2d 791 (Ct. Cl. 1977); Rule 1.10(e), Mass. Rules of Prof. Conduct (eff. Jan. 1, 1998); Rule 1.10(e), Rules of Prof. Conduct, U.S. Dist. Ct., N.D. Ill.;[13] D.C. Bar Ethics Op. 227 (1992). In addition, there should be written notification to all personnel of the firm and to the clients of the fact and elements of the screen. *Kala*, 81 Ohio St. 3d at 10, 688 N.E.2d at ___; *see* Rule 1.10(e), Mass. Rules of Prof. Conduct (eff. Jan. 1, 1998); D.C. Bar Ethics Op. 227 (1992). In appropriate circumstances, such as where the disqualified lawyer works near those handling the matter, the file protection element can include labeling files to reflect the access prohibition, *see* D.C. Bar Ethics Op. 227 (1992), or even maintaining files in a secure location, *e.g., Kesselhaut*, 214 Ct. Cl. at 127-28, 555 F.2d at 793 (files maintained in locked cabinet with keys controlled by two partners and issued only on a need-to-know basis); *In re Del-Val Finan-*

[11] One decision suggests that where a screen is permitted, the individually disqualified lawyer must be screened "from participation in counseling and compensation arrangements." *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1192 (D.C. 1982). A United States District Court ruling ordered the disqualified lawyer not to "discuss with [his partner representing the codefendant] any information" that the disqualified lawyer received from his former client. *United States v. Childress*, 731 F. Supp. 547, 554 (D.D.C. 1990).

[12] Cmt. [9] to Rule 1.10 requires that protected confidences and secrets not pass in either direction between the disqualified lawyer and others in the firm but does not offer further particulars.

[13] This local rule also requires that the disqualified lawyer be "isolated from all contacts with the client or any agent, officer or employee of the client and any witness for or against the client." Rule 1.10(e)(2), Rules of Prof. Conduct, U.S. Dist. Ct., N.D.Ill.

*cial Corp. Securities Litigation*, 158 F.R.D. 270, 273 (S.D.N.Y. 1994) (locked, limited-access room).[14]

Adopted: March 18, 1998
Inquiry No. 97-10-47

*Opinion No. 280*

**Direct Communication Between a Lawyer Representing a Client and Members of a Local Government Board**

• Under Rule 4.2(d), a lawyer who represents a client before a D.C. professional licensing board can properly contact individual board members to discuss the board's action against the lawyer's client. The lawyer also can discuss the board member's alleged dissatisfaction with the board staff and internal operations as they affect the lawyer's client.

*Applicable Rule*

• **Rule 4.2(d)** (Communication By Lawyer With Government Officials)

*Inquiry*

The inquirer, a private practitioner, requests an opinion addressing whether, under Rule 4.2(d), an attorney may communicate directly with government officials on a licensing board without first obtaining consent of the board's lawyer. The inquirer represents a client who reached an unsatisfactory consent order with a D.C. health professional licensing board concerning the client's chiropractic license. The inquirer believes that the administrative and legal staff assigned to support the licensing board both determined the outcome and acted improperly in his client's case. In addition, it is his understanding that many members of the licensing board are unhappy about the staff imposing its will on the board with respect to a number of matters. Consequently, the inquirer is interested in contacting the individual board members to discuss two topics: (1) his client's consent order; and (2) board member's alleged dissatisfaction with the board staff and with other internal operational matters affecting both his client and other clients' matters. Rule 4.2 generally prohibits contact between an attorney and opposing parties, unless the attorney has the prior consent of the lawyer representing the opposing party or is authorized by law to make contact. Paragraph (d) of Rule 4.2, however, provides that the Rule "does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official when the communication is made."[1] The inquiry requires that we define the scope of this section.

*Discussion*

Rule 4.2(d) authorizes a broad range of substantive communications between a lawyer for a private party and government officials. Based on the legislative history and Comment [7] to Rule 4.2[d], we conclude that neither of the communications proposed would violate Rule 4.2.

In enacting Rule 4.2, the Board of Governors of the District of Columbia Bar concluded that ABA Model Rule 4.2 should be amended to exclude entirely communications between attorneys and governmental officials from the "no contact" rule.[2] The drafters recognized that contacts with governmental parties should be treated differently from contacts with non-governmental parties. Consistent with D.C. Bar Op. No. 80, the drafters rationalized that many considerations different from those found in private litigation apply where the government is the opposing party.[3]

For example, Rule 4.2 has at its core the societal concern that lawyers are better positioned, by education and training, to overwhelm the lay person and exploit his or her lack of legal knowledge in the course of communicating directly with the lay party. Such a concern is not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive. Moreover, government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present.

The drafters also recognized that in litigation involving a governmental party, the authority to make decisions is not, like private litigation, entirely that of the client; rather, decisions may be shared by the government and counsel, and in some instances may rest solely with counsel. Under such circumstances, responsible government officials may not know of positions taken by government counsel. Prohibiting direct communications with the governmental party, therefore, may hinder rather than advance the goal of client control of the proceedings.

Another difference between private and governmental parties noted by the drafters is that the government represents the public. Therefore, the public interest is not just that the government win a case but that the government advance the public interest. Permitting direct communication with government officials — "those who are best versed in the competing policy considerations and most experienced in analyzing, choosing among, and reconciling" a variety of public interests — facilitates such a result. Yellow Cover Legislative History at 188.

In addition to the different considerations applicable to governmental parties, the drafters of Rule 4.2 acknowledged that prohibitions on contacting government officials may infringe upon the freedom to

[14] Sample forms for screens appear in Task Force on Conflicts of Interest, Section on Business Law, A.B.A., *Conflicts of Interest Issues*, 50 BUS. LAW. 1381, 1402-21 (1995).

[1] Rule 4.2(b) allows an attorney to contact lower-level employees of an adverse organizational party without the consent of the organization's attorney. The rule requires that a lawyer disclose his or her identity and identify his or her adversary position against the employee's organization prior to communicating with any nonparty employee of the opposing party.

[2] The explicit governmental exception to Rule 4.2 departs significantly from the predecessor provision DC 7-104(A)(1), *see* Opinion No. 80 (restricting access to government officials under DR 7-104(A)(1)), and the rules of most state bars. California is the only other jurisdiction that provides a specific exception to the no-contact rule for governmental parties, *see* California Rules of Professional Conduct 7-103, although a number of jurisdictions have interpreted their rules barring contacts between a lawyer and an opposing party to allow some contacts with adverse government officials so as not to infringe the First Amendment right to petition the government for redress of grievances. *See generally* A.B.A. Opinion No. 97-408 (1997) at n. 7.

[3] *See* Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changed Recommended by the District of Columbia Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar, Nov. 19, 1986 ("Yellow Cover Legislative History"), at 186-188.

petition the government for redress of grievances guaranteed by the First Amendment. *Id.* At 188-189. First Amendment concerns recently led the ABA Ethics Committee recently to alter its position and issue an opinion under Model Rule 4.2 (which does not contain an explicit exception for government contacts) that permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue . . . ." ABA Formal Opinion 97-408 (8/2/97).[4]

Comment [7] our Rule 4.2, however, indicates that the right of a private party's attorney to communicate directly with government officials is not absolute. The commentary notes: [p]aragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government." The comment further clarifies that the rule "is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes." The examples provided by Comment [7] indicate that the drafters excluded only communications about procedural matters from the range of direct contact permitted with government officials, presumably to allow government counsel full control over the day-to-day conduct of litigation without preventing substantive communications between the public and government officials.[5]

In the instant situation, both types of communications proposed by the inquirer appear to fall within the scope of permissible communications under paragraph (d). Indeed, contact with members of the licensing board about the conclusion reached in a particular matter as well as the alleged improper conduct of governmental personnel, *i.e.*, the board's counsel and staff, is directly addressed by the commentary to paragraph (d). Specifically, comment [7] to the Rule explains that paragraph (d):

> is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute.

We therefore conclude that the proposed communications are consistent with the broad scope of direct communications with adverse government officials permitted by Rule 4.2(d).

Inquiry No. 97-9-43
Adopted: March 18, 1998

*Opinion No. 281*

**Transmission of Confidential Information by Electronic Mail**

- In most circumstances, transmission of confidential information by unencrypted electronic mail does not *per se* violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security.

**Applicable Rule**

- **Rule 1.6** (Confidentiality)

*Inquiry*

We take this opportunity to consider whether Rule 1.6 of the District of Columbia Rules of Professional Conduct would be violated by a lawyer who communicates concerning confidential matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail transmitted over commercial services or directly across the Internet. We conclude that the use of unencrypted electronic mail is not, by itself, a violation of Rule 1.6.

*Discussion*

Rule 1.6 provides, in relevant part, as follows:

> . . . a lawyer shall not knowingly . . . reveal a confidence or secret of the lawyer's client . . . .

Furthermore, Rule 1.6(e) requires lawyers to ensure that persons working for the lawyer use reasonable means to ensure the confidentiality of protected client information.

The recent explosion in the use of electronic mail as a method of communicating between lawyer and client[1] has raised a question whether a lawyer is acting responsibly to protect his client's confidences when he transmits them electronically.

A number of the early ethics opinions that considered this subject reached the conclusion that unencrypted electronic transmission violated Rule 1.6. *See, e.g.,* Iowa Supreme Court Bd. of Professional Ethics Op. 96-1 (8/29/96); South Carolina Bar Ethics Advisory Comm. Op. No. 94-27 (1/95); and Colorado Ethics Op. No. 90 (11/14/92). A number of those opinions were based on the notion that electronic communications are impermissibly susceptible to interception and access by third parties, making transmission of client confidences by such means inappropriate in the absence of specific client consent. *E.g.,* North Carolina State Bar Ethics Op. No. RPC 215 (7/95).[2]

However, as the technology involved in electronic transmission has become better understood and as the law concerning telecommunications has developed, the prevalent view, which this Committee adopts, is that electronic transmission is in most instances an acceptable form of conveying client confidences even where the lawyer does not obtain specific client consent. *See e.g.,* State Bar Ass'n of North Dakota Ethics Comm. Op. No. 97-09 (9/4/97); Illinois State Bar Ass'n Advisory Op. on Professional Conduct No. 96-10 (5/16/97); Arizona State Bar Ass'n Formal Op. No. 97-04 (4/4/97); South Carolina Bar Ethics Advisory Comm. Op. No. 97-08 (6/97) (overruling South Carolina Bar Ethics Advisory Comm. Op. 94-27, *supra*); and Vermont Advisory Ethics Op. No. 97-5.

In discussing these issues, it is useful to define a number of terms. We set forth three definitions from Vermont Advisory Ethics Op. No. 97-5:

[4] The ABA's opinion requires that the lawyer give government counsel "reasonable advance notice of an intent to communicate," a restriction that we do not adopt. We specifically do not intend this opinion to address whether and to what extent our Rule 4.2 prohibits government counsel from approaching represented individuals. *See* Cmt. [8] to D.C. Rule 4.2.

[5] We note D.C. Rule 3.5(b) provides that lawyers are prohibited from communicating *ex parte* with judges, jurors, prospective jurors or other officials "except as permitted by law", reiterating that under our Rules applicable prohibitions on *ex parte* contacts must be observed. *See generally* Rule 106(b) of the Rules of the United States District Court for the District of Columbia (prohibiting letters directly to court unless so directed by a judge). We are unaware of any such rules applicable to the situation considered in this opinion.

[1] This opinion does not consider the security aspects of communications with opposing or adverse parties or counsel because those communications are, almost without exception, not subject to the lawyer confidentiality rules.

[2] *See* Lapidus, Using Modern Technology to Communicate with Clients: Proceed with Caution and Common Sense, 34 Houston Lawyer 39 (Sept. - Oct. 1996).

> "Electronic mail" or "e-mail" is a message sent from one user's computer to another user's computer via a host computer on a network, or via a private or local area network (which we defined to mean a network wholly owned by one company or person which is available only to those persons employed by the owners or to whom the owner has granted legal access) or via an electronic mail service such as America Online (a public network), via the Internet, or by a combination of these methods.
>
> "Encrypted e-mail" is e-mail that has been electronically locked to prevent anyone but the intended recipient from reading it using a "lock and key" technology.
>
> The "Internet" is a world-wide super network of computers consisting of individual computers and private and public networks owned by various persons and entities including business, schools, governments, and non-secure military computers. Individual users connect to the Internet through a local "host" computer. The local host computer communicates with other computers throughout the world over the phone lines or privately owned high-speed fiber optic lines using a collection of well-defined common protocols.

Finally, it is important to understand how e-mail travels over the Internet. Here, we quote from State Bar Ass'n of North Dakota Ethics Comm. Op. No. 97-09 (9/4/97):

> E-mail sent over the Internet does not go directly from the sender's computer over a land-based line to a password-protected "mailbox." The message is broken into two or more "packets" of information by the sending computer or host computer, which are then sent individually over the lines and ultimately reassembled back into the complete message at the recipient's "mailbox." The mailboxes may exist on the recipient's computer or may exist on the host computer that the recipient uses to connect to the Internet. These information packets must pass through and be temporarily stored in other computers called "routers" operated by different firms known as "Internet Service Providers" which assist in distributing e-mail over the Internet.

It seems to us that the pre-1997 opinions holding that electronic transmission did not adequately protect client confidences overlooked three key factors. First, all methods of transmission of information are, to one degree or another, subject to interception. A conference room could be subject to electronic eavesdropping; a telephone line may be tapped; or a fax may be intercepted in the fax room of its intended recipient. These risks do not mean that these methods of communication may not be used to transmit confidential information. Indeed, when one considers the possibility of conference room bugs, mail tampering, wire taps, and fax interception, it seems to us that the question under Rule 1.6 is whether the method of transmission is such that one might reasonably expect the message sent to remain confidential. The rule does not require absolute security in protecting confidentiality; it requires reasonable effort to maintain confidentiality.

Second, a number of the pre-1997 opinions on this subject overlooked the fact that while a message is actually traveling over the Internet, having been disassembled into a number of packets which may not travel in parallel routes, it is extremely difficult to trap all of the relevant information packets and to reassemble them in a readable form. We do not ignore the fact that e-mail transmissions are at certain points along the way more vulnerable to interception. Particularly at the point of transmission and at the point of reassembling in the recipient's mailbox, hackers or careless and dishonest employees of Internet service providers can access this information. But it seems to us that this risk is not appreciably greater than the risk that careless or dishonest employees of the phone company will have access to telephone messages, and yet we know of no authority holding that discussing client confidential information by telephone, at least over land-based lines, is a violation of Rule 1.6.

Third, as the law concerning telecommunications has developed, it has been made clear that interception of electronic transmissions over the Internet (like telephone conversations) is illegal under the Electronic Communications Privacy Act of 1986 as amended in 1994. *See* 18 U.S.C. §2511. Furthermore, Congress specifically provided in 18 U.S.C. §2517(4) that:

> No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

This legal background has given rise to several opinions in which, for purposes of search and seizure law under the Fourth Amendment, persons transmitting electronic messages are held to have a reasonable expectation of privacy. *See United States v. Keystone Sanitation Company*, 903 F.Supp. 803 (M.D.Pa. 1995); *United States v. Maxwell*, 43 Fed. R. Serv. 24 (U.S.A.F. Ct. Crim. App. 1995).

Thus, we hold that the mere use of electronic communication is not a violation of Rule 1.6 absent special factors. We recognize that as to any confidential communication, the sensitivity of the contents of the communication and/or the circumstances of the transmission may, in specific instances, dictate higher levels of security. Thus, it may be necessary in certain circumstances to use extraordinary means to protect client confidences. To give an obvious example, a lawyer representing an associate in a dispute with the associate's law firm could very easily violate Rule 1.6 by sending a fax concerning the dispute to the law firm's mail room if that message contained client confidential information. It is reasonable to suppose that employees of the firm, other lawyers employed at the firm, indeed firm management, could very well inadvertently see such a fax and learn of its contents concerning the associate's dispute with the law firm. Thus, what may ordinarily be permissible — the transmission of confidential information by facsimile — may not be permissible in a particular factual context.

By the same analysis, what may ordinarily be permissible — the use of unencrypted electronic transmission — may not be acceptable in the context of a particularly heightened degree of concern or in a particular set of facts. But with that exception, we find that a lawyer takes reasonable steps to protect his client's confidence when he uses unencrypted electronically transmitted messages.

Inquiry No. 97-12-55
Adopted: February 18, 1998

*Opinion No. 282*

**Duties of Lawyer Employing a Social Worker Who is Obligated to Report Child Abuse**

• A lawyer who engages a social worker to provide services in connection with the representation of a client must inform the client that the social worker may be obligated under law to report suspected child abuse or neglect. The lawyer should inform the client that while the Rules of Professional Conduct require the lawyer to assure that persons employed by the lawyer in the representation of a client preserve client secrets and confidences, other laws may require the social worker to report child abuse or neglect.

**Applicable Rules**

• **Rule 1.6** (Confidentiality of Information)

• **Rule 5.3** (Responsibilities Regarding Nonlawyer Assistants)

*Inquiry*

An association of social workers seeks guidance regarding the obligations of a social worker employed by or consulting with a lawyer in the representation of a client where the social worker receives information that the client has engaged in child abuse. Under D.C. Code §2-1352, social workers and certain other professionals who reasonably suspect that child abuse or neglect has taken place must "immediately" report the suspected abuse to the Metropolitan Police Department or to the Child Protective Services Division of the Department of Human Services.[1] The statute makes clear that the social worker so obligated has no discretion to refuse to report once the social worker knows or has reasonable cause to suspect that child abuse or neglect has taken place. The statute does not include lawyers among those professionals required to report child abuse or neglect.[2]

Inquirer presents no specific facts or incidents out of which the inquiry arises. We assume that the social worker is either employed by or acting as a consultant to a lawyer or law firm in the course of its representation of a client. The inquiry also does not state whether the information about child abuse came directly from the client or from another source, but in our view the analysis does not change depending on the source of the information.

The Committee is limited to expressing opinions concerning lawyers' ethics and therefore cannot decide the scope of the social worker's obligations under the mandatory reporting law. We focus, first, on whether Rule 1.6 of the District of Columbia Rules of Professional Conduct (the "Rules") authorizes a social worker employed by a lawyer to disclose client confidences and secrets and, second, the obligations of the lawyer employing the social worker.

*Discussion*

As an employee of or consultant to a lawyer representing a client, the social worker is a nonlawyer assistant under Rule 5.3 in that the social worker "acts for the lawyer in rendition of the lawyer's services." Rule 5.3, Comment [1]. Rule 5.3 requires the lawyer to assure that nonlawyer assistants understand and comply with the Rules of Professional Conduct. To assure that the nonlawyer assistant abides by the Rules, a partner in a law firm must put into "effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." Rule 5.3(a). The failure to put these measures into effect, or allowing the nonlawyer assistant to violate the obligations imposed by the Rules, can result in discipline of a lawyer supervising the employee so long as the lawyer has knowledge of the conduct and fails to take action to avoid or mitigate the violation. Rule 5.3(c). Moreover, Rule 1.6(e) specifically requires a lawyer to exercise reasonable care to prevent employees, associates, and others working for the lawyer from disclosing or using confidences and secrets of a client unless the client consents or an exception applies.

One of those exceptions is contained in Rule 1.6(d)(2), which provides that the lawyer may reveal the confidences or secrets of a client when "required by law." This provision continues practice under former Disciplinary Rule 4-101(C)(2) and follows a provision of the American Bar Association 1980 discussion draft of Model Rule 1.6, which was dropped from subsequent versions of the model rule by the ABA. During the drafting of Rule 1.6 in the District of Columbia, there was considerable debate concerning the scope of the exception to the lawyer's duty to refrain from disclosing confidences and secrets to prevent harm to third parties. By contrast, the exception for disclosure obligations required by law received very little attention. The unqualified language of the exception, though, appears to recognize the authority of the legislature to subordinate the obligation to preserve client confidences and secrets to other social objectives.

Like the duty to preserve confidences and secrets, this exception extends to employees, associates and "others whose services are utilized by the lawyer." Rule 1.6(e). They "may reveal information permitted to be disclosed by paragraphs (c) and (d)." *Id.* The question is whether this exception authorizes the social worker to reveal confidences and secrets pursuant to a law that does not apply to the lawyer.[3] We conclude that it does not.

The exception in Rule 1.6(e) allowing persons employed by the lawyer to disclose confidences or secrets is strictly derivative of the exception for disclosures by the lawyer. That is, it is defined by referring to Rules 1.6(c) and (d), which contain exceptions to the lawyer's obligation to keep client confidences and secrets. In other words, under Rule 1.6(e), client confidences and secrets can be disclosed by an employee only in circumstances where the lawyer may disclose. The Rule does not authorize disclosure of client confidences and secrets by an employee where the lawyer is prohibited from so disclosing.

We would reach a different conclusion if Rule 1.6(e) contained language authorizing an employee to disclose client confidences and secrets independently of the disclosure rules applicable to the employing lawyer. In the absence of such language, we conclude that in the circumstances presented here Rule 1.6(e) allows no exception to the duty to ensure that the social worker preserves the confidences and secrets of the lawyer's client. We believe this interpretation of Rule 1.6 is consistent not only with its strict limitations on disclosures of client confidences and secrets but also with its recognition that lawyers require assistance of other professionals and lay people to represent their clients properly.

We acknowledge that this interpretation of Rule 1.6 creates a quandary both for the social worker and for the lawyer.[4] The

[1] The statute triggers the reporting requirement when a covered person "knows or has reasonable cause to suspect that a child known to him or her in his or her professional or official capacity has been or is in immediate danger of being a mentally or physically abused or neglected child, as defined in §16-2301(9). . . ." D.C. Code §2-1352(a).

[2] The class of persons required to report includes, in addition to a social worker, a physician, psychologist, medical examiner, chiropractor, dentist, registered nurse, licensed practical nurse, person involved in the care and treatment of patients, law-enforcement officer, school official, teacher, social service worker, day care worker, and mental health professional. D.C. Code §2-1352(b).

[3] There may be circumstances where the lawyer may report child abuse under Rule 1.6(c)(1), but only where it amounts to "a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer." The District of Columbia child abuse and neglect reporting requirement is far broader, both in referring to past acts and in using a lower threshold of harm to the child to trigger the reporting obligation.

[4] The relationship between mandatory child-abuse reporting rules and the duty of confidentiality obligations has been the subject of considerable discussion. Rosencrantz, *Rejecting "Hear No Evil Speak No Evil:" Expanding the Attorney's Role in Child Abuse Reporting, 8 Geo. J.L. Ethics 327 (Winter 1995);* Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant,* 1992 Duke Law J. 203; Stuart, *Child Abuse Reporting: A Challenge to Attorney-*

Rules of Professional Conduct cannot insulate a social worker from obligations otherwise imposed by law. Thus, the lawyer's duty to exercise "reasonable care" to assure that employees do not disclose client confidences and secrets cannot include preventing the social worker from reporting child abuse or neglect as mandated by law.[5] An alternative interpretation of Rule 1.6, though, would create the anomaly that the social worker working for the lawyer would be mandated to make disclosures that the lawyer is forbidden from making.

The one prior decision of the Committee interpreting Rule 1.6(d)(2) does not shed light on the question before us. In D.C. Bar Op. 219, a regulation of the U.S. Patent and Trademark Office required practitioners to reveal a fraud perpetrated on a "person" or "tribunal" during the course of the representation of the client, a disclosure that might otherwise be prohibited by Rule 3.3(d).[6] We held that the exception for disclosures required by law applied, subject only to the additional requirement that the client be informed of the lawyer's obligation and be given an opportunity to challenge the regulation. But that opinion concerned only an obligation to disclose placed directly on the lawyer, not on a person employed by the lawyer.

The inconsistent duties of the social worker and the lawyer — the social worker to report under the child abuse and neglect law, the lawyer to assure that confidences and secrets of a client are preserved — require that the lawyer take steps to assure that the client understands the inconsistency. *See* Rule 1.4(b).[7] Before bringing a social worker into the representation, the lawyer should inform the client that the social worker may have a statutory duty to report child abuse or neglect that is inconsistent with the duty of both the lawyer and the social worker to preserve confidences and secrets imposed by the Rules of Professional Conduct. The lawyer should further explain that, as a result, the social worker may in fact report information supplied by the client or the lawyer to relevant authorities. It is then the client's decision whether to proceed with the use of a social worker in the case.

It is also appropriate for the lawyer to inform the social worker of the lawyer's obligations under Rule 1.6 to preserve confidences and secrets of the client and to assure that the social worker does the same. The lawyer should not, however, provide legal advice to the social worker regarding reporting obligations under the statute because the lawyer's duty to the client to assure protection of confidences and secrets precludes giving any contrary opinion to the social worker. *See* Rule 1.7(a). Nor should the lawyer request that the social worker ignore the provisions of the law mandating reporting of child abuse or neglect.

*Conclusion*

The dilemma faced by the lawyer, the client, and the social worker is not easily resolved, and the Rules do not appear to have contemplated the situation we confront. Given the lack of clarity in the relationship between Rule 1.6 and laws mandating reporting of child abuse and neglect by certain professionals, the lawyer's obligations under the circumstances discussed in this opinion are twofold: first, to inform his client of the possible implications of sharing information about child abuse or neglect with a social worker working for the lawyer; and second, to inform the social worker of the obligations imposed by Rule 1.6.

Inquiry No. 97-7-36
Adopted June 17, 1998

*Client Confidentiality*, 1 Geo. J.L. Ethics 243 (1987).

It is arguable that the social worker has no mandatory reporting obligation in these circumstances. A court might interpret D.C. Code §2-1352 as excluding a social worker from mandatory reporting obligations when working for a lawyer. The legislative history of the Prevention of Child Abuse and Neglect Act of 1977 contains no discussion of the impact of the law on lawyers or on health professionals working for lawyers. The committee report states only that the statute is intended to apply to "a broad range of medical, educational, social service and law enforcement professionals." Council of the District of Columbia, Report on Bill 2-48, Mar. 30, 1977.

[5] *See also* Rule 1.6, Cmt. [27], expressing a presumption against other laws superseding a lawyer's obligation of confidentiality. Absent a judicial interpretation of the applicability of the statute to a social worker working for a lawyer, however, the lawyer must ensure that the client understands the potential inconsistency between the lawyer's duty to protect the information and the social worker's apparent statutory duty to report it.

[6] Rule 3.3(d) provides that a lawyer need not disclose a fraud perpetrated by a client upon a tribunal where doing so "would require disclosure of information otherwise protected by Rule 1.6. . ."

[7] Rule 1.4(b) provides that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

*Opinion No. 283*

**Disposition of Closed Client Files**

• A lawyer who is entrusted with the property of a current or former client has certain ethical obligations with respect to its disposal: (1) valuable client property must be promptly delivered to the former client or safeguarded indefinitely; (2) other client property may, based on the former client's direction, be delivered to the former client, stored or destroyed; (3) if it is not possible to locate the former client, non-valuables that are not reasonably necessary to protect a client's interest may be destroyed five years after the termination of representation; and (4) non-valuables not belonging to a former client or third party may be destroyed at any time.

**Applicable Rules**

• **Rule 1.15** (Safekeeping Property)
• **Rule 1.16(d)** (Declining or Terminating Representation)
• **Rule 1.8(i)** (Conflict of Interest: Prohibited Transactions)
• **Rule 3.4(a)** (Fairness to Opposing Party and Counsel)

*Inquiry*

The inquirer is a solo practitioner in Washington, D.C. who represented a multinational corporate client for more than twenty years before the representation was terminated and another law firm began representing the client. Upon termination of representation, the inquirer transferred to the successor law firm all client files relating to pending matters as well as corporate documents and originals of documents provided to him by the client. The inquirer retained in an off-site commercial storage facility the former client's closed or "dead files" including notes, memoranda, pleadings, and other items prepared by him in the course of the twenty-year representation as well as research files containing opinions, articles and other publicly available material, duplicate copies of correspondence between the attorney and former client, and materials received from third parties. According to the inquirer, the client was provided during the course of representation with copies of these materials. Furthermore, the inquirer states that there are no valuable items in the former client's closed files, and asserts there would be "no foreseeable prejudice or harm to the former client's interests if the files are not returned to the client."

The inquiring attorney has begun to phase out his law practice, and no longer wishes to continue to pay storage fees for his former client's closed files. Accordingly, the attorney recently wrote his former client and indicated his desire to dispose of the closed files, suggesting three possible alternatives: (1) delivery of the files to the former client's successor law firm in Washington, D.C.; (2) retention of the files in the off-site storage facility with the former client responsible for paying the storage fees; or (3) destruction of the files under secure conditions.

The former client responded that it wished to have the files shipped from Washington, D.C. to its New York office. The inquirer asserts that complying with this request would cost him considerable time, effort and expense. Thus, the attorney asks whether he may ethically require the client to: (a) reimburse him for all direct costs associated with the transfer of the closed files; and (b) compensate him for the time expended in reviewing, and/or preparing the closed files for delivery.

*Discussion*

The Legal Ethics Committee last addressed a lawyer's ethical obligations relating to the disposition of former clients' closed or "dead" files in 1989, prior to the effective date of the current D.C. Rules of Professional Conduct ("D.C. Rules"). Given the subsequent adoption of the D.C. Rules, numerous inquiries by members of the Bar, and recent ethics opinions in other jurisdictions, the Committee believes it appropriate to revisit a lawyer's responsibilities in this regard. Specifically, this opinion attempts to clarify the parameters of a "client file," to suggest reasonable guidelines to ensure the ethical disposition of closed client files in accordance with the D.C. Rules, and to address concerns regarding the costs of transferring, storing, reviewing, or destroying former client files.[1]

Lawyers do not have a general duty to preserve permanently all files of their former clients. D.C. Bar Opinion 206 (1989); ABA Informal Op. 1384 (1977). Obviously, neither solo practitioners nor the largest law firms have unlimited office space or other resources to accommodate all former client files on an indefinite basis.[2] On the other hand, a lawyer has an ethical obligation to current and former clients to prevent the premature or inappropriate destruction of client files. D.C. Bar Opinion 206 (1989). Attempting to balance these two legitimate interests has created understandable uncertainty among members of the Bar, particularly with respect to closed files of a former client.

The Committee has noted in the past, and continues to believe, that the overriding consideration when disposing of closed files must be the lawyer's responsibility to protect his former client, and not the former client's property interests in any particular item or document in such files or issues of the lawyer's personal convenience. D.C. Bar Opinion 206 (1989), D.C. Bar Opinion 168 (1986). However, in light of the fact that the D.C. Rules governing the disposition of client files are drafted in terms of the "property to which the client is entitled," *see* D.C. Rule 1.16(d); D.C. Rule 1.15(b), some discussion of the major categories of property that may constitute a client file is necessary to clarify the lawyer's ethical responsibilities.

*Defining Client File*

In a previous opinion interpreting the D.C. Code of Professional Responsibility, we adopted the "entire file" approach to the disposal of a client file. D.C. Bar Opinion 168 (1986). Under this approach, before a lawyer withdraws from representation he must deliver to the client (or his or her legal representative) the entire contents of the client's file unless withholding any items would "not result in foreseeable prejudice to the former client."[3] *Id.* D.C. Bar Opinion 206 retained the "foreseeable prejudice to the former client" standard, but also explained that not all materials within the client file necessarily impose the same ethical obligations on a lawyer. This opinion divided the closed client file into three categories: valuable property, work product and other client property. D.C. Bar Opinion 206 (1989). In order to avoid the potential for confusion arising from reliance on property law concepts, we now define a more workable means of segregating property within a client file that conforms with the standards used in several other jurisdictions.

*1. Valuable Property Subject to Rule 1.15(b)*

The disposition of property in a client file that has intrinsic value or that directly affects valuable rights, such as securities, negotiable instruments, deeds, settlement agreements, and wills,[4] is governed by D.C. Rule 1.15(b), *Safekeeping Property,* which provides:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

In D.C. Bar Opinion 206, we noted that implicit in this duty to promptly deliver valuable property to the client or third person to whom it belongs is the obligation to retain such property indefinitely until it can be returned to its rightful owner, the owner's legal representative, or a successor in interest. Thus, it would be unethical for a lawyer to destroy valuables contained in a client file.[5] We also recognize, however, that it may be impractical for a lawyer to store valuable property indefinitely. Therefore, after termination of representation and a lawyer's diligent but unsuccessful effort to deliver promptly valuables contained in a client file to the client or a third party (or their legal representatives or successors), the lawyer may invoke any state law procedures for escheat funds or unclaimed prop-

[1] This opinion is intended to replace our previous opinions regarding the retention of client files. *See* D.C. Op. 206 (1989); D.C. Op. 168 (1986). Many of the views expressed in those earlier opinions, however, have been incorporated here.

[2] It has been recognized that the "substantial storage costs can affect the cost of legal services, and the public interest is not served by unnecessary and avoidable additions to the cost of legal services." ABA Informal Op. 1384 (1977).

[3] In contrast, some jurisdictions have adopted the "end-product" approach, whereby the client only owns the final result of the attorney's work, *i.e.*, pleadings, contracts, reports, etc., and the attorney owns the rest of his work product. *See, e.g., Corrigan v. Armstrong, Teasdale, Schlafy, Davis & Dicus,* 824 S.W. 2d 92 (Mo. Ct. App. 1992); ABA Informal Op. 1376 (1977).

The "entire file" approach in the District of Columbia is consistent with D.C. Rule 1.8 (i), which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for. *See* Rule 1.8(i); D.C. Op. 250 (1995).

[4] While there is no indication in earlier opinions that deeds, wills and settlement agreements constitute the "other property" referred to in 1.15(b), due to the intrinsic value of such items, we find this interpretation is reasonable. Other jurisdictions have reached the same conclusion. *See* Wis. Ethics Op. E-98-1 (1998); 58 Ala. Law. 368 (1997); Mich. Ethics Op. R-12 (1991)

[5] This is the case regardless of whether the valuables belong to the client or to a third person, as Rule 1.15(b) makes clear.

erty depositories.[6] In the absence of such alternatives, the lawyer is obligated to maintain the valuables until they can be delivered to the client or third party or appropriate representative.[7]

*2. Other Client Property Subject to Rule 1.16(d)*

Rule 1.16(d) governs all other client property in a former client's closed file. Rule 1.16 (d), *Declining or Terminating Representation*, provides:

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

In order to avoid uncertainty regarding the treatment of client files, it is sound law practice management for lawyers to make arrangements with their clients for the disposal of clients' files either in the initial representation agreement or in the agreement terminating the attorney-client relationship. *See* Wisconsin Ethics Op. E-98-1 (1998). Consistent with the remainder of this opinion and Rule 1.16 (d), such an agreement may provide for the immediate delivery of the client's files upon termination of the representation, storage of the closed files for a specified period of time and then destruction of the files, or the immediate destruction of the files following completion of the representation. Similarly, the parties' respective obligations regarding delivery, storage or destruction costs may be set forth in this agreement.

In the absence of such an agreement, however, the lawyer must be guided by the provisions of Rule 1.16(d). Upon termination of representation the lawyer should make a reasonable and good-faith effort to notify the former client of the existence and contents of the client's files and follow the client's instructions whether to hold, return or destroy the files. *See* D.C. Bar Opinion 206.[8] This process is obviously easiest to implement if undertaken immediately following the termination of the representation, but there may be circumstances where this is not possible.

More difficult problems associated with the disposal of former clients' files arise when some period of time has passed since the end of the representation and either the client cannot be located or the client simply declines to respond to the lawyer's request for instructions regarding the disposition of the client's closed files. Because the ethical responsibility to do what is "reasonably practicable to protect a client's interests" persists even in the case of a former client, *see* Rule 1.16(d), there is no hard and fast rule that resolves this issue in all cases. Many jurisdictions, however, have recommended a minimum time period in which a lawyer should maintain the closed files belonging to his former client.[9]

We believe, absent special circumstances,[10] that a five year retention period beginning at the termination of representation is generally sufficient to protect the client's interests with respect to closed files.[11] Therefore, after unsuccessfully attempting to obtain instructions from the former client or his or her legal representative,[12] a lawyer who concludes that further retention of a former client's closed files is not "reasonably practical to protect a client's interest" may destroy the files five years after the termination of representation. Relying on ABA Informal Op. 1384 (1977), we suggest that the following guidelines should be considered when determining which materials in the closed files should not be destroyed but retained under Rule 1.16(d) beyond the five year period:[13]

- A lawyer should use care not to destroy any document that the lawyer has a legal obligation to preserve.
- A lawyer should use care not to destroy or discard information that the lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired.
- A lawyer should use care not to destroy or discard original documents provided by the client when they are not otherwise

[6] The availability of such procedures is a matter of state law. *See., e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, §1200.46(f-1) (1996)(money payable to a missing client may, by court order, be directed to the state's Lawyers' Fund for Client Protection): 58 Ala. Law. 368 (1997) (valuables belonging to a missing client preferably should be deposited with the court.)

[7] The language in Rule 1.15(b) is significant in this regard because it requires the lawyer to affirmatively "deliver" the valuable property. *See* D.C. Op. 206. We believe this word choice implies that, absent an agreement to the contrary, the lawyer should be responsible for any reasonable costs associated with promptly returning the valuable property to its owner, or storing the valuables for a reasonable time period should prompt delivery not be possible.

Additionally, we note that the requirement in Rule 1.15(a) that "complete *records* of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation," refers only to the records of such property described in Rule 1.15(a) that were delivered to the client or other owner. This provision should not be construed as suggesting that the valuable property itself, if unable to be delivered in accordance with Rule 1.15(b), should only be preserved for five years following the termination of representation.

[8] Even if the client chooses to destroy the file, the lawyer still must review the files and withhold any documents that he may have a legal obligation to preserve. *See, e.g.*, Rule 3.4 (lawyer shall not destroy evidence "if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding"); D.C. Op. 119 (1983).

[9] *See, e.g.*, Wis. Ethics Op. E-98-1 (1998) (recommending six year retention period); 58 Ala. Law. 368 (1997) (recommending six year retention policy); N.C. Revised Proposed RPC 209 (1995) (recommending six year minimum retention period for closed files); Ill. Ethics Op. 94-19 (1995) (recommending five year retention period for former client files of legal aide agencies); Md. Ethics Op. 93-39 (1994) (recommending five year retention policy); Mich. Ethics Op. R-12 (1991) (recommending five year retention period for public defenders).

[10] Special circumstances that require a longer retention period may include, but are not limited to: files relating to a matter involving a minor who will not attain the age of majority within the next five years; estate planning files that may need to be maintained until after the death of the client and the expiration of the probate period; or tax files that may need to be retained longer. *See* Martin, *How Long Do I Have to Keep Those Client Files Anyway*, 21-Mont. Law. 5 (Sept. 1995); Inge, *Handling & Retention of Clients' Documents*, Virginia Lawyer 10 (Dec. 1995).

[11] Several state bars apparently chose a retention period consistent with their jurisdictions' preservation period for records of account funds as provided for in rules similar to D.C. Rule 1.15(a). The District of Columbia requires a five year retention period for such records of account funds. Thus, we believe that a five year period for the retention of former client files is sufficient, subject to the limitation described above.

[12] At a minimum, a reasonable attempt to reach the former client should include sending a letter to the client's last known address and "wait[ing] a suitable period of time (perhaps six months)" for a response. Wis. Ethics Op. E-98-1 (1998).

[13] In previous opinions, the Committee, quoting language in former DR 2-110(A)(2) stated that the lawyer must consider whether destruction of documents would be "likely to prejudice the former client's interests." *See* D.C. Op 206. We believe instead that the new language in Rule 1.16(d) requiring a lawyer to retain or to return to the client or legal representative all materials "reasonably practicable to protect the client's interest" is a more workable standard when applied consistent with the factors described above. Not only does this rule protect the former client's best interest, but it also allows lawyers to account for the practical problems associated with the unnecessary retention of former clients' files.

filed or recorded in the public records.

- Copies of documents that previously have been delivered to the client in the course of representation may be destroyed if reasonable within the context of all the circumstances.

- Documents that are otherwise publicly available to the client may, if reasonable, be destroyed.

- Paper copies of documents that are stored on computer disk, CD-ROM, microfilm or a similar technology may be destroyed, provided the stored information is retrievable and the technology is not rendered obsolete over time by the fact that the equipment or hardware required to retrieve such document is no longer available.

- Any documents that the client would have no reasonable expectation for the lawyer to indefinitely preserve may also be destroyed.

Additionally, the following practical considerations also suggested in ABA Informal Op. 1384 should be noted in undertaking the actual destruction of former client files:

- In disposing of a client's closed file, a lawyer should take care to protect the confidentiality of the contents. *See* Rule 1.6 Confidentiality of Information (lawyer shall not knowingly reveal a confidence or secret of the lawyer's client).[14]

- A lawyer should preserve, perhaps for an extended time, an index or identification of the files that the lawyer has disposed of or destroyed.[15]

*3. Non-Client Materials*

Adopting an approach similar to the New York Bar, we believe that absent a legal obligation to the contrary, non-valuable property in the client's closed file that does not clearly or probably belong to the client or a third party may be destroyed without consultation or notice to the client or third party.[16] *See* New York Ethics 623 (1991). This Committee, however, is not authorized to answer questions of law regarding the ownership of, or the property interest in, the contents of a closed client file. *See* "Preserving Client Files," 27 Maryland Bar J. 52 (May/June 1994); Kentucky Ethics Op. E-300 (1985); ABA Informal Op. 1384 (1977). This decision should be made by the lawyer in accordance with the applicable laws of the governing jurisdiction.

*Costs Related to the Disposal of Client Files*

The inquirer here specifically has asked whether he may charge the former client for the direct costs associated with returning closed client files pursuant to the client's directive. We believe the lawyer does not have an affirmative duty to pay for the delivery of files relating to the representation of a former client when the materials in the files are not reasonably necessary to protect the former client's interest.[17] Because the language in Rule 1.16 (d) as distinguished from Rule 1.15(b) obligates a lawyer to merely *surrender* the client's files, this means, absent an agreement to the contrary, that the lawyer may, in the case of files not necessary to protect a client's interests or otherwise needed for continued representation,[18] make the files available for pick-up or delivery at the client's expense. Similarly, a lawyer instructed by the client to store any such files may charge the client for the costs of such storage.

The second specific inquiry is whether a lawyer may charge the former client for the time and effort expended segregating or reviewing materials in closed files upon termination of representation. As noted in New York Opinion 623, a lawyer has an ethical obligation to inspect the contents of closed files prior to disposition. Nonetheless, review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee. Thus, in the absence of an agreement to the contrary, a lawyer may charge the client a reasonable fee for the time incurred and other costs associated with file review. This is particularly appropriate when such review is made more complicated by the need to fulfill specific client instructions regarding the treatment of certain materials that may be contained in the client files. Good management practices during the course of the client representation, however, should be employed to minimize time and expense associated with reviewing voluminous client files. For example, detailed records kept during the course of representation by an attorney may prevent the need for a page-by-page review of all the former client's files prior to disposition. If further review is necessary after the conclusion of the representation, non-lawyers working under the supervision of a lawyer also may assist in reviewing files or otherwise preparing them for disposition.

*Conclusion*

Under Rule 1.15 (b), upon termination of representation, a lawyer should deliver promptly items of intrinsic value that belong to the former client or a third party. If such valuable property cannot be delivered, the lawyer must safeguard the valuables until they can be delivered, or if necessary, utilize available state law procedures for escheat funds or unclaimed property depositories.

Under Rule 1.16 (d), upon termination of representation, a lawyer should notify the client of any other client property in the former client's closed files and ascertain whether to retain, surrender or destroy such materials. In implementing the client's instructions in this regard, absent agreement to the contrary, the lawyer may require the former client to pay the costs of delivery or storage of the files. If the client fails to respond to the lawyer's request for instructions, after five years and a final attempt to notify the client, the attorney may destroy any materials "not reasonably necessary to protect a client's interest."

[14] Merely throwing the client files into the garbage presumably would not protect client confidentiality. On the other hand, shredding, incinerating or employing a commercial service that guarantees confidential disposal of documents would be sufficient. *See* Montaña, *Retention and Destruction of Client Files in a Law Firm*, 25 Colo. Law. 47, 48 (Apr. 1996); Martin, *supra* note 10; Thar, *How Long Should You Retain Client Files?*, 83 Ill. Bar J. 649, 650 (Dec. 1995).

[15] Such an index should be sufficient to "provide the firm and any other investigators with all pertinent information regarding both protection of the client's interests and the ultimate disposition of the file and its contents." *See* Montaña, *supra* note 14. Therefore, in addition to a list of files destroyed, the lawyer should at least retain a copy of the returned notice sent to the former client regarding the disposition of his or her closed files, or if applicable, a letter of consent from the client. *See id.*

[16] The lawyer still has a duty to preserve the confidentiality of these materials in accordance with D.C. Rule 1.6. *See supra* note 14.

[17] In the case of materials reasonably necessary to protect the former client's interests, the lawyer may, for clients unable to pay for delivery of the files, have an obligation to pay the delivery charges. *Cf.* D.C. Rule 1.8(i) (attorney work product lien does not apply when client becomes unable to pay or when withholding work product would present a "significant risk to the client of irreparable harm").

[18] *See* Cmt. [10] to Rule 1.16 ("a lawyer must take all reasonable steps to mitigate the consequences to the client").

Inquiry No. 98-3-10
Adopted: July 15, 1998

*Opinion No. 284*

**Advising and Billing Clients for Temporary Lawyers**

• Whether a lawyer must disclose to the client the use of a temporary lawyer on the client's matter depends on the nature of the work, the reasonable expectations of the client, and the nature of the relationship between the employing lawyer and the "temporary" lawyer. The employing lawyer generally need not disclose to the client the temporary lawyer's cost to the lawyer or law firm, and the lawyer may bill the client for the temporary lawyer's work at any reasonable rate mutually agreeable to the lawyer and client. Agency fees or other fees associated with the hiring of a temporary lawyer may not be billed to the client at greater than the amount actually disbursed or at a specifically agreed to markup.

**Applicable Rules**

- **Rule1.2** (Scope of Representation)
- **Rule1.4** (Communication)
- **Rule1.5** (Fees)
- **Rule7.1** (Communications Concerning A Lawyer's Services)
- **Rule7.5** (Firm Names and Letterheads)

*Inquiry*

Ethics opinions from the American Bar Association[1] and from various state jurisdictions,[2] together with recent articles in legal periodicals,[3] indicate that changes in the legal workforce and legal marketplace have increased demand by lawyers and clients for "temporary" lawyers to assist in legal representations on a short-term basis. As this phenomenon has become more common, it has become necessary to apply traditional ethical considerations to a form of practice that may not easily fit into traditional models. Because we believe that there has been some confusion among lawyers and clients as to the ethical questions relating to: (1)requiring disclosure to the client of the use of temporary lawyers, and (2)billing the client at a markup for the temporary lawyer's work, we seek to clarify application of the Rules in the District of Columbia to these issues.

*Discussion*

A review of the literature on this subject suggests that there is a wide variety of employment arrangements between law firms and "temporary" lawyers. In essence, a temporary lawyer is one who is not a partner and who is employed by a practitioner or a law firm to work on either a specific project or matter or for a fixed or otherwise limited period of time. If the relationship is expected to last indefinitely, regardless of whether it actually does, the employment does not fall within the category that we discuss in this opinion. Nor does this category include part-time lawyers, whose employment may be less than full-time but who work for one law firm exclusively and the duration of whose employment is expected to be indefinite. The temporary lawyer may work for one law firm at a time or for several law firms simultaneously. The temporary lawyer may be hired directly or through an employment agency for a fee, and may be paid directly by the law firm or by the agency.

Temporary lawyering offers benefits to clients as well as to the lawyers who use them. Yet, temporary lawyering also poses a number of complex ethical issues, including those relating to competence, independence, undivided loyalty, conflicts of interest and confidentiality. As noted, in 1988, the American Bar Association issued a formal opinion, 88-356 (Dec.16, 1988), which addressed a number of these issues. Its analysis of the conflicts, undivided loyalty, and confidentiality issues as they pertain to temporary lawyers has met with uniform acceptance and is persuasive. In essence, a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets. Temporary lawyers and their employing lawyers each have an obligation to ensure that the appropriate standards and requirements are met.

However, the ABA's resolution of the issue relating to client disclosure has not been uniformly followed by courts or ethics committees in subsequent decisions. The ABA opinion concluded that the use of a temporary lawyer had to be disclosed to a client only if the temporary lawyer is not working under the close supervision of a regular lawyer at the firm. This conclusion has been rejected by the Supreme Court of Kentucky and bar associations in Illinois, New York, and Ohio.[4] These authorities have concluded that under the ethical rules in those jurisdictions a lawyer should invariably disclose to a client the proposed use of a temporary lawyer on the client's behalf and receive consent from the client.

In this opinion, we address the question of whether a lawyer must disclose to the client the proposed use of a temporary lawyer on a client's matter and the billing obligations of the lawyer for the temporary lawyer's work and any related agency fees.

Our disciplinary rules do not explicitly address the issues of disclosure and billing practices relating to temporary lawyers. Rather, there are a number of rules that, when considered in concert, in our judgment, lead to a middle ground between the ethical opinions (such as Illinois, New York and Ohio) that require an lawyer to disclose to the client any time that the lawyer proposes to use a temporary lawyer on the client's matter and the ABA opinion which limits disclosure only to the situations where the employing lawyer is not closely supervising the work of the temporary lawyer. In our view, Rules 1.2(a) and 1.4 dictate that the temporary status of a

[1] ABA Formal Op. 88-356 (Dec. 16, 1988).

[2] N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. No. 632 (Oct. 12, 1984), *Oliver v. Board of Governors, Ky. Bar Ass'n* 779 S.W.2d 212, 216 (Ky. 1989); Ill. St. Bar Ass'n Advisory Op. on Prof. Conduct 92-97 (Jan. 22, 1993); Ohio Bd. of Comm'rs on Grievances and Discipl. Op. No. 90-23 (Dec. 14, 1990); Bar of City of New York Comm. on Prof. and Judicial Ethics Op. No. 1988-3 (Mar. 31, 1988), *reaff'd*, Ethics Op. 1989-2 (May 10, 1989).

[3] Johnson, *Law Firm Salaries and Billing Rates*, Legal Times, Dec. 16, 1996, at 536; Adelman, *Choosing Among Different Models to Charge Clients for Contract Lawyers Can Be Tricky Business*, Legal Times, June 30, 1997, at 569; *see also* Turano and Dolido, *When is a Law Firm an Employer and Responsible for its Contract Lawyers*," Legal Times, July 15, 1996, at 11.

[4] *But see, e.g., Oliver v Board of Governors, Ky. Bar Ass'n, supra* note 2 ("We cannot accept the ABA's distinctions and would recommend disclosure to the client of the firm's intention. . . to use a temporary lawyer. . . in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement." *See also* Ill. St. Bar. Ass'n Advisory Op. on Prof. Conduct Op. 92-97 (Jan 22, 1993); Ohio Bd. Of Comm'rs on Grievances and Discipl. Op. No. 90-23 (Dec. 14, 1990) (requiring disclosure of temporary lawyers under Code of Prof. Conduct); Bar of City of New York Comm. on Prof. and Judicial Ethics, Op. No. 1988-3 (Mar. 31, 1988), *reaff'd*, Ethics Op. 1989-2 (May 10, 1989) ("The Committee continues to believe that the law firm has an ethical obligation in all cases . . . to make full disclosure in advance to the client of the temporary lawyer's participation . . . and to obtain the client's consent . . . . "); *but see* N.J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. No. 632 (Oct. 12, 1989) (agreeing with ABA that disclosure turns on level of supervision).

lawyer working on a client's behalf should be disclosed to the client whenever that status may reasonably be likely to be material to some aspect of the representation of the client.

On the other hand, our rules do not require that the client be advised of the temporary lawyer's cost to the lawyer or the law firm. The lawyer may bill the legal services provided by a temporary lawyer at any reasonable rate mutually agreed to by the lawyer and by the client, provided any disbursements associated with hiring a temporary lawyer (such as agency fees, if they are to be billed to the client) are billed at the amount of the disbursement or an agreed upon markup.

*1. Disclosing the Use of "Temporaries"*

There are a number of rules that bear on this issue. Rule 1.4 requires that in all matters the lawyer must keep the client reasonably informed so the client can make decisions regarding the representation. Similarly, Rule 1.2(a) provides that "a lawyer . . . shall consult with the client as to the means by which [the objectives of the representation] are to be pursued." Rule 7.5(c) provides that a lawyer may not mislead the client as to the lawyer's practice "organization." Finally, Rule 1.5(e)(2) provides that where a lawyer divides the client's fee with any outside lawyer, including a temporary lawyer, disclosure to the client is required. Thus, where there is to be a division of fees (as opposed to the payment of a salary or time-based payment by the law firm to the temporary employee), the rule mandates that "the client [be] advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged." The rule also requires that the client consent to the arrangement. *See also* Rule 1.5, Comment [14].

Read together, these provisions illustrate the requirements that lawyers actively advise clients of critical matters, including important staffing issues, and that they not mislead clients as to the associations in which they practice, including affiliations between themselves or their firms and lawyers outside of the firm hired to work on a particular matter. These rules establish that the client is reasonably entitled to expect that it will be informed of any matter that is material to the representation.

Often the temporary status of a lawyer who has been assigned to work for the client may well be material to the representation. For example, if the client's matter is expected to last for a considerable period of time but the temporary lawyer's involvement is to be limited to a shorter period because her employment is scheduled to end, then the client is entitled to know that fact. The client may not wish to employ and educate a lawyer to work on his case who will not reasonably be expected to be able to finish out her responsibilities regarding the case. Similarly, a client whose adversaries in unrelated matters have retained a particular law firm may well want and expect to know whether a temporary lawyer is currently or has in the recent past worked for that law firm. Finally, when the client is relying on the expertise and talents of the employing lawyer (or partners and associates of the lawyer or the reputation of the law firm) and the temporary lawyer will have important responsibilities and will not be closely supervised by such lawyers, then clearly the employing lawyer has a duty to disclose the temporary status to the client and to obtain consent for the temporary lawyer's work. Indeed, we agree with the ABA opinion that where the work of the temporary lawyer will not be closely supervised by the employing lawyer or law firm, the client should usually be advised of the proposed role to be played by the temporary lawyer and her status as a temporary lawyer. Exceptions would include when the temporary lawyer's work does not require the substantial exercise of judgment, such as the digesting of deposition transcripts.

On the other hand, there are situations in which the temporary status of the lawyer will be irrelevant to the client's interests. For instance, if a temporary lawyer is employed to write a single memorandum on a specific legal subject in the case without any expectation that the temporary lawyer would continue to be involved in the client's matter, then it is irrelevant that the employment of the temporary lawyer is limited in time where that time is as long or longer than the assignment for the client is expected to last.

There may be other circumstances that suggest that a client should be informed of the temporary status of the lawyer. For example, the client may have stated or manifested a desire that it have available to it a regular cadre of lawyers who will develop expertise and be available to work on a series of expected matters. Such a client would not likely wish to employ and educate a lawyer who is unlikely to be available to work on the client's future matters. In such a circumstance, the temporary status of a lawyer would be material to the client and the employing lawyer would have a duty to disclose at the outset of the temporary lawyer's assignment to the project.

In short, in our view, the combination of rules that we have cited mandates that a lawyer should advise and obtain consent from the client whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations.[5]

The disclosure of the temporary lawyer's role does not necessarily mean that the financial arrangement between the firm and the temporary lawyer must be disclosed. That is a wholly separate issue to which we now turn.

*2. Billing Clients for Temporary Lawyers*

The billing for services of a temporary lawyer raises the issue of whether the charge is more akin to seeking reimbursement for out-of-pocket disbursements or to charging for the time of a regular associate, whose salaries and benefits are not required to be, and are not generally, disclosed to the client. If the employing lawyer's payments to a temporary lawyer are considered to be out-of-pocket disbursements, there would have to be disclosure to the client of the costs, which could not be marked up without the client's consent. (*See* D.C. Bar Op. 185).

All of the precedents in other jurisdictions and our analysis of the D.C. Rules convince us that the charges to be billed to the client for the services of a temporary lawyer are, like the services of a regular associate, a matter to be determined by mutual agreement between the lawyer and client. We find that fees generated by a temporary lawyer are, for purposes of the disciplinary rules, equivalent to fees generated by any other lawyer in a law firm working on the client's matter. Accordingly, the only disciplinary restriction on the fee billed to the client for the temporary lawyer's time is that it be "reasonable." *See* Rule 1.5(a).

No court decision or bar association opinion has suggested that the employing law firm must disclose to the client the salary it pays to the temporary lawyer or the

[5] Because we recognize that there may be different considerations relating to temporary nonlawyers, employed to assist a lawyer, our analysis and this opinion is limited to temporary lawyers.

markup the firm charges the client for the temporary lawyer's time. It is, of course, usually the case that the law firm does not disclose to clients the compensation arrangements of partners, contract partners, of counsel, or regular associates. We see in the rules no reason for a distinction for the compensation paid to a temporary lawyer, unless there is an actual division of fees. As noted, when there is an actual division of fees, Rule 1.5(e) requires notice to the client and the client's consent. In the absence of fee splitting, the only requirement is that the billing rate charged by the firm for the temporary lawyer's time be reasonable and be agreed to by the client. If there is in fact an agreed division of a client's payment for the services of a temporary lawyer between the temporary lawyer and the employing the law firm, we believe that the requirements of 1.5(e), including notice and the client's consent, must be met. The payment of a salary to a temporary lawyer, of course, just like the payment of the salary of a regular employee would not be considered a division of fees.

Finally, in addition to the charges incurred by the law firm for work done by a temporary lawyer, in some instances the firm might make payments to a "placement agency" or other referral firm in connection with finding and hiring the temporary lawyer. As the ABA formal opinion concludes, these expenses are disbursements and are not salary for purposes of billing the client. In accordance with Rule 7.1's requirements that a lawyer not make false or misleading statements about the lawyer's services and Rule 8.4 prohibiting a lawyer from any misrepresentations, if these disbursements are billed to the client, they must be limited to no more than the actual disbursement amount or any mark-up that is specifically disclosed to and agreed to by the client. *See also* D.C. Bar Op.185 (1987) (finding that under the former Code of Professional Responsibility, provisions regarding integrity and honesty required that disbursements for third party services be billed to clients at cost). The payment to the agency may not be based on the amount of the fees paid by the client to the firm for the legal services rendered because no fee splitting is permitted with non-lawyers. *See* Rule5.4(a).

Inquiry No. 97-3-15
Adopted: September 15, 1998

*Opinion No. 285*

**Nonlawyer Former Government Employee Working for a Lawyer**

- A lawyer who employs a nonlawyer former government employee must screen that person from matters that are the same as, or substantially related to, matters on which the nonlawyer assisted government lawyers in representing a government client. In addition, Rules 4.4 and 8.4 preclude the lawyer from inducing the former government employee to reveal certain other types of confidential information.

**Applicable Rules**

- **Rule 1.11** (Successive Government and Private Employment)
- **Rule 4.4** (Respect for Rights of Third Persons)
- **Rule 5.3** (Responsibilities Regarding Nonlawyer Assistants)
- **Rule 8.4** (Misconduct)

*Inquiry*

An ethics official in a department of the federal government inquires about "the application of the D.C. Rules of Professional Conduct to law firms that employ or use nonlawyers who are former employees of the Department . . . ." A "principal concern is the risk that confidential government information may be disclosed or abused," particularly when former government employees work as consultants in legal matters related to their former government duties. In posing this general concern, the inquirer invites comment on four different scenarios: (1) the nonlawyer worked directly with government attorneys on a matter in which the law firm is now involved; (2) the former employee had no direct contact with government lawyers but was exposed to confidential government information; (3) the government is not a party to a case but still may be harmed by the abuse of confidential government information; and (4) the consultant formerly participated in government policy making.

*Discussion*

We emphasize at the outset that the D.C. Rules of Professional Conduct have no direct application to the conduct of nonlawyers.[1] In some instances, however, the Rules require lawyers to be responsible for the conduct of their nonlawyer assistants. For example, Rule 5.3, in both subsections (a) and (b), requires a lawyer to make reasonable efforts to ensure "that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." Moreover, under certain circumstances, a lawyer will be responsible for the conduct of a nonlawyer employee or associate that would be a violation of the rules of professional conduct if engaged in by a lawyer. Rule 5.3 (c). Rule 8.4 (a) also provides that it is professional misconduct for a lawyer to "violate or attempt to violate the rules of professional conduct . . . through the acts of another."

Thus the professional obligations of lawyers provide a necessary background for our analysis. Although there is nothing improper *per se* about a lawyer communicating with a former employee of an opponent, *see* ABA Formal Op. 91-359 (1991), it is important to consider the rules dealing with "side-switching" and imputed disqualification of lawyers. The government lawyer who moves to the private sector is precluded from accepting employment "in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee," Rule 1.11 (a), and he must be "screened" from any such matters being handled by his law firm. Rule 1.11 (c). *See generally* D.C. Bar Op. No. 279 (1998) (discussing availability of screening as a cure for imputed disqualification).

Although rules requiring screening do not apply by their own terms to nonlawyers, screening has often been required when nonlawyers move from one law firm to another.[2] For example, the ABA Committee on Ethics and Professional Responsibility considered the ethical issues presented when a paralegal who worked on litigation matters for one law firm was hired by an opposing law firm and concluded that screening would be adequate to avoid imputed disqualification of the new employer. ABA Informal Op. 88-1526 (1988). The official synopsis explains:

> A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose

[1] The primary restrictions on former officers and employees of the federal government are found in the Ethics in Government Act, *see, e.g.,* 18 U.S.C. § 207, which applies to lawyers and nonlawyers alike. This committee has no authority to interpret the requirements of this law and similar laws.

[2] We do not address the related issues that would be presented if the former government employee were now a lawyer. *See* D.C. Rules of Professional Conduct 1.6(g) and 1.10(b).

> interests conflict with the interests of clients of the former employer on whose matters the nonlawyer has worked, as long as the employing firm screens the nonlawyer from information about or participating in matters involving those clients and strictly adheres to the screening process described in this opinion and as long as no information relating to the representation of the clients of the former employer is revealed by the nonlawyer to any person in the employing firm. In addition, the nonlawyer's former employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer.

Looking for guidance to Model Rule 5.3's requirement that supervising lawyers make reasonable efforts to ensure that the conduct of their nonlawyer employees "is compatible with the professional obligations of the lawyer," the ABA Committee nevertheless recognized that "[i]t is important that nonlawyer employees have as much mobility in employment opportunity as possible consistent with the protection of clients' interests. . . . Accordingly, any restrictions on the nonlawyer's employment should be held to the minimum necessary to protect confidentiality of client information." The Committee noted as well that the standards for screening adopted in its opinion "apply equally to all nonlawyer personnel in a law firm who have access to material information relating to the representation of clients and extend also to agents who technically may be independent contractors, such as investigators."[3]

In Opinion No. 227 our committee also addressed the case of a paralegal who moved from one law firm to another. The new firm was handling a matter "substantially related" to one on which the paralegal had worked at the former firm. Applying Rule 5.3, we concluded that the new firm must not exploit any confidences or secrets[4] that the paralegal had obtained during former employment but could avoid imputed disqualification by "screening" the paralegal from that matter. "In the case of migratory *nonlawyers* generally, we approve[d] the pro-screening approach reflected in ABA Informal Op. 88-1526."

Many other legal ethics committees have also required screening when nonlawyers move from one law firm to another. *See, e.g.,* Prof. Resp. Comm., Chicago Bar Ass'n, Op. 93-5 (1993) (screening applied to secretary who moved from one law firm to another); Michigan Ethics Op. RI-284 (1996)(screening applied to secretary); Michigan Ethics Op. RI-115 (1992) (screening applied to secretary); New Jersey S. Ct. Advisory Comm. on Prof. Ethics Op. 665 (1992) (screening applied to paralegal); North Carolina Ethics Op. RPC 176 (1994) (screening applied to paralegal); South Carolina Bar Ethics Advisory Op. 93-29 (1993) (screening applied to secretary).

We similarly conclude that a screen must be used when the nonlawyer former government employee worked directly with government attorneys on a matter which is the same as, or is substantially related to, a matter in which his law firm employer is now involved. However, this conclusion is based on the fact that the nonlawyer worked directly with government attorneys who were representing a client. The obligation to preserve client confidences and secrets has no application if there is no underlying lawyer-client relationship. Thus, Rule 1.6 does not govern the situation described by the inquirer where the former employee did not work with government lawyers, but was otherwise exposed during his employment to confidential government information.[5]

Nor is there any bar to employment (or obligation of screening) under the Rules when the former government employee participated in government policy making. It is quite common for lawyers and nonlawyers alike to use expertise acquired in government employment to enhance their marketability in the private sector. "The making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11." D.C. Rules of Professional Conduct, Rule 1.11, Comment [3]. Similarly, matters will be deemed "substantially related" "only if specific information (*as distinct from general agency expertise or contacts*) that a former government lawyer may have had access to in one matter is likely to be useful in a subsequent matter . . . ." *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 48 (D.C. 1984) (*en banc*) (emphasis added). Thus, neither a lawyer nor a nonlawyer will be disqualified simply because he or she participated in government policy making or is intimately familiar with the workings of a government agency.

In limited circumstances, however, the Rules of Professional Conduct may preclude the law firm that currently employs the nonlawyer former government employee from inducing him or her to violate obligations of confidentiality not derived from assisting government lawyers in representing a client. Rule 4.4 provides in pertinent part that, "[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person." We have not previously interpreted this provision, and there is no helpful commentary in our rules, but there is some explanation of its scope in opinions from other jurisdictions.

For example, in Formal Op. 91-359 (1991), the ABA Committee on Ethics and Professional Responsibility concluded that Rule 4.2 does not preclude contact with former employees of an opposing corporate party. The committee cautioned, however, that the attorney "must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employee's counsel are protected by the privilege . . . . Such an attempt could violate Rule 4.4 (requiring respect for the rights of third persons)." *See also* ABA Formal Op. 97-408, n.14 (1997) ("Gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation nevertheless may vio-

[3] Similarly, the conclusions we reach in this opinion do not depend on there being an employer/employee relationship between the nonlawyer and the lawyer, but apply equally when the nonlawyer former government employee has been hired as a consultant by a lawyer opposing the government.

[4] Rule 1.6(b) explains that the term "confidence" refers to information protected by the attorney-client privilege. The term "secret" is defined much more broadly to refer to "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

[5] In many cases brought to our attention by the inquirer, disqualification or screening was required only because the nonlawyer had worked directly with lawyers in his or her former employment. *See, e.g., Camden v. State of Maryland*, 910 F. Supp. 1115 (D.Md. 1996) (lawyers disqualified because they "had listened in at the legal confessional"; former government employee had been extensively exposed to confidential client information of the other interested party); *MMR/Wallace Power & Industrial v. Thames Assoc.*, 764 F. Supp. 712 (D. Conn. 1991) (attorneys disqualified; nonlawyer who had consulted on litigation, had extensive contact with plaintiff's counsel, and had access to confidential litigation materials switched sides and become a trial consultant for defendants); *Kapco Mfg. Co. v. C & O Enter.*, 637 F. Supp. 1231 (N.D. Ill. 1985) (disqualified denied; law firm secretary/office manager who moved to opposing law firm had been effectively screened); *Williams v. TWA*, 588 F. Supp. 1037 (W.D. Mo. 1984) (plaintiffs' law firm disqualified because they also represented a client who, while employed by defendant, assisted one of defendant's attorneys with the defense of plaintiffs' claims and had access to confidential information about these cases).

late Model Rules 4.4, 8.4(c) and 8.4(d) . . . ."); Conn. Bar Ass'n, Informal Op. 96-4 (1996) (Rule 4.4 precludes lawyer from reviewing and copying psychiatric records of client's ex-wife made confidential by statute); Pa. Bar Ass'n, Informal Op. 93-135 (1993) (Rule 4.4 prohibits lawyer from conducting surreptitious inspection of psychiatric records of major witness against client; although information would be very useful in impeaching witness, Pennsylvania caselaw makes such records absolutely confidential); New Jersey S. Ct. Advisory Comm. on Prof. Ethics, Op. 680 (1995) (if lawyer had surreptitiously copied confidential documents in possession of attorneys for adverse party, and items of evidence were involved, it would constitute a violation of Rule 4.4). While we do not believe that Rule 4.4 precludes a lawyer from attempting to learn all information which the government would deem confidential, it does preclude attempts to induce a present or former employee to reveal information known to the lawyer to be protected from disclosure by statute or a well-established common law privilege.

*Conclusion*

A lawyer must screen a nonlawyer former government employee from matters the same as, or substantially related to, matters on which he or she assisted government lawyers in representing a client. On the other hand, the nonlawyer will not be disqualified from working on a matter simply because he or she is intimately familiar with the workings of a government agency or participated in relevant government policy making. Rules 4.4 and 8.4 preclude attempts to induce the former government employee to reveal information made confidential by statute or a well-established common law privilege.

Inquiry No 97-2-8
Adopted: November 17, 1998

*Opinion No. 286*

**Contingent Referral Fees**

• A payment by a lawyer to another person for the referral of legal business, which is contingent on the lawyer's receipt of fees from the referred legal business and is tied to the amount of those fees, constitutes the sharing of legal fees. Such sharing can only be done with another lawyer, and only if certain client disclosure and other conditions are satisfied.

**Applicable Rules**

• **Rule 1.5(e)** (Restrictions on Division of Fees Between Lawyers Not In the Same Firm)
• **Rule 5.4(a)** (Lawyer may not Share Legal Fees with a Nonlawyer)
• **Rule 7.1(b)(5)** (Consideration May Be Paid by a Lawyer to an Intermediary for the Referral of Legal Business)

*Inquiry*

Legal ethics rules in the District of Columbia have long contained restrictions on the sharing of fees by one lawyer with another lawyer, and prohibitions on the sharing of legal fees with nonlawyers and on the payment by a lawyer of something of value to another person for the referral of legal work. Under DR 2-107 of the former Code of Professional Responsibility, a division of fees between lawyers not in the same firm could only be made in proportion to the services performed and responsibility assumed by each lawyer; under DR 3-102, legal fees could not be shared with nonlawyers (except under one of several very narrow exceptions concerning the estate of a deceased lawyer and law firm retirement plans). And under DR 2-103(C), payments to others for the referral of legal business could only be made if for advertising or for the fees of a lawyer referral service.

Most of these restrictions continue in the District of Columbia Rules of Professional Conduct ("the Rules"), which became effective in 1991. Rule 1.5(e) establishes conditions under which lawyers not in the same firm may divide legal fees between themselves, and Rule 5.4(a) generally prohibits the sharing of legal fees with nonlawyers. Regarding payments to others for the referral of legal business, the Rules liberalized some of the restrictions of the former Code, as they now permit a lawyer to pay consideration to a person for the referral of business to the lawyer, subject to certain disclosure obligations to the client. This provision, contained in Rule 7.1(b)(5), is unique to the District of Columbia.[1]

In this inquiry, we address a question which touches each of these Rules – whether a payment to a lawyer or nonlawyer for the referral of legal business, which payment is contingent on, and tied to, the lawyer's receipt of revenue from the referred matter, is a sharing of legal fees governed by Rules 5.4(a) and 1.5(e) (and therefore permitted only between lawyers), or is a Rule 7.1(b)(5) referral fee (and therefore payable to anyone). We addressed contingent referral fees in an earlier Opinion (No. 253), where we noted a "tension" between the fee-sharing prohibition of Rule 5.4(a) and the referral fee authorization of Rule 7.1(b)(5). In that Inquiry, this Committee was presented with a situation in which a law firm proposed to pay an insurance company for clients referred to the firm. The payment — a pre-determined specified sum — would be due on settlement or judgment in the case.

In Opinion 253, we concluded that such an arrangement was permissible under the Rules of Professional Conduct. The apparent tension or conflict between the fee-sharing prohibition of Rule 5.4 and the referral fee authorization of Rule 7.1(b)(5) was resolved in the Committee's observation that Rule 7.1(b)(5):

> was intended to be a narrow exception to Rule 5.4. Therefore, only those lawyers who disclose to their clients the information required under Rule 7.1(b)(5) can escape Rule 5.4's general ban against the sharing of legal fees with nonlawyers.

After careful consideration of Opinion 253, the Committee has decided to issue this Opinion to clarify the reach of Rule 7.1(b)(5) and the status of contingent referral fees under the Rules.

*Discussion*

The central factor that determines the legality of contingent referral payments is whether they are payments to an intermediary for the referral of legal business (permitted under Rule 7.1(b)(5) to any recipient) or the division or sharing of a legal fee (lawful under Rule 5.4(a) only if between lawyers and subject to the requirements of Rule 1.5(e) if between lawyers practicing in different firms).

A non-contingent payment for the referral of legal business, *i.e.*, one that is paid regardless of the success or outcome of the representation, is not a division of legal fees. Such payments are simply part of a lawyer's marketing expenses, payable whether or not they produce revenue for the lawyer. Such payments, once prohibited in the District of Columbia (and still prohibited in most other jurisdictions), are lawful under Rule 7.1(b)(5) of the District of Columbia Rules of Professional Conduct. We believe that such non-contingent pay-

[1] The ABA Model Rules, in Rule 7.2(c), are more akin to the District of Columbia's former DR 2-103(C), permitting only payments for advertisements and lawyer referral service membership.

ments – such as a cash payment or gift certificate given to a person for each potential client referred to the lawyer —are the ones contemplated by that Rule.[2] Because they are like payments from the general funds of the lawyer for advertising or other marketing expenses, and not from the proceeds of a particular representation, such payments (whether made to a lawyer or nonlawyer) do not run afoul of Rules 1.5(e) and 5.4(a) because they do not involve a division or sharing of legal fees.[3]

On the other hand, the payment of a contingent referral fee, tied to the amount of the lawyer's fees or recovery on behalf of the client, is not a marketing expense unconnected to the realization of income; rather, it is more akin to a commission, which directly reduces the fee income of the lawyer making the payment. The lawyer making such a payment is, in practical effect, paying some of the proceeds of a specific legal representation to another person.

When so viewed, such a payment is a form of fee sharing, which is prohibited except as between lawyers and except as the requirements of Rule 1.5(e) are satisfied. There is direct support for this conclusion in Florida Bar Professional Ethics Committee Opinion 89-4 (a commission paid by a law firm to a marketing agent tied to legal fees derived from referred business is an unethical division of fees), and indirect support in *Son v. Margulius, Mallios, Davis, Rider & Tomar*, 709 A. 2d 112 (Md. 1998); *Trotter v. Nelson*, 684 N.E. 2d 1150 (Ind. 1997); *In Re Drakulich*, 908 P. 2d 709 (Nev. 1995); and *Texas State Bar v. Tinning*, 875 S.W. 2d 403 (Tex. App. 1994).

We conclude, therefore, that a payment to a *nonlawyer* for the referral of business, tied to the amount of revenue received by the lawyer from the referred business, is not permitted under the Rules. If paid to a *lawyer,* the payment must conform to the requirements of Rule 1.5(e).

[2] Subpart (b)(5) of Rule 7.1 was added by the Board of Governors of the District of Columbia Bar to the recommendations of the Model Rules of Professional Conduct Committee. No similar provision was contained in the ABA Model Rules of Professional Conduct. In fact, Model Rule 7.2 (not adopted in the District of Columbia) generally prohibits the payment of anything of value to a person for referring legal business to a lawyer.

[3] Under some circumstances, the referral fee could be passed on to the client, a circumstance which would have to be included in the required disclosure under Rule 7.1(b)(5).

We do not believe that Rule 7.1(b) (5) is an exception to the long-standing prohibition of the sharing of legal fees with nonlawyers, because it does not concern the sharing of legal fees. The Rule did mark a departure from prior ethics law in this jurisdiction, but only in its authorization of certain payments to others for the referral of legal business to a lawyer. When such payments are not contingent on and tied to the receipt of fee revenue by the lawyer, they are not a sharing of legal fees. Under this view of Rule 7.1(b) (5), there is no tension with Rule 5.4, as we do not interpret the former to apply to contingent referral payments to nonlawyers.

Thus, the conclusion (discussed above) and much of the discussion of Opinion No. 253 remain undisturbed. We only reach that conclusion by the reasoning of this Opinion, *i.e.*, that the payment of a fixed sum as a referral fee is not the sharing of a legal fee.

Inquiry Nos. 96-5-16 and 97-6-28
Adopted: November 17, 1998

*Opinion No. 287*

**Ex Parte Contact With Former Employees of Party-Opponents**

- A lawyer may contact unrepresented former employees of a party-opponent without obtaining consent from that party irrespective of the position formerly held by the ex-employee in the opposing organization. Prior to any substantive communication, the lawyer must disclose to the former employee the lawyer's identity and the fact that the lawyer represents a party adverse to the ex-employee's former employer. During the communication the lawyer may not solicit privileged information of the party opponent.

**Applicable Rules**

- **Rule 4.2** (Communication Between Lawyer and Opposing Parties)
- **Rule 4.3** (Dealing with Unrepresented Person)
- **Rule 4.4** (Respect for Rights of Third Parties)

*Inquiry*

The inquirer is a lawyer representing a client in an action against a corporation. He has asked the Committee whether, and under what circumstances, he may contact former employees of his party-opponent without first obtaining that party's consent.

*Discussion*

District of Columbia Rule of Professional Conduct 4.2 (a) generally prohibits communication about the subject of a representation between a lawyer and a party known to be represented by another lawyer in the matter, unless the lawyer has prior consent of opposing counsel to the communication or is authorized by law to do so. The Rule does not expressly address the propriety of *ex parte* contact between a lawyer and a former employee of a party-opponent. The provisions and commentary of Rule 4.2, however, lead to the conclusion that *ex parte* contact between a lawyer and a former employee of a party-opponent is permitted, subject to observance of certain safeguards.

Significantly, Rule 4.2 does not bar all communications between a lawyer and nonparty employees of an opposing party. Rather, only communications with nonparty employees who have the authority to bind the opposing party in the matter are proscribed. Toward that end, Rule 4.2 provides in pertinent part:

> (b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.
>
> (c) For purposes of this rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2 (1996).[1] Comment [3] to Rule 4.2 elucidates the meaning of "person

[1] D.C. has adopted a unique version of Model Rule of Professional Conduct 4.2. The Model Rule, in force and effect in a majority of states, does not contain sections (b) and (c), providing only that "[I]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." *See* ABA Formal Op. 91-359 (1991) (Rule 4.2 prohibits contacts by a lawyer with employee of an opposing corporate party if the employee (a) has "a managerial

... who has the authority to bind a party organization," providing that "[t]he Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer." As a result, Rule 4.2 prohibits communication only with those employees of a party opponent who hold or exercise the power or authority to decide, by conduct or admission, the organization's position(s) in the matter.

Rule 4.2 effectively memorialized the view expressed in Opinion 129. In that Opinion — decided under DR7-104, the predecessor to Rule 4.2. — this Committee found that the prohibition against communication with adverse parties did not prohibit contact with current employees who could not bind an organization with regard to the litigation. *See* D.C. Bar Op. 129 (1983). In Opinion 129, and before that in Opinion 80, we noted that several policies supported the prohibition of contact with adverse parties:

> (1) the presumed imbalance of skill between a lawyer and a layman, giving one an unfair advantage over the other; (2) the risk that an uncounseled party will make admissions or concessions or reach judgments from which his lawyer could protect him; and (3) the risk that a lawyer might be compelled to become a witness in a case or forced to choose between advancing his client's interests and not overreaching in communicating with an unprotected adverse party.

In both Opinions, we balanced these policies with the broad policy that litigants should have access to all relevant, non-privileged information regarding a matter and, derivatively, lawyers should be allowed to find facts as quickly and inexpensively as possible. We found that the potential dangers of *ex parte* contacts were outweighed by the additional burden to litigants of an expansive prohibition on *ex parte* contacts with all employees of an adverse party. This interpretation was subsequently embodied in the narrow restriction of Rule 4.2.

A similar approach is warranted for *former* organizational employees. Indeed, neither the text nor the underlying policies of Rule 4.2 provide a basis for extending its prohibition to former employees. Because former employees, as a general rule, cannot bind the organization by decisionmaking, by conduct, or by admission with respect to a pending or prospective matter, Rule 4.2 does not prohibit *ex parte* contacts with these individuals. That former employees may possess information prejudicial to their former employer, or may have engaged in conduct creating potential liability for that employer, is a matter of historical fact. It does not, without more, place those former employees in a position to bind the organization in the manner contemplated by Rule 4.2.

Consistent with this approach, a majority of state and federal courts that have considered this issue have concluded that *ex parte* contact with former employees of a party opponent is permissible. *See, e.g., Spencer v. Steinman*, 179 F.R.D. 484, 491 (E.D. Pa. 1998); *H.B.A. Management Inc., v. Estate of Schwartz*, 693 So. 2d 541, 543-46 (Fla. 1997); *Aiken v. Business and Industry Health Group, Inc.*, 885 F. Supp. 1474, 1478-79 (D. Kan. 1995); *United States v. Western Electric Co.*, 1990 WL 39129, at *I (D.D.C. Feb. 28, 1990) (interpreting Model Rule 4.2); *Wright v. Group Health Hospital*, 691 P.2d 564, 569 (Wash. 1984). The ABA has also interpreted Model Rule 4.2 to permit *ex parte* contacts with former employees. *See* ABA Formal Op. 91-359 (1991).

Consideration of the policies underlying Rule 4.2 supports the conclusion that lawyers may make *ex parte* contact with unrepresented former employees of party-opponents. As the ABA noted in Formal Opinion 95-396 (1995), Rule 4.2 is not designed to protect against disclosure of prejudicial facts. Instead, the Rule is targeted at protecting the attorney-client relationship and safeguarding against a litigant being injured by binding *ex parte* disclosures. Since a principal purpose of Rule 4.2 is to foster and protect the lawyer-client relationship, not to restrict the flow of relevant, non-privileged information, interpreting Rule 4.2 to forbid *ex parte* contacts with former employees would require parties to spend more time, money, and resources by utilizing formal discovery to obtain information that could have been obtained informally. Such an expansive reading of Rule 4.2 would place too heavy a burden on the fact gathering process without protecting any legitimate interest sought to be safeguarded by the Rule.

At the same time, a lawyer does not have *carte blanche* with respect to the scope of communications with former employees of a party opponent. The most significant concern in such communications is the possibility that the former employees were privy to privileged information and that, without counsel present, they might be inclined to reveal this information to the opposing lawyer.[2] This concern is serious and a lawyer may not solicit information when communicating with former employees of a party-opponent that is reasonably known or which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege.[3] We base this conclusion on Rule 4.4, which requires lawyers to refrain from using "methods of obtaining evidence that violate the legal rights of [third parties]." These rights include the former employer's right to protect its privileged information from disclosure.[4]

responsibility" on behalf of the employer-corporation, or (b) is one whose act or admission in connection with the matter that is the subject of the potential communicating lawyer's representation may be *imputed* to the corporation, or (c) is one whose "statement may constitute an admission" by the corporation).

[2] *See., e.g. Zachair, Ltd., v. Driggs*, 965 F. Supp. 741 (D.Md. 1997), *aff'd*, 141 F.3d 1162 (4th Cir. 1998) (disqualifying counsel for, *inter alia*, violating Maryland Rule 4.2 by engaging in *ex parte* contact with the former general counsel of a corporate defendant whom counsel knew or should have known possessed substantial privileged information); *Camden v. State of Maryland*, 910 F.Supp. 1115 (D.Md. 1996) (holding under Maryland Rule 4.2 that a lawyer may not have *ex parte* contact with the former employee of an organizational party when the lawyer knows that the former employee was extensively exposed to privilege information.)

[3] In Op. 256 we concluded that where a lawyer receives documents containing client secrets or confidences of an adversary, and knows prior to examining the documents that the disclosure was inadvertent, Rule 1.15(a) requires the receiving lawyer to return the documents to the sending lawyer; the lawyer also violates Rule 8.4(c) if the lawyer reads and/or uses the material. Whether a lawyer has received a party opponent's privileged information during communications with a former employee may be considerably more ambiguous than is the case with the receipt of privileged documents from opposing counsel, which itself is not always a model of clarity. In situations where counsel knows that a former employee's disclosure of clearly privileged information is not authorized by the entity holding the privilege, however, a lawyer may violate Rule 8.4(c) if the lawyer uses the privileged information.

[4] For example, in Formal Op. 91-359 (1991), the ABA Committee on Ethics and Professional Responsibility concluded that Rule 4.2 does not preclude contact with former employees of an opposing party. The committee cautioned, however, that the attorney "must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as a former employee with his or her former employee's counsel are protected by the privilege. . . . Such an attempt could violate Rule 4.4 (re-

In order to reduce the possibility that protected information is revealed in the *ex parte* communication or the occurrence of other hazards that Rule 4.2 is designed to prevent, a lawyer must at the outset disclose the lawyer's identity and the fact that the lawyer represents a party that is adverse to the ex-employee's former employer in pending or prospective litigation. Comment [3] to Rule 4.2 states that it is preferable to give this notice in writing. Rule 4.3 reinforces this protection by requiring the lawyer to take affirmative steps to avoid misunderstandings and assure that the former employee correctly understands the lawyer's role in the matter.

Suffice it to say, a lawyer should proceed cautiously in communicating with former employees of a party opponent. Certain former employees may be involved on an ongoing basis with the matter concerning which the contact is sought, or they may be engaged, on the basis of their knowledge and experience, to consult with organizational management or with legal counsel in the matter. Of course, if the former employees are represented by their own counsel in the matter, the bar against communication without consent of that counsel applies unless that communication is authorized by law.

*Conclusion*

A lawyer may communicate with unrepresented former employees of a party opponent without consent from that party. At the outset, the lawyer must make the disclosures required by Rule 4.2. Throughout the communication, the lawyer must follow the dictates of Rules 4.3 and 4.4.

Inquiry No. 98-7-22
Adopted: October 20, 1998
Date Issued: January 19, 1999

quiring respect for the rights of third persons)." *See also* ABA Formal Op. 97-408, n.14 (1997) ("Gaining from a former government employee information that the lawyer knows is legally protected form disclosure for use in litigation nevertheless may violate Model Rules 4.4, 8.4(c) and 8.4(d). . . . "); Conn. Bar Ass'n Informal Op. 96-4 (1996) (Rule 4.4 precludes lawyer form reviewing and copying psychiatric records of client's ex-wife made confidential by statute); Pa. Bar Ass'n Informal Op. 93-135 (1993) (Rule 4.4 prohibits lawyer form conducting surreptitious inspection of psychiatric records of major witness against client; although information would be very useful in impeaching witness, Pennsylvania caselaw makes such records absolutely confidential); N.J. Sup. Ct. Adv. Comm. on Prof. Ethics Op. 680 (1995) (if lawyer had surreptitiously copied confidential documents in possession of attorneys for adverse party, and items of evidence were involved, it would constitute a violation of Rule 4.4).

*Opinion No. 288*

**Compliance with Subpoena from Congressional Subcommittee to Produce Lawyer's Files Containing Client Confidences or Secrets**

• In response to a Congressional subcommittee's subpoena for a lawyer's files pertaining to the representation of a current or former client and containing confidences or secrets that the client does not wish to disclose, the lawyer has a professional responsibility to seek to quash or limit the subpoena on all available, legitimate grounds to protect confidential documents and client secrets. If, thereafter, the Congressional subcommittee overrules these objections, orders production of the documents and threatens to hold the lawyer in contempt absent compliance with the subpoena, then, in the absence of a judicial order forbidding the production, the lawyer is permitted, but not required, by the D.C. Rules of Professional Conduct to produce the subpoenaed documents. A directive of a Congressional subcommittee accompanied by a threat of fines and imprisonment pursuant to federal criminal law satisfies the standard of "required by law" as that phrase is used in D.C. Rule of Professional Conduct 1.6(d)(2)(A).

**Applicable Rule**

• **Rule 1.6(d)(2)(A)** (Confidentiality of Information)

*Inquiry*

The inquirer, a managing partner of a law firm in the District of Columbia, requests an opinion regarding the propriety of his compliance with a Congressional subcommittee subpoena duces tecum for the firm's files and records relating to its representation of a client.[1] The inquirer seeks to know how far he and the firm must go to meet their obligations to protect the client's confidences under the D.C. Rules of Professional Conduct. Implicitly, he raises the question of whether a lawyer must stand in contempt of a subcommittee and face the prospect of a criminal conviction, imprisonment and fines in order to vindicate the client's interest in confidentiality.

[1] Throughout this opinion, we refer to actions by a Congressional subcommittee since these are the facts with which we are presented. However, the same reasoning and principles would apply to the appropriate response of a lawyer to subpoenas and directives of a Congressional committee, a House of Congress, or the full Congress.

The Congressional subcommittee issued a subpoena duces tecum requiring the firm to produce "all records that relate to the services, efforts, lobbying or other work undertaken or provided, or to be undertaken or provided" to one of the firm's clients. The subpoena also demanded all records relating to the fees the firm charged that client, "including but not limited to all records that relate to the nature, negotiation, agreement, billing, payment, structure, purpose or allocation of such fee."

The law firm and the client maintain that the subpoenaed documents contain client confidences and secrets. The law firm filed written objections to the request and advised the client of the subpoena. The subcommittee overruled the objections and demanded compliance with the subpoena. When threatened by the chairman with contempt of Congress and possible criminal prosecution and sanctions, the subpoenaed partner produced the documents, despite protests and a threat of suit by the client.

Even though this particular matter has been concluded, we address the ethical issues arising from these facts because of the disturbing increase in incidences of Congressional subpoenas being sent to lawyers in their professional capacity seeking information relating to the activities of their clients and legal services provided to them.

Relying on prior interpretations of the D.C. Rules of Professional Conduct and its predecessor, the Code of Professional Responsibility, in the analogous area of compliance with judicial and administrative subpoenas to lawyers for confidential client information, we conclude that a lawyer has an obligation to make all appropriate objections to the Congressional subpoena. We also suggest that the lawyer may be well advised to discuss with the client the opportunities and prospects of seeking a court order to prevent disclosure. Thereafter, if the subcommittee overrules the objections, orders the documents be produced and threatens to hold the lawyer in contempt for failure to comply, and if no judicial intervention is obtained by the client, then, we conclude, the lawyer may comply with the directive as if it were a court order to comply with a subpoena after all appeals have been exhausted.

*Discussion*

*1. A Lawyer May Disclose Client Confidences or Secrets Against the Client's Will When Required by Law or Court Order*

Under Rule 1.6(d)(2)(A) of the District of Columbia Rules of Professional Conduct ("Rules" or "Rule"), a lawyer may reveal a client confidence or secrets only when expressly permitted by these rules or when "required by law or court order." *See* Rule 1.6, Cmt. [10]. Client confidences are protected by state and federal law as set forth in the governing attorney-client privilege and the work-product doctrine as well as by the ethical constraints on lawyers imposed by the D.C. Rules on confidentiality. *See* Rule 1.6, Cmt. [5]. The rules and the comments reflect the critical importance that preserving client confidences and secrets has to the attorney-client relationship and to the ability of the client to receive effective legal advice and representation. Accordingly, the comments to the Rules recognize that the doctrines of privilege and confidentiality "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." *Id.* They also recognize that the rule applies to "all information gained in the course of the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would . . . likely . . . be detrimental to the client . . . ." *See* Rule 1.6, Cmt. [6].

Thus, the ethical obligation of the lawyer to take all necessary steps to protect client information is broader than the confines of the attorney-client privilege or the work product doctrine. As stated by a leading legal ethicist, "[e]xtending a reach that includes all of those protections – and encompassing much of what they omit – is the professional regulation requiring a lawyer to keep a vast array of client information confidential and not to use it against the interests of the client. We will call that obligation the principle of confidentiality." Wolfram, *Modern Legal Ethics* § 6.7.1, at 296 (Practitioner's ed. 1986). Echoing the language in our own commentary, Professor Wolfram states that this principle of confidentiality applies in all contexts, including legislative hearings. *Id.* § 6.3, at 255. We agree and believe that a lawyer's obligations to protect client confidences in the Congressional context are the same as those in the judicial or administrative context.

This Committee has repeatedly addressed the lawyer's obligations to maintain the client's confidences and secrets in judicial and administrative proceedings. *See, e.g.,* D.C. Bar Ops. 214, 180, 124, 99 and 14. These opinions essentially hold that a lawyer has an ethical obligation to raise all available, legitimate objections to a judicial or administrative subpoena for protected information and, as reflected in Comment [26] to Rule 1.6, either to make "every reasonable effort" to appeal an order demanding compliance with a subpoena or at least to notify the client of the order and provide the client every opportunity to challenge it. On the other hand, our opinions and all of the other authorities we can identify bearing on the question suggest that a lawyer is not required to stand in contempt of a court order and risk criminal prosecution in order to protect the subpoenaed information.

For example, in D.C. Bar Opinion 83, we stated that a lawyer "is not obliged to run the risk of being held in contempt of court because of the client's desire that confidences and secrets not be disclosed." Similarly, in D.C. Bar Opinion 14, we stated that "the attorney is . . . free to comply with whatever directive the trial court gives." In D.C. Bar Opinion 214, we stated "we conclude that the law firm . . . may comply with a final judicial order enforcing an IRS summons without seeking appellate review of that order, but only after giving its client notice of the court's order and a reasonable opportunity to seek review independently of the firm."

The American Bar Association's Committee on Ethics and Professional Responsibility similarly has concluded that if a lawyer's efforts to seek to limit a subpoena to protect client confidences or secrets are "unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over [the subpoenaed files]," then the lawyer may do so consistently with the Model Rule of Professional Conduct 1.6. ABA Formal Op. 94-385 (1994). The American Law Institute's Restatement (Third) of the Law Governing Lawyers: Confidential Client Information § 115 (Proposed Final Draft No. 1, 1996)[2] also concludes that in such a situation the lawyer may "but is generally not required" to be held in contempt to protect such information.

While there are obvious similarities in the procedures available in the judicial and legislative contexts to register and argue objections to subpoenas, there are two important differences. First, there is no recognized available appellate procedure in the legislative process as there is in the judicial system. As we understand the Congressional procedures and the judicial enforcement of the federal criminal contempt statute, as set forth below, once a witness is found in contempt by a Congressional body, there is no appeal permitted and the offending conduct may not be cured by a later disclosure.[3] If a witness refuses to comply with a Congressional subpoena, any mistake of law, including, reliance on the good faith but mistaken advice of counsel, is not a defense in a later criminal prosecution for contempt of Congress. *See, e.g., Yellin v. United States*, 374 U.S. 109, 123 (1963). Second, due to the Speech or Debate Clause of the Constitution, the federal courts, in general, will not enjoin members of Congress or their staffs from issuing or attempting to enforce a Congressional subpoena that is "within the sphere of legitimate legislative activity." *See Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 501 (1975) (internal quotations omitted). Under *Eastland,* therefore, only the most blatant effort of a Congressional committee to inquire into personal affairs that do not implicate matters of legislative policy will be quashed by the federal courts.

Thus, in the absence of a generally available effective judicial remedy, the question we must address is at what stage of the Congressional process is there a "requirement of law" to comply with a Congressional subpoena for purposes of Rule 1.6.

*2. When a Congressional Subcommittee Directs Compliance with a Subpoena and Threatens to Hold a Lawyer in Contempt for Noncompliance, Disclosure Is "Required by Law" as That Term Is Used in D.C. Rule 1.6(d)(2)(A)*

The Congressional subpoena does not, in itself, create the legal requirement that the lawyer disclose confidential information or a client's secrets. Like a subpoena issued by a party in a judicial proceeding or a grand jury subpoena, a Congressional sub-

[2] The final version of the Restatement (Third) of the Law Governing Lawyers is expected to be published in late 1999 with no substantive changes to § 115.

[3] While no appeal is available to the respondent, under current House Rules, a subcommittee needs a full committee vote to support a referral for a contempt prosecution. *See* House Rule XI, cl. 1(a)(2). If before the full committee votes to uphold the contempt, the lawyer discloses the subpoenaed documents, the full committee may, but need not necessarily, consider the matter moot.

poena is not self-executing. As with subpoenas in the judicial or administrative process, objections can be raised, argued and resolved in the legislative process. Negotiations with the subcommittee chairman, members or staff may lead to modifications or even withdrawal of all or part of a Congressional subpoena.

All of the authorities of which we are aware that have addressed this question uniformly suggest that a lawyer has an obligation in the legislative process to raise all available, legitimate objections to a Congressional subpoena for confidential client information. For example, the Restatement (Third) of the Law Governing Lawyers, *supra*, asserts that the lawyer has an obligation in the legislative process to object on all legitimate grounds to such a subpoena: "The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise . . . in supplying evidence to a *legislative committee*, grand jury, or administrative agency. . . . A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information . . ., unless disclosure would serve the client's interests . . ." Restatement (Third) of the Law Governing Lawyers: Confidential Client Information § 115 (Proposed Final Draft No. 1, 1996) (emphasis added). Similarly, the American Bar Association's Committee on Ethics and Professional Responsibility in its Formal Opinion 94-385 (1994) suggests that the requirement to make "every reasonable effort" to quash or limit a subpoena applies in the legislative arena. That opinion stated that "if a governmental agency, or any other entity or person, subpoenas . . . a lawyer's files and records relating to the lawyer's representation of a current or former client, the lawyer has a professional responsibility to seek to limit the subpoena . . . on any legitimate available grounds so as to protect documents that are deemed to be confidential . . . ."

In addition to making all appropriate objections to the Congressional body issuing the subpoena, a lawyer would be well advised to discuss with the client the possibility of a judicial action by the client against the lawyer to prevent compliance with the Congressional subpoena. While, as noted, courts will generally not enjoin members of Congress or their staffs from issuing or seeking to enforce a legislative subpoena, it is an open question whether an action might lie against a third party such as a lawyer or a law firm to enjoin compliance with a Congressional subpoena. *See Eastland* at 516 (Marshall, J., concurring) ("The Speech or Debate Clause cannot be used to avoid a meaningful review of Constitutional objections to a subpoena simply because the subpoena is served on a third party. Our prior cases arising under the Speech or Debate Clause indicate that only a member of Congress or his aide may not be called upon to defend a subpoena against Constitutional objection, and not that the objection will not be heard at all."). In *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), the court upheld an action by the Department of Justice to enjoin AT&T from complying with a Congressional subpoena to provide telephone records that, according to the Executive Branch, implicated national security. *See also* Grabow, *Congressional Investigations* § 3.2[c] at 85 and n.31 (1988).

To prevent any possible appearance of collusion or other impropriety, it may well be prudent for the lawyer to suggest to the client that the client seeks separate counsel regarding such a possible course of action and to be advised of the prospects of such an option by counsel other than the subpoenaed lawyer.[4]

Once the process of objections, negotiations and a ruling by the Congressional subcommittee has been exhausted, and assuming the absence of any judicial intervention, the subcommittee may demand that certain enumerated documents be produced under pain of contempt. At that point, there is effectively no further recourse available to the subpoenaed lawyer. Based on our understanding of Congressional procedures, judicial precedents enforcing the criminal contempt of Congress' statutory provisions and analyses by recognized experts, we conclude that the point at which the lawyer becomes "required by law" to disclose any client confidences is the point at which the Congressional subcommittee specifically directs compliance with the subpoena and threatens to use its statutory authority, 2 U.S.C. § 192, providing criminal sanctions for contempt of Congress.

Current Congressional rules expressly permit any subcommittee of a House Committee to hold hearings and "to require by subpoena or otherwise, the attendance and testimony of such witnesses and the production of . . . documents as it considers necessary." Rules of the House of Representatives, 106th Cong., 1st Sess., Rule XI, cl. 2(m)(1)(B) ("House Rules") *reprinted* in 145 Cong. Rec. H6-10 (daily ed. Jan. 6, 1999). Compliance with a subpoena issued by a subcommittee may be enforced as authorized by the House. House Rule XI, cl. 2(m)(2)(B).[5] A contempt of Congress may be prosecuted, following a referral from the House, by the U.S. Attorney pursuant to 2 U.S.C. § 192.[6] Under this statute, contempt may be prosecuted against any individual who willfully failed to comply with a subpoena issued pursuant to the authority of either House or any Committee of the

[4] The lengths to which the lawyer must go to protect the attorney-clinet privilege and confidentiality of the client raise the collateral issue of the lawyer's entitlements to fees and expenses from the client for these efforts. While this may be a subject in the first instance for negotiations between the client and lawyer, we note that, as set forth in our prior Opinion 214, the lawyer has obligations to preserve the privilege and confidentiality of client information even if it is evident that the lawyer will not be compensated for those efforts by the client. As we stated in Opinion 214:

> The ethical obligation of lawyers to protect the confidences and secrets of their clients is not a matter of contract between the lawyer and client; the obligation arises because "confidentiality is essential to the role of the lawyer in the administration of justice," Opinion No. 180, and because, under Canon 1, every lawyer has a duty "to assist in maintaining the integrity and competence of the legal profession."

We interpret this to mean that if no agreement on fees and expenses is reached regarding the efforts to protect the confidential information, the lawyer must nevertheless take all ethically required steps to protect the privilege even if not compensated for the services by the client. Whether a suit in quantum meruit for the services rendered in such a situation may succeed under District of Columbia law is a subject on which we express no view.

[5] Under current House Rules, after the relevant chairman has ruled against any objections or challenges to a subpoena, the relevant Committee or subcommittee may vote on whether to hold the party in contempt. If the initial contempt was voted by a subcommittee, then the contempt finding will reach the House floor only if the full Committee also votes the witness in contempt. *See* House Rule XI, cl. 1(a)(2). Under these Rules, if the House is in session, a vote of the full House is required to refer the matter to the U.S. Attorney for prosecution. However, when the House is not in session, the speaker may refer a finding of contempt by the full Committee to the appropriate U.S. Attorney. 2 U.S.C. § 194.

[6] 2 U.S.C. § 192 provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

In addition, theoretically, either chamber of Congress may exercise its "self-help" contempt power

House. Since a subcommittee subpoena is authorized by the Rules of the House, a contempt of Congress may lie against anyone who willfully failed to comply with a subcommittee subpoena. This interpretation is buttressed by the fact that the statute that authorizes certification from the Congress to the U.S. Attorney for prosecuting an alleged contempt to a grand jury specifically includes the willful failure to comply with a subcommittee subpoena. 2 U.S.C. § 194.

As the General Counsel to the Clerk of the House of Representatives noted, "In the Congressional context, the ruling by the Subcommittee chair that the privilege will not be accepted is the legal and functional equivalent [of] a legal requirement or a court order. Failure to answer at that point constitutes a criminal violation. Disclosure at that stage does not violate the Canons of Ethics nor the Bar Code of any jurisdiction." Memorandum Opinion from Steven R. Ross, General Counsel of the Clerk of the House of Representatives to Congressman Stephen J. Solarz (Dec. 11, 1985) *reprinted in* 132 Cong. Rec. 3036, 3038 (1986). Similarly, in a memorandum from the American Law Division to the Office of the Clerk of the House in 1986, the conclusion was reached that where a committee issues a subpoena, "the contempt of Congress is complete when a committee rejects all claims of privilege and demands that a witness respond. The obligation of law attaches at that time." 132 Cong. Rec. 3044, 3047 (1986). In connection with this same matter, New York University Law School ethics professor Stephen Gillers stated that with regard to privileged information "an order to answer a question, coming from a body with legal power to issue the order, imposes a legal duty that overrides the ethical duty." Memorandum from Professor Gillers to Congressman Solarz (February 19, 1986) *reprinted in* 132 Cong. Rec. 3042, 3043 (1986).

At the heart of these conclusions is the recognition that a lawyer may face criminal conviction, imprisonment and fines for refusing at that point in the Congressional process to provide the demanded information. A violation of the contempt of Congress provisions of 2 U.S.C. § 192 carries with it the possibility of imprisonment of up to one year as well as a monetary fine.

which involves a trial before the relevant body and confinement upon conviction for as long as the term of the current Congress. Such a confinement is subject to judicial challenge through a writ of habeas corpus. *See* Grabow, *supra*, § 3.4[a] at 87. This alternative procedure has not been utilized in modern times.

The Supreme Court has held that a contempt of Congress cannot be cured by the lawyer's later compliance with the subpoena. *Jurney v. MacCracken,* 294 U.S. 125, 148 (1935) ("[w]here the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.") As noted, the Supreme Court has also held that when a witness refuses to answer a question in a mistaken, good faith belief that it would violate his rights to be compelled to answer, his mistake of law will be no defense at a trial on the criminal contempt charge. *Yellin v. United States*, 374 U.S. 109, 123 (1963).

Compounding the dilemma faced by the lawyer is the uncertainty of the applicability or force of the attorney-client privilege or work-product immunity in Congressional proceedings. While we have no doubt that the salutary purposes of the attorney-client privilege and work-product doctrine (as recognized by Congress itself in the Federal Rules of Evidence, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure) would be severely undermined if they were not fully applicable in Congressional proceedings, individual senators and representatives have repeatedly suggested that these privileges may not apply, or not apply with full force, in Congressional hearings. *See, e.g.*, Beard, *Congress vs. The Attorney-Client Privilege: A Full and Frank Discussion*, 35 Am. Crim. L. Rev. 119 (1997); Rich, *The Attorney-Client Privilege in Congressional Investigations*, 88 Colum. L. Rev. 145 (1988). The matter has never been resolved definitively in the courts.[7] An incorrect prediction of the law could result in the imprisonment of a lawyer who was held in contempt of Congress for refusing to produce documents on the ground of the attorney-client privilege.

The cited Supreme Court cases suggest that if a court upholds the view of a subcommittee — either that the attorney-client privilege or the work-product doctrine does not apply in Congressional proceedings or does not cover the subpoenaed documents — the lawyer will have no valid defense and could be ordered to serve a term of imprisonment. Since it is the unanimous ethical view that a lawyer need not stand in contempt, with the risk of imprisonment, to protect privileged confidential or secret information, it follows that the lawyer may comply with the directive of the subcommittee to produce the required documents without risking a citation for contempt of Congress.

[7] While far beyond the purview of this Committee and while recognizing the complexity of the issue, we believe it would be extremely beneficial to both clients and lawyers throughout the country for Congress to pass legislation clarifying the applicability of the attorney-client and perhaps other privileges in Congressional proceedings. Such legislation could also provide for procedures in which the privilege may be invoked, considered and resolved.

The fact that a lawyer may deem himself or herself "required by law" to produce the documents at the point the subcommittee demands it does not mean that the lawyer must produce the documents at that time. It was noted at the time that the D.C. Rules of Professional Conduct were proposed that Rule 1.6(d)(2) and its commentary "do not advise a lawyer how far the lawyer must go in protecting client information." Analysis of Comments submitted to the District of Columbia Court of Appeals in response to the Court's order of September 1, 1988, Docket No. M-165-88, Proposed Rules of Professional Conduct and related comments, 21 (1989). In reviewing these comments at the request of Chief Judge Rogers, the former chairman of the D.C. Bar Model Rules of Professional Conduct Committee, Robert E. Jordan, III responded, "I suggest that judgments on these points be left to the lawyer who is ordered to disclose. It seems difficult to specify the proper course of action for such a lawyer given a myriad of factual circumstances which may exist." Notwithstanding the authorization granted by Rule 1.6(d)(2)(A), the lawyer retains the discretion to risk being held in contempt and litigate the issue in the courts, based on the totality of the circumstances.

*Conclusion*

At the point that the lawyer has made and pressed every appropriate objection to the Congressional subpoena and has no avenues of appeal available, and in the absence of any judicial order to the contrary, a lawyer faced with a Congressional directive and a threat of contempt of Congress may deem himself or herself "required by law" to comply with the subpoena within the meaning of D.C. Rule 1.6(d)(2)(A). A lawyer has satisfied his or her professional obligation to maintain client confidences once all objections have been made and exhausted and is not required by the Rules to stand in contempt of Congress if the subcommittee overrules the objections.

Inquiry No. 98-6-16
Adopted February 16, 1999

*Opinion No. 289*

**"Cause" Litigation By A Non-Profit Foundation Run By Non-Lawyers; Prospectively Restricting Clients' Right To Waive Attorneys' Fees Or Agree To A Confidential Settlement**

• Lawyers in the General Counsel's office of a non-profit, public interest organization are forbidden by D.C. Rule of Professional Conduct 5.4 from participating in, managing or directing litigation brought on behalf of individual third parties with whom they do not have a lawyer-client relationship. By doing so, the organization, which employs and compensates the lawyers, improperly directs or regulates the independent professional judgment of the lawyers acting on behalf of the parties in litigation, and threatens the duty of confidentiality owed to such parties. A client's right to accept or reject a settlement offer cannot be contracted away in advance through a provision in a retainer agreement that precludes the client from accepting any settlement that waives the client's right to recover attorneys' fees, or that prevents the client from agreeing to a confidential settlement.

**Applicable Rules**

• **Rule 1.2** (Scope of Representation)
• **Rule 1.6** (Confidentiality of Information)
• **Rule 1.7** (Conflict of Interest: General Rule)
• **Rule 1.8** (Conflict of Interest: Prohibited Transactions)
• **Rule 5.4** (Professional Independence of a Lawyer)

*Inquiry*

A non-profit membership organization ("the Organization"), whose activities consist of legislative lobbying and public education efforts on behalf of a particular population group, also seeks to advance its public policy purposes through so-called "cause" litigation — litigation intended to establish what it views to be useful legal precedents, or to challenge those which it believes are undesirable. To this end, the Organization relies upon staff lawyers to represent it as *amicus curiae* and, in certain cases, as a plaintiff.

The Organization now desires to expand its litigation efforts to represent third persons, who also may be members of the Organization. It would do so through the auspices of a companion non-profit, charitable foundation ("the Foundation") it has created to carry on activities other than lobbying. The Foundation is funded by the Organization and by governmental grants. The Organization's lawyers who would be involved in this effort have been placed in a separate unit within the Foundation ("the Unit"). The Unit, however, is not a separate legal entity from the Foundation.

The Organization, recognizing some of the ethical issues discussed in this opinion, has undertaken various measures to insulate the Unit's lawyers from lay control and interference with their conduct of third-party representation.

• First ,the personnel of the Unit are all either lawyers or legal support personnel.

• Second, while the lawyer in charge of the Unit will report to the Foundation's Administrator and Board of Directors, all of whom are non-lawyers, they purportedly will exercise no role in the conduct of third party representation cases. Non-lawyers outside of the Unit, however, will participate in the Unit's selection of cases to be undertaken, in order to determine whether the Unit's litigation efforts would be consistent with the Organization's public policy goals, the Organization's representation of other clients, and its relationships with other entities.

• Third, the Unit has a charter and litigation guidelines, which have been formally adopted by the Foundation's Board, a set of written procedures, and a standard retainer agreement. Among other things, these documents state that no director, officer, employee or agent of either the Organization or the Foundation who is not a staff lawyer of the Unit or a lawyer in the office of general counsel of the Organization (who are also general counsel to the Foundation) will interfere in the selection, management or conduct of litigation involving the representation of third persons, and that no staff lawyer will permit any person or entity outside the Unit to interfere with or attempt to influence her independent professional judgment regarding the selection, management or progress of such a case. The documents ensure that client confidences and secrets will not be shared with nonlawyers other than those providing support services to the lawyers.

• Fourth, with client consent, the scope of the Unit's representation of a particular client may be limited, as specified in a signed retainer agreement. Once such an agreement is executed, however, neither the Organization, the Foundation, nor any of their directors, officers, employees or agents outside the Unit staff will influence or interfere with the management or conduct of litigation involving the representation of third persons. The standard retainer agreement specifies that if it is to the client's advantage to take a legal position in conflict with the Organization's or the Foundation's policies, then the client has the last word as to whether the position will be taken. If the client chooses to adopt such a position, the Unit's lawyers may seek leave to withdraw.[1]

According to the Organization, the clients in the Unit's third person representation cases will not be responsible for payment of any fee for the services of the Unit's lawyers, but the Unit and cooperating counsel will seek such fees in cases where court-awarded attorneys' fees may be available. Fee awards will be split between the Unit and cooperating counsel in proportion to the respective time their lawyers have spent on the case.[2] Any fees obtained by Unit lawyers will be placed in a separate account, to be used solely for the purpose of supporting other "cause" litigation in which the Unit's lawyers are engaged.

While the retainer agreement provides that the Unit's legal representation will be without fee to the client, it obligates the client to cooperate a) in obtaining an award of attorneys' fees in cases where they are available, b) in obtaining fees from the defendants in connection with settlement, and c) in publicizing the case. In this connection, the agreement specifically commits the client, as a condition of the representation, not to accept a settlement offer conditioned on the client's waiver of his or her right to pursue court-awarded attorneys' fees. It also specifically commits the client not to accept a settlement offer conditioned on keeping the fact and/or terms of the settlement confidential, so that the Unit (or perhaps the Foundation or the Organization) is permitted to publicize the results of the case.

[1] The Organization advises that this will not leave the party without representation, as other cooperating counsel will be involved and remain able to provide representation. We presume that any lawyers involved in such representation will comply fully with the D.C. Rules of Professional Conduct addressing withdrawal from representation, *see* Rule 1.16, as well as with all applicable rules of the court(s) in which the representation takes place.

[2] We were not advised whether fee apportionment will be discussed with the client or will be part of the standard retainer. We presume again that the lawyers involved will follow those portions of our Rules which address division of fees, *see* Rule 1.5(e), including appropriate notice to the client and client consent.

The inquirer asks whether the above-described activities of the Unit's lawyers will be in compliance with the D.C. Rules of Professional Conduct.

*Discussion*

*A. Lay Interference with a Lawyer's Independence of Judgment: Rules 1.6, 1.8, and 5.4*

Although the Organization has taken a number of steps designed to insulate the Unit's lawyers from lay control, the arrangement as presented to the Committee does not do so in compliance with governing provisions of our Rules, several of which reflect the importance of preserving a lawyer's independent judgment. Rule 5.4 is specifically designed "to protect the lawyer's professional independence of judgment." *See* Rule 5.4, Comment [1]. Rule 5.4(c) thus prohibits a person who employs or pays a lawyer to render legal services to another to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 1.8(e)(2) also specifically provides that "a lawyer shall not accept compensation for representing a client from one other than the client" unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship".

The inquirer advises that "no director, officer, employee or agent of either the Organization or the Foundation who is not a staff lawyer of the Unit *or a lawyer in the office of general counsel of the Organization (who are also general counsel to the Foundation)* will interfere in the selection, management or conduct of litigation involving the representation of third persons" (italics supplied). The implication of this representation, confirmed through conversation with the inquirer, is that lawyers in the Organization's general counsel's office (who are agents of a lay entity and have no lawyer-client relationship with the individual party) will be permitted to participate in the day-to-day management of third party representation conducted by the Unit's lawyers (and presumably by lawyers of cooperating firms who also have direct lawyer-client relationships with the represented individual). Therefore, the lay organization, although acting through counsel, improperly will be regulating the Unit lawyer's professional judgment in violation Rules 1.8 and 5.4.[3]

This conclusion is consistent with prior opinions of this Committee. In Opinion No. 93, for example, we examined a similar question under our prior Rules and concluded that "the non-lawyers involved [in a legal service organization] must not direct or regulate the exercise of professional judgment of lawyers in the performance of legal services." The rule was followed in Opinion No. 135, another case dealing with a lawyer working for a corporation, which stressed again that "non-lawyers involved in the corporation must not exercise *any control or influence* over the exercise of the inquirer's professional judgment in performing legal services for the corporation's clients" (italics supplied).

The instant inquiry poses a slightly different question: whether lawyers (as opposed to lay individuals) employed by a corporation may exercise control or influence in third party litigation where they have no attorney-client relationship with the party. We have no doubt that the barriers applicable to lay persons in this setting are equally applicable to lawyers. Indeed, the proposition that lawyers acting on behalf of lay individuals may seek to exercise such control over litigation brought by parties to whom they do not owe the lawyer's obligations of undivided loyalty raises even more significant questions than having lay individuals exercise such control or influence. We conclude that this exercise of control is inconsistent with the our Rules of Professional Conduct.[4]

*B. Waiving the Right to a Confidential Settlement: Rules 1.2, 1.6, 1.8, and 5.4*

As noted above, the standard retainer agreement applicable to the Unit's third party clients commits the client not to accept a settlement offer conditioned on keeping the fact and/or terms of the settlement confidential. The inquirer asserts that this commitment is necessary because the Unit's cases are undertaken for public policy objectives that will not be served if a favorable disposition of the case is deprived of precedential or educational value.

Regardless of the Unit's laudable objectives, however, this commitment interferes with the client's ability to settle a case. Rule 1.2, governing scope of representation, specifically provides, in relevant part, "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." Rule 1.2(a). This rule is designed to preserve the client's right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time a settlement offer is communicated. *See also* 1.4 (c) (requiring that settlement offers be communicated promptly).

Rule 1.2 (c) allows a lawyer and client to limit the objectives of the representation if the client consents after consultation. We do not believe it is possible, in this situation, for a client to offer informed consent to the advance condition in question. The client's consent is sought in this instance at the outset of the litigation, before he or she is likely aware of the particular confidences and secrets that may emerge in the litigation process, and well before he or she can understand clearly the effect of publicizing a settlement which has yet to be proposed. He or she may desire confidentiality terms in the settlement agreement in order to preclude public access to personally embarrassing or detrimental facts that may have emerged during the litigation process, but which had been shielded from public disclosure, such as through a protective order. Lawyers are ethically bound not to reveal such facts. *See* Rule 1.6(a)(1)-(3) (prohibiting a lawyer from knowingly revealing client confidences or secrets, from using confidences or secrets to the client's disadvantage, and from using confidences and secrets to the lawyer's own advantage or the advantage of a third person).

In the analogous area of prospective waiver of conflicts of interest under Rule 1.7, the ABA Committee on Ethics and Professional Responsibility, in Formal Op. 93-372, persuasively observed:

3 The inquirer further indicates that client confidences and secrets will not be shared with *nonlawyers* other than those providing support services to the lawyers. We are troubled by the implication of this representation; that client confidences and secrets may be shared with *lawyers* outside of the Unit, namely, lawyers in the Organization's general counsel's office. Such information sharing, should it occur, would run afoul of Rules 1.8 and 5.4, to the extent confidences are shared for purposes of managing the litigation and influencing the professional judgment of the Unit's lawyers. We note further that the proposed standard retainer agreement clarifies that the third-parties are clients of the Unit's lawyers, not the Organization or the Unit. Sharing of confidential information with the Organization's lawyers, with whom the clients will have no attorney-client relationship, may breach the Unit's lawyers' duty of confidentiality under Rule 1.6. *See* Rule 1.6(a)(1) (providing, with limited exceptions, that a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client).

4 Additionally, the lawyers may be acting in contravention of Rule 5.5(b), which prohibits a lawyer from assisting a person who is not a member of the D.C. Bar (such as the lay leaders of the Organization who employ the lawyers in the general counsel's office) from the unauthorized practice of law. While the inquirer asserts that Rule 5.5(b) "would not come into serious question" because only the Unit's lawyers are representing clients, this assertion may be inconsistent with having lawyers in the Organization's general counsel's office involved in managing, directing or influencing these clients' litigation.

> [A waiver of future conflicts] must meet all the requirements of a waiver of a contemporaneous conflict of interest, and if a waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so that the client's consent can reasonably be viewed as having been fully informed when it was given.

A lawyer's generalized disclosure of a potential future conflict can be considered "full" only if, based on such a disclosure, the client can appreciate what it will mean down the road to have waived confidentiality. *See ABA Formal Op. 93-372* (Apr. 16, 1993) ("Since the prospective waiver is sought at a time when the scope of the services the lawyer will provide the client may not be fully defined, ... we conclude that a client's prospective waiver of conflicts cannot be presumed to waive objection to disclosure or use of confidential client information subject to Rule 1.6."). We see no way for the proposed advance waiver of confidentiality, which is analogous to a prospective waiver of a conflict of interest, to meet this exacting standard. Accordingly, it is impermissible for the retainer agreement categorically to preclude any settlement agreement with a confidentiality provision (whether or not the provision is at the defendant's insistence), because such preclusion amounts to an improper prospective waiver of the client's right to maintain the confidentiality of information protected by Rule 1.6.

Moreover, to the extent that non-lawyer personnel of the Organization and the Foundation require the Unit's lawyers to impose this settlement limitation in every third-party representation, the Unit's lawyers are subject to improper lay interference with their independence of professional judgment and their client-lawyer relationships. *See* Rules 1.8(e)(2) and 5.4(c). This lay interference also is improper to the extent it fails adequately to protect client confidences and secrets protected by Rule 1.6 (*see* Rule 1.8(e)(3)).[5]

*C. Waiving the Right to Accept a Settlement without Attorneys' Fees: Rules 1.2, 1.7, 1.8 and 5.4*

As noted, the Unit's standard retainer agreement also commits the third-party client, as a condition of the representation, not to accept a settlement offer conditioned on the client's waiver of his or her right to pursue court-awarded attorneys' fees. The inquirer asserts that this provision is only a "slight impingement" on the client's right to accept a settlement in "cause" litigation, an impingement which allegedly is justified by fee-shifting statutes and by the "public interest" served by providing financing for further "cause" litigation.

Ensuring the recovery of attorneys' fees in a settlement has taken on substantial importance in civil rights cases since the Supreme Court held, in *Evans v. Jeff D*, 475 U.S. 717 (1986), that defendants in cases where a court may award fees may condition settlement upon a waiver of fees.[6] Where a settlement offer provides full relief to the plaintiff but is conditioned upon a waiver of attorneys' fees, a tension may arise between the interests of the lawyer and the client. There are several clearly ethical ways of dealing with this dilemma from the viewpoint of a plaintiff's counsel. For example, the lawyer and client may agree in advance that the client shall cooperate in obtaining fees; that fees will be sought if available; and that the client will be required to pay counsel fees (either contingent or hourly) in the event the such fees are not sought or recovered from the defendant. Such an agreement removes the conflict between counsel and client arising in the event of a fee-waiver settlement offer.

The course proposed here, however, is not consistent with our Rules. An agreement designed to mitigate the impact of such a settlement offer by committing the client in advance to reject it, or by insisting that the client assign to the attorney his or her right to fees, raises very serious questions under our Rule 1.2(a). While the Committee is aware of a split in opinion between Bar associations and commentators who have considered this issue, we find persuasive the opinions of those Bar associations that have condemned advance agreements of this type regarding settlement terms because they infringe upon a client's absolute right to accept or reject a settlement offer.

The Ethics Advisory Opinion Committee of the Utah State Bar has found, for example, that it would be unethical for an attorney to insist in advance that a client cede to him the right to veto a particular offer in settlement of a case because it did not provide for payment of attorneys' fees. *Utah Op. No. 98-05* (Apr. 17, 1998). According to the Utah Committee, the client must always have the final say whether or not a settlement will be accepted and that this "ultimate client authority cannot be contracted away." *Id.*[7]

The Committee on Professional Ethics of the Connecticut Bar Association has reached the same conclusion. In *Informal Op. 97-31* (Nov. 3, 1997), the Connecticut Committee withdrew its earlier opinion (Op. 85-19) providing that a lawyer and a client could agree that the lawyer would have a right to veto a settlement otherwise satisfactory to the client, but that did not provide for a legal fee acceptable to the lawyer. The Committee found that "[a] lawyer may not reject a settlement agreement that a client wishes to accept." Although the Committee did not determine whether a client may assign her right to a fee award to her lawyer, leaving this decision to the federal courts, it did note that such an assignment not only could place the lawyer in a position to veto a settlement acceptable to his client, but also would create a financial conflict between a lawyer who insists on a particular fee award and the desires of the client, thus violating Rule 1.7. *See Informal Op. 97-31.*

Similarly, in Opinion Number 93-09 (June 28, 1993), the State Bar Association of North Dakota addressed the propriety of a retainer agreement in which a plaintiff agreed not to accept an offer of settlement conditioned on the waiver of attorneys' fees. The Ethics Committee found that the retainer agreement created a conflict of interest between the attorney and the client. *See North Dakota Op. 93-09* at 3. While such a conflict theoretically can be waived after disclosure and consent, the Committee concluded that the "attorney should refrain from use of this type of agreement, in light of the serious questions that could be raised about the adequacy of the consultation and the voluntariness of the client's consent." *Id.* A retainer agreement can make clear the client's responsibility for

[5] This arrangement also may violate Rule 5.5's prohibition on the unauthorized practice of law. *See* note 4, above.

[6] *Jeff D* in essence overruled D.C. Legal Ethics Opinion No. 147 (1985), which had concluded that it was unethical to condition settlement upon an explicit waiver of a statutory award of attorneys' fees.

[7] Many other jurisdictions have recognized the client's exclusive authority to settle a case. *See, e.g., Nebraska State Bar Ass'n Advisory Comm.*, Op. 95-1 (interpreting EC's 7-7 & 7-8, the predecessors to Rule 1.4(a)-(c); "the committee's opinion is that any provision limiting the client's ultimate authority to settle a matter will be unenforceable and improper"); *New York County Lawyers' Ass'n Comm. on Professional Ethics, Op. 699* (Mar. 10, 1994) (interpreting EC 7-7; "[a] provision in a retainer agreement requiring the lawyer's consent to settle an actions is prohibited...."); *North Carolina State Bar Op. RPC 145* (Jan. 15, 1993) (interpreting North Carolina Rule 7.1(C)(1) which requires a lawyer to abide by a client's decision whether to accept settlement; "a lawyer cannot divest a client of his exclusive authority to settle a

fees and costs, but "that agreement may not restrict the client's right to receive and accept settlement offers." *Id.*

In contrast, the California State Bar's Standing Committee on Professional Responsibility and Conduct has found that a lawyer ethically may contract with a client for the right to apply for and receive an award of attorneys' fees, provided clear disclosure of the potential conflicts are made in advance. *See California State Bar Comm. Op. 1994-136* (1994), 1989 WL 253262. Although the California Committee agreed that vesting the right to pursue fees in the lawyer "creates an actual conflict between the attorney and client because it allows the lawyer to pursue a course of action that may not be in the client's best interests," it also observed that "[a]ssignment by the client of the statutory right to attorney's fees appears fair" and that "[s]uch an assignment is consistent with the purposes of the attorney's fees award in civil rights cases." Accordingly, the California Committee found that such an assignment was ethically permissible so long as the lawyer met stringent disclosure requirements.[8] *See also* Hazard & Hodes, *The Law of Lawyering*, § 1.5.107 (2d Ed. 1998 Supp.).

The Committee, like the other jurisdictions that have faced this issue, recognizes that a client's right to accept or reject a settlement offer is absolute, as confirmed by our Rule 1.2(a). Moreover, an advance waiver of this right in the context of a fee award would create an actual conflict between the lawyer and client when and if the client were called upon to honor the settlement restriction, seriously impairing the lawyer's ability to render full and candid advice regarding the propriety of accepting the settlement offer and raising serious issues regarding the client's ability to provide a voluntary consent to the lawyer's continued representation. For this reason, we conclude that an agreement of the sort proposed here is not consistent with the D.C. Rules of Professional Conduct.

Finally, to the extent that non-lawyer personnel of the Organization and the Foundation require the Unit's lawyers to impose this settlement limitation in every third-party representation, the Unit's lawyers are subject to improper lay interference with their independence of professional judgment and their client-lawyer relationships. *See* Rules 1.8(e)(2) and 5.4(c).

*Conclusion*

The Committee finds laudable the Organization's desire to pursue so-called "cause" litigation in order to protect what it views as the public interest. The Committee also notes many of the measures the Organization has implemented in an effort to safeguard the professional independence of the Unit's lawyers, such as (1) the placement of lawyers who will be conducting the third-party representations into a separate Unit, (2) a standardized retainer agreement clarifying the scope of representation, the independence of the Unit's lawyers, and the client's right to confidentiality, and (3) a policy of funneling any fees derived from such representations into a separate fund to be used solely by the Unit's lawyers.[9] Nonetheless, third party clients represented without fee by lawyers engaged in "cause" litigation remain clients and are entitled to be treated no less favorably by counsel than any other client. Their rights in litigation cannot be subject to outside control, they cannot be required to waive their right to confidentiality, and their right to accept or reject a settlement offer must be inviolate.

Inquiry No. 98-6-15
Adopted: January 19, 1999
Date Issued: March 16, 1999

*Opinion No. 290*

## Disclosure of Protected Information of Insureds to Insurers and Outside Auditing Agencies

A lawyer may release an insured client's confidential or secret information, including detailed work descriptions, to the insurer or an auditing firm hired by the insurer, only after the lawyer has made appropriate disclosure to the insured and obtained consent. Client consent to disclose confidential or secret information to the insurance company does not provide a basis to infer client consent to disclose the same information to the insurer's auditing firm.

### Applicable Rules

- **Rule 1.6** (Confidentiality of Information)
- **Rule 1.8(e)** (Conflict of Interest: Accepting Compensation from one Other than the Client)

*Inquiry*

The inquirer is a law firm that defends insureds and is paid by an insurer. The law firm requests the Committee's opinion regarding a lawyer's ethical obligations to the insured when the insurer has retained an outside agency to audit its legal bills. To facilitate these audits, the insurer requires that the law firm submit detailed billing information to the outside auditing agency. In turn, the auditing agency has requested that the law firm's billing invoices contain descriptions of activities that are "specific enough to allow a person unfamiliar with the case or billing attorney to determine what function they are performing." The auditor also has requested that the law firm provide in support of its invoices detailed information and materials that appear to be protected by Rule 1.6. Examples of the level of detail the auditors expect the law firm to provide include the identity of participants, the content of all communications (telephone calls, correspondence, meetings), specific issues researched, the specific trial preparation performed, and the identity of material or documents reviewed and written work product generated in the representation of the client.

The first question we turn to is whether and under what conditions, consistent with the D.C. Rules of Professional Conduct, the law firm may release a client's confidential information directly to an insurer. The Committee concludes that the law firm ethically may submit an insured's detailed bills that contain protected information to the insurer only after the lawyer has informed the insured about the nature and potential consequences of both the requested disclosure and non-disclosure and the insured has consented to the release of the information. Disclosure of such information to an independent auditing agency also

[8] These included, in addition to the generic disclosure attendant upon any conflict waiver, specific disclosure that the lawyer might attempt to override the client's desire to settle the case if the settlement offer depends upon a waiver of attorneys' fees, and that in the event the defendant offers complete relief contingent upon waiver of fees, the lawyer's interest and the client's in the settlement would differ, with the result that the lawyer might be forced to withdraw. Additionally, the Committee noted that even with such disclosures, "there is no guarantee that such agreements are enforceable" because "[a] member may not agree to settlement without the client's consent" and because "[t]he client always has the right to determine whether or not to accept a settlement."

[9] *See Am. Fed'n of Gov't Employees v. Fed. Lab. Relations Auth.*, 944 F.2d 922, 937 (D.C. Cir. 1991) (holding that a "separate operating account for legal services provides sufficient protection against the unauthorized practice of law by a lay organization") (quoting *Curran v. Dep't of Treasury*, 805 F.2d 1406, 14087 (9th Cir. 1986)).

may occur only with consent of the insured after disclosure. Consent to disclose confidences and secrets to the insurer may not provide a basis to infer consent to disclose the same information to another entity who performs work for the insurer.

*Discussion*

*1. The Applicable Rules*

D.C. Rules of Professional Conduct 1.6 and 1.8(e) control the relationship among a lawyer, a client, and a third party who is paying for the lawyer's representation of the client.

Rule 1.8(e) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless: 1) the client consents after consultation; 2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and 3) information relating to a client's representation is protected as is required by Rule 1.6. Comment [6] to the Rule reiterates the need, when a third party is responsible for payment of the client's legal fees, to protect the client's confidences and secrets from unauthorized disclosure and emphasizes the requirement that the lawyer may not represent a client under such circumstances if a conflict of interest arises. Thus merely because an insurer is paying the insured's legal expenses does not alter the lawyer's duty to protect his clients' confidences and secrets under Rule 1.6.

When an insurer requests that an attorney furnish it with information concerning representation of the insured, a lawyer representing the insured must determine, as a threshold matter, whether client confidences or secrets are involved. Whether a billing statement contains client confidences (information protected by the attorney-client privilege) or client secrets (information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing, or would likely be detrimental to the client) will depend on the content of the statement. While some billing statements may not reflect protected information, at least some of the information and materials described by the inquirer clearly fall within the protection of Rule 1.6.

Under Rule 1.6, a lawyer may not knowingly reveal a confidence or secret of the client or use a confidence or secret of a client for the benefit of a third party unless one of three relevant exceptions is met: 1) the client consents after full disclosure 2) the lawyer has "reasonable grounds for believing that a client has impliedly authorized disclosure in order to carry out the representation"; or 3) disclosure is permitted by these Rules, or "required by law." Rule 1.6 (d)(1),(2), and (4). With respect to the exception for implied authorization, the set of facts presented to the Committee does not suggest that divulging the information to the insurer is necessary to performing the job for which the lawyer was retained. Therefore, the Committee concludes that the circumstances of the retention by the insured do not imply authorization to disclose. While payment for legal services is no doubt important to the client, the Comments to the Rules compel a narrower interpretation of this exception. To illustrate the scope of the implied authorization exception, the Comments provide two examples: "a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion." Comment [9]. As these examples suggest, implied authorization is limited to situations in which disclosure is essential to the purpose of the representation. Moreover, given the express mandate of Rule 1.8(e) requiring protection of client confidences and secrets from disclosure to third party payers, this general exception should not be construed to so easily negate those protections.

Nor do other provisions of the Rules or the requirements of any laws permit disclosure of an insured's confidences and secrets to the insurer for auditing purposes. Comment [11] indicates that "[u]nless the client otherwise directs," a lawyer is permitted to reveal "limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential." Comment [11] covers the lawyer's use of third parties such as accountants to perform business functions, where the lawyer has the power to select and control the third party. Comment [11] is not applicable where, as here, the information sought is substantive and the lawyer neither selects the auditor nor controls its use of the information.

Other provisions of the Rules that allow divulging confidences or secrets — for example, to defend against allegations by the client concerning the representation, to prevent imminent serious bodily harm or when required by law or court order — are inapplicable. Thus, a lawyer may only share confidential information of the type described by the inquirer with the insurer with the consent of the client after full disclosure.

*2. Effect of the Contract of Insurance*

The insurance contract or other agreements the insured entered into in submitting the claim may grant the insurer access to confidential or secret information. The lawyer's duty to the insured, however, is governed by the Rules of Professional Conduct, not by the insurance contract. The lawyer will need to review these provisions with the client to determine whether they constitute the informed consent for disclosure required by Rule 1.6.

Consent is defined by the Rules to mean "a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." Rules, Definitions section. Neither Rule 1.6 nor the Comments elaborate on what is meant by full disclosure. However, the Rules define consultation to mean "communication of information reasonably sufficient to permit the client to appreciate the matter in question". The commentary to Rule 1.7, dealing with disclosure of and consent to waivable conflicts of interest, notes that "disclosure and consent are not mere formalities." Rule 1.7, Comment [19].

In the matter before the Committee, the lawyer must evaluate the reasonably foreseeable adverse consequences of disclosure and inform the client of the adverse effects that may result, in a manner consistent with the client's level of sophistication. *In re James*, 452 A.2d 163-167 (D.C. 1982). The consequences of disclosure and the adequacy of any general consent by the client in the insurance contract will inevitably turn on the facts and circumstances of the particular case. For example, if the information sought is subject to an evidentiary privilege, the consequences of disclosure to a third party are potentially far more serious than if the information involves client secrets that would be subject to discovery in any event. Furthermore, the risk of losing privileged status for the confidential information sought may be diminished by the nature of the relationship between the insurer, insured, and lawyer which may have a colorable basis of joint privilege. Even if waiver of privileged material is likely to occur, in some cases the negative effects of such a waiver may be negligible.

Similarly, the consequences to the insured of not consenting to disclosure must

be evaluated with the client. For example, the insurance contract may require the insured to cooperate in the defense of the claim or allow disclosure of confidential information and failure to agree to disclosure could risk loss of insurance coverage.

In seeking client consent to the release of information to the insurer, an attorney should be cognizant of the possible conflict between his interests and the client's interests. See 1.7(b)(4). The lawyer may have a financial interest in avoiding an audit of his billing practices, and should avoid exaggerating the risks of disclosure to a client whose consent to disclosure is sought. Conversely, a lawyer may have an interest in cooperating with the insurance company to preserve the lawyer's business relationship with the insurance company. In sum, the disclosure to the client in order to obtain adequate consent within the meaning of Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests and will depend on the facts and circumstances of each case.

It has been suggested that the existence of legal privilege provides a basis to infer consent to disclosure or implied authorization. Communications among the insurer, insured and lawyer may be privileged, at least in part, because the lawyer is representing both parties, because there is a joint defense agreement or because a legal doctrine governing the "tripartite" relationship of insurer-insured-attorney applies. This is a matter of substantive law beyond the scope of the Committee's opinion. In any event, the mere existence of a possible privilege among insurer, insured and counsel does not in and of itself provide a basis to infer client consent to disclosure of confidences or secrets. Except as allowed by Rule 1.6, a lawyer may not release information relating to the representation of a client to anyone, including a co-client, unless the first client consents after disclosure or an exception is met. To the extent it is relevant, the existence of a joint privilege may bear on the consequences of disclosure of which the client must be apprised before consenting.

*3. Release to an Auditor*

The inquirer has also asked whether it would be ethically permissible to provide the same detailed billing information and work product directly to the outside auditing agency. If the auditor is an independent entity from the insurance company, disclosure to the auditor is only permissible if the provisions of Rule 1.6 have been met. Even if disclosure to the insurance company has been consented to by the client, that consent should not be assumed to include consent to disclosure to a third party auditor. The Rule 1.6 considerations we have described with respect to insurance company disclosure should be separately addressed when disclosure to an auditor is requested.

We note that many other jurisdictions have issued opinions addressing the same or similar facts and have concluded that the insured's consent after disclosure is necessary before a lawyer may disclose protected information to outside auditing agencies. See Utah State Bar Opinion 98-003; Florida Bar Staff Opinion 20591, December 31, 1997; Alabama State Bar (unnumbered); South Carolina Ethics Advisory Opinion 97-22; Kentucky Bar Association, KBA E-404; North Carolina Proposed 98 Formal Ethics Opinion 10; Louisiana State Bar Association (unnumbered); Indiana State Bar Association, Opinion 4 of 1998, Virginia Legal Ethics Opinion 1723, Maryland State Bar Association, Inc., Committee on Ethics Docket No. 99-7. A number of these decisions specifically address the different status of the insurer and the third party auditing agency. See, e.g., Virginia Opinion 1723, Indiana Opinion 4 of 1998, Maryland Opinion No. 99-7, Alabama State Bar Opinion RO-98-02.

The Massachusetts Bar Ethics Committee has taken a somewhat different approach, concluding that if a client has consented to disclosure of protected information to the insurer, the information may be disclosed to an independent auditing company retained by the insurer without further client consent if the lawyer is satisfied that the auditor has taken reasonable steps to protect confidentiality of the disclosed information. Mass. Bar Opinion, November 22, 1997. We do not adopt this approach. We find nothing in the D.C. Rules of Professional Conduct that supports the conclusion that consent to disclosure to the insurer may be used to infer consent to disclosure to other third parties whose purpose it is to assist the insurer in ts business, not the attorney in representing the client's interests. Even if disclosure to the insurance company has been consented, to, the Rule 1.6 considerations that we have described with respect to insurance company disclosure should be separately addressed when disclosure to an auditor is requested. For example, where applicable law affords privileged status to communications among the insurer, insured and the insured's attorney, disclosure by the insurer to a third party could effectively waive the privilege. See Indiana State Bar Opinion No. 4, 1998. In this regard we note that if disclosure to a third party without client consent has the effect of waiving the privilege, other ethical provisions become relevant. See, e.g., Rule 1.1 (Competency), Rule 1.4(b) (Communication) and Rule 1.6 (interference with professional judgment and attorney-client relationship by person paying rather than client).

The inquirer also asked whether the Rules of Professional Conduct apply if the lawyer provides the protected information to the insurer, who then sends it to the outside auditor. The Rules of Professional Conduct do not apply to an insurer and insurance companies are therefore not bound by this opinion. Prior to disclosure of protected information to the insurer, however, the lawyer should instruct the insurer not to release the protected information and should designate all such information clearly. If there is reason to believe that the insurer will not follow this instruction, the lawyer should so advise the client, prior to disclosure, explaining any additional risks that would result from disclosure by the insurer to a third party.

*Conclusion*

The requirements of Rules 1.6 and 1.8 need not be impediments to effective representation of insured clients or to the interests of insurers. Identification of each party's interests and informed disclosure at the outset of the representation should allow a workable relationship that meets the insured and insurer's needs and the ethical obligations of the lawyer. For example, at the outset the attorney could identify with the insurer and auditing agency the type of information that would be requested during the representation and discuss with the client the legal effects of such disclosure. In assessing the legal effects, the lawyer may wish to evaluate the agreement between the auditor and the insurer regarding procedures to protect confidential materials. Where agreement is reached at the outset regarding the scope of disclosure to the insurer or auditor, the lawyer must continue to be vigilant throughout the representation to the scope of the consent and obtain new or updated client consent where appropriate.

Inquiry No. 98-6-17
Adopted: April 20, 1999

*Opinion No. 291*

## Contracts with Temporary Lawyers: Restrictions on Subsequent Employment

• A lawyer seeking temporary employment or a lawyer seeking the temporary services of another lawyer may not enter into a contract with a lawyer placement agency that requires the temporary lawyer to agree not to apply for or to accept subsequent employment with a firm to which he was assigned or with a client of the firm. Such restriction would violate Rule 5.6. A lawyer seeking temporary employment may agree to notify the placement agency if within a stated period the lawyer accepts subsequent employment at the firm to which he was assigned on a temporary basis.

### Applicable Rule

• Rule 5.6(a) (Restrictions on Right to Practice)

*Inquiry*

The committee received an inquiry from a lawyer who had been working as a temporary lawyer under contract with various temporary agencies in the DC area. The inquirer asked whether the following provision in one placement agency contract would violate DC Rule 5.6:

> Except as provided by this Agreement, or as may be consented to by the [placement agency] in writing, Attorney agrees as a condition of this Agreement and [of] assignments of Attorney to Firm that Attorney will not solicit or accept an offer of employment, or otherwise directly or indirectly, on a full-time, part-time or temporary basis, provide services to Firm, its clients or their respective affiliates until the expiration of one year after termination of this agreement. Attorney shall immediately notify the [placement agency] if Firm or any affiliate solicits Attorney with an offer of employment or other services.

The inquirer also asked whether the following provision in another contract between a placement agency and a temporary lawyer would violate Rule 5.6:

> The Employee shall not accept employment from or offer him/herself to be employed by the Client, for a period beginning with the date the Company first contacts the Client regarding the Employee and concluding ninety (90) days following completion of any assignment, unless the Client first agrees to pay [the agency] a fee in an amount determined by [the agency]. . . .
>
> In the case of a permanent placement, the Employee shall not accept a position which has been offered to the Employee as a result of a referral by the Company directly from the Client for a period of one year, commencing with the date the Company first contacts the Client regarding the Employee, it being understood and agreed to by the Employee that the Company is entitled to a placement fee to be paid by the Client as consideration for the Company's efforts on behalf of the Employee and the Client.

The Committee reviewed some other contracts between temporary lawyer placement agencies and temporary lawyers and noted that they impose similar restrictions on subsequent employment.[1] This inquiry presents several questions:

1. Would a lawyer violate Rule 5.6 by signing an agreement with a temporary lawyer placement agency that:

   a) *flatly prohibited* the temporary lawyer from accepting an offer of subsequent employment[2] from a firm where the lawyer had been placed or from a client of the firm for a designated period of time?

   b) prohibited the lawyer from accepting subsequent employment unless the firm agreed to pay a fee to the agency?

2. Would a lawyer violate Rule 5.6 by agreeing *to notify* the temporary agency of any offer of employment by a firm subsequent to a temporary placement, to allow the agency to collect an agreed placement fee from the firm?

3. Would a lawyer violate Rule 5.6 by signing an agreement with a temporary lawyer placement agency that prohibited the lawyer for a specified period of time from *applying* for subsequent employment:

   a) at a *firm* where the lawyer had been placed as a temporary lawyer or

   b) with a *client of the firm* in question, or that

   c) prohibited the lawyer from *applying* for subsequent employment *unless* the firm agreed to pay a fee to the agency?

4. Would a lawyer seeking to employ a temporary attorney violate Rule 5.6 by agreeing that if the firm offered subsequent employment to the temporary attorney, the firm would pay a placement fee to the agency?

*Discussion*

Rule 5.6 prohibits a lawyer from entering into a contract that restricts a lawyer's right to practice. The rule states, in pertinent part:

> A lawyer shall not participate in offering or making:
>
> (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

The comment following the rule explains that "An agreement restricting the right of partners or associates[3] to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."

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[1] One agency contract with temporary lawyers notes that its contracts with client employers: restrict our clients from directly or indirectly employing or retaining a practitioner whom we procure other than through [the agency], unless and until either an agreed-upon fee is paid . . . or a period of time of up to 30 months has passed since such practitioner last worked for the client.

Another agency contract provides that:

Clients of [the agency] may offer [agency] employees permanent jobs only in accordance with the terms of the clients' agreements with [the agency], providing [the agency] with a payment in certain situations to compensate [the agency] for recruiting and developing temporary lawyers . . . . [The temporary lawyer] agrees not to accept direct employment or additional assignments from any client of [the agency] to whom [the lawyer] is assigned both during any assignment and for a period of 180 days after [the lawyer's] last day of work on behalf of that client without first notifying [the agency].

[2] The term "subsequent employment" is used here to refer to any full-time, part-time or other employment that follows the fulfillment of an assignment from a placement agency.

[3] The reference in the comment following rule 5.6 to "partners or associates" raises a question whether the rule applies to a lawyer employed in a law firm neither as an associate nor as a partner. We find that the rule is intended to apply to lawyers generally. The language of the comment was taken from the comment to DR-2-108(A), the predecessor of Rule 5.6, which was drafted when lawyers in firms generally had only two statuses. Different statuses for lawyers in law firms (temporary lawyers, contract associates, non-equity partners, staff attorneys, etc.) have proliferated since the 1980s. *See* Vincent R. Johnson and Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 370, notes 36 and 37 and accompanying text (1990), *quoting* Gilson and Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989).

The DC Court of Appeals recently explained the purpose of Rule 5.6, quoting a leading treatise:

> Rule 5.6(a) is designed, in part, to protect lawyers, particularly young lawyers, from bargaining away their right to open their own offices after they end an association with a firm or other legal employer. It also protects future clients against having only a restricted pool of attorneys from which to choose.[4]

*Prohibition from Accepting Subsequent Employment*

The purposes of Rule 5.6(a) are thwarted by a clause in the contract between the placement agency and the temporary lawyer restricting the lawyer's subsequent employment. If a contract between a placement agency prohibited the temporary lawyer from *accepting* employment with a firm where the lawyer had been placed or with a client of that firm for a specified period, the clause would violate rule 5.6. In D.C. Bar Op. 181, this Committee held that: "A law firm may not require a lawyer employed by it to sign an agreement that unduly restricts the lawyer's right to practice law after he or she disassociates from the firm." In that matter, a confidentiality agreement, less restrictive than a flat ban on certain subsequent employment, was found to violate DR 2-108(A)(predecessor of Rule 5.6).

The policy against contracts restricting a lawyer's right to practice is reflected very strongly in court decisions, which find most such provisions in partnership agreements and other legal employment contracts to be unenforceable as against public policy. *See, e.g., Cohen v. Graham,* 722 P. 2d 1388, 44 Wash. App. 712 (1986) (arbitrator did not err in finding a contract for the sale of a law practice that prohibited the seller from agreeing to continue to represent firm clients to violate DR 2-108(B) and to be unenforceable on public policy grounds); *Dwyer v. Jung,* 336 A. 2d 498 (N.J. Super. Ct. Ch. Div. 1975) (declaring unenforceable a partnership agreement that designated particular clients with whom each partner could do business in the event of termination; provision found to violate public policy because it would restrict lawyer's autonomy and client's choice of counsel). *Cf. Newman v. Akman, supra* n. 4 (finding permissible a restriction of benefits payable on retirement).

The interpretations of Model Rule 5.6 by the American Bar Association's Committee on Ethics and Professional Responsibility also reflect the view that contractual provisions that restrict a lawyer's autonomy or a client's choice of counsel are unethical. *E.g.*, ABA Formal Op. 94-381 (May 9, 1994) (finding a contract prohibiting lawyers employed by a corporation from subsequent representation of any client against the corporation to violate Model Rule 5.6); ABA Informal Op. 1417 (1978) (law partnership agreement found to violate DR 2-108(A) because it prohibited departing partners from hiring or associating with any associates of the firm for a specified period following departure from the firm); ABA Formal Op. 300 (1961) (unethical for an employing lawyer to propose or for an employed lawyer to agree to a contractual covenant restricting the employed lawyer, after leaving employment, from practice in a specified geographic area for a period of time); *see* ABA Formal Op. 88-356 (1988)(contracts between temporary lawyers and their agencies should avoid any interference or control by the agency in "the exercise of professional judgment by the lawyer, including limiting or extending the amount of time the lawyer spends on work for the clients of the employing firms.")

A lawyer who signed a contract prohibiting a temporary lawyer from accepting employment at a firm where the lawyer had been temporarily assigned would violate Rule 5.6(a). Similarly, it would not be proper for a temporary lawyer to agree to decline an offer of permanent employment absent the employer's payment of a placement fee to a temporary agency. While it is permissible for a temporary agency to charge a reasonable fee to a client organization that hires a temporary lawyer, the lawyer should not be asked to decline employment to facilitate enforcement of the contract between the temporary agency and the client organization. The temporary agency may seek legal recourse against an organization that breaches its contractual obligation with the agency, but the agency may not use lawyers as bargaining chips to secure enforcement of these agreements.

*Notice of Subsequent Employment*

A contract between a lawyer placement agency and a temporary lawyer may require the lawyer to give the agency notice of an offer of employment from a firm to which the lawyer was temporarily assigned. If the purpose of such a clause is to allow the placement agency to collect a fee from the firm that has offered a non-temporary position to the lawyer, the clause would not restrict the lawyer's right to practice or the client's right to choose counsel. A temporary lawyer may sign such a contract without violating Rule 5.6.

*Restriction of Employment of the Temporary Lawyer by Third Parties*

Where a temporary lawyer is employed by a law firm, a corporate client of the firm might decide to offer the temporary lawyer a permanent position in the corporation. The corporate client of the law firm has undertaken no contractual obligations toward the placement agency. The corporation may not even be aware that the law firm is employing the lawyer on a temporary basis.[5] The first of the two contract provisions presented by the inquirer would restrict the temporary lawyer from seeking or accepting a position with a client of the firm where he was placed. This contract would hamper the lawyer's

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In D.C. Bar Op. 284 (Advising and Billing Clients for Temporary Lawyers), this committee concluded that "a temporary lawyer has the same ethical obligations as any other lawyer to be competent to handle the matter tendered, to exercise independent professional judgment, to devote undivided loyalty to the client, and to preserve the client's confidences and secrets." It is but a small step to conclude that Rule 5.6 should be interpreted to apply to temporary lawyers despite the somewhat narrow language of the comment.

[4] GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING, § 5.6:201 at 824 (2d ed. Supp. 1997), *quoted in Neuman v. Akman,* 715 A.2d 127, 130-131 (DC 1998) (partnership agreement allowing departing partner to recover his capital account and his share of the profits for a pro rata portion of his departing year but denying a partner who joins another firm an "additional amount" that would be paid over the remaining lifetime of a retiring partner found not to violate Rule 5.6 because the clause is a permissible restriction of payment of benefits upon retirement).

[5] In D.C. Bar Op. No. 284, this committee recently noted that some clients prefer to employ lawyers who will be available to them for an indefinite period of time. In such cases, a lawyer must "advise and obtain consent from the client whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations." A client should be informed of the temporary status of a lawyer to be assigned to a client's matter if the client has "stated or manifested a desire that it have available to it a regular cadre of lawyers who will develop expertise and be available to work on a series of expected matters." Under Op. No. 284, then, there are some situations in which a firm must inform its clients of the use of temporary lawyers, and some situations in which a firm need not do so.

autonomy and interfere with the client's freedom in choice of counsel. A lawyer would violate Rule 5.6 by signing an agreement that barred the temporary lawyer's employment by a third party.[6]

*Restriction on Communication by Former Temporary Lawyer*

While a temporary lawyer may agree to give notice of an offer of subsequent employment, a temporary lawyer would violate Rule 5.6 by signing a contract that prohibited him or her from seeking subsequent employment with the firm to which he was assigned or with a client of the firm. Likewise, the lawyer would violate Rule 5.6 by agreeing not to respond to inquiries about the possibility of representation by a former or prospective client.

In D.C. Bar Op. No. 221, the Committee found that Rule 5.6 would be violated by an agreement that prohibited a lawyer from sending an announcement notifying clients of his intended departure from the firm, or from responding to inquiries initiated by clients about his impending departure from the firm. Contractual restrictions on direct (in-person or telephonic) solicitation of firm clients by departing lawyers have been found not to violate Rule 5.6 (or its predecessor, 2-108) as long as the lawyer, without financial disincentive, can inform potential clients of his availability to represent them, and as long as clients' right to choose counsel freely is fully protected. Ops. 221 and 97.

*Payment of a Placement Fee*

A lawyer employing a temporary lawyer may agree to pay a placement fee to a temporary agency if his firm offers permanent employment to a temporary lawyer.[7] A lawyer who agreed to pay a reasonable placement fee charged by the agency would no more violate Rule 5.6 than would a lawyer who agreed to pay a similar fee to a lawyer placement agency that identifies candidates for permanent positions as lawyers.

*Conclusion*

Lawyers seeking the assistance of temporary lawyers and lawyers seeking temporary assignment must read their contracts carefully and decline to agree to contractual provisions that would violate Rule 5.6. A temporary lawyer may agree to provide notice to an agency if the lawyer accepts permanent employment with a client of the agency where the lawyer had been placed as a temporary employee. A temporary lawyer may not agree to a contract with a temporary lawyer placement agency that imposes other geographic or temporal restrictions on his subsequent employment or that restricts his former clients' opportunity to communicate with him.

Inquiry No. 28-2-5
Adopted: June 15, 1999

*Opinion No.292*

**Conflict of Interest: "Thrust Upon" Conflict**

- Where a law firm is providing ongoing representation of a client with respect to an identifiable set of legal issues involving common parties, facts, theories and claims, that representation should be viewed as a single representation for purpose of applying the "thrust upon" conflict provision of Rule 1.7(d) even though multiple legal proceedings may be involved. Thus, if a new proceeding that meets these criteria arises in which the interests of another law firm client are directly adverse to the interests of the client that is the subject of the ongoing representation, the law firm may rely upon Rule 1.7(d) to continue its representation even in the absence of client consent.

**Applicable Rules**

- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.16 (Declining or Terminating Representation)

*Inquiry*

A law firm whose attorneys are subject to the Rules of the District of Columbia Bar and a current client of that firm ("Client A") jointly have requested an opinion from this Committee as to whether the law firm may, consistent with DC Rule of Professional Conduct 1.7, continue to represent other clients of the firm whose interests have become adverse to Client A. Since 1993, the law firm has represented Client A as a defendant in a class action ERISA lawsuit filed in federal district court. Discovery in the ERISA lawsuit has been concluded, and if the lawsuit is not resolved through pending motions for summary judgment, the case is ready for trial.

In 1996, Client B retained the law firm to represent it on a regulatory issue involving access to certain facilities in its industry ("Competitive Access issue"). The law firm has represented Client B on this issue in seven distinct proceedings, including a federal district court lawsuit and a subsequent appeal, an FCC complaint proceeding, an FCC declaratory ruling proceeding, and several different FCC application proceedings. Some of these representations are still ongoing. In 1997, Client C retained the law firm to provide advice and legal services on another related but different access issue ("Direct Access issue"),[1] and the law firm has represented Client C in three FCC proceedings involving this issue, including an ongoing FCC Notice of Proposed Rulemaking.

The law firm and Client A agree that there is no substantial relationship between the ERISA litigation in which the law firm represents Client A and the Competitive Access or Direct Access proceedings in which the law firm represents Client B or Client C. In 1998, Client A announced its intent to acquire a company that had been and continues to be adverse to Client B in the Competitive Access issue proceedings and to Client C in the Direct Access issue proceedings. Client A's merger is still pending and is subject to various regulatory approvals, including FCC approval.

Upon learning of the merger, the law firm sought to obtain conflict of interest waivers so that it could continue to represent Clients B and C in matters involving Competitive Access and Direct Access issues where, following the merger, Client A would be directly adverse to Clients B and C.[2] The law firm also sought a waiv-

[6] A lawyer would violate Rule 5.6 by signing such an agreement whether he was a temporary lawyer or a lawyer at a firm employing a temporary lawyer.

[7] *See* Vincent R. Johnson and Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 389 (1990) (noting that "an employer who is impressed with the quality of a temporary's work may extend an offer of permanent employment to that attorney. In such instances, the agreement between the employer and the agency may provide for the agency to receive a placement fee from the employer.")

[1] No conflict of interest is presented by the law firm's simultaneous representation of Client B and Client C since these clients' interests are not in any way adverse on the Competitive Access and Direct Access issues.

[2] Even though there would be no potential for Client A's confidential information obtained in connection with the ERISA litigation to be useful in

er to represent Clients B and C in the FCC proceeding reviewing Client A's acquisition. Client B and Client C each agreed to provide the necessary conflict of interest waiver, but Client A refused to do so, consenting only to the law firm's continuing general representation of Clients B and C on matters in which there was no direct adversity.

Disagreeing with Client A's position, the law firm filed comments on behalf of Clients B and C in the FCC proceeding reviewing Client A's acquisition. While neither Client B nor Client C opposed FCC approval of Client A's merger, they both requested that the merger be conditioned in a manner that would effectively produce the relief they had been seeking in the various Competitive Access and Direct Access proceedings. Client A viewed these comments as adverse to its interests because in its view the relief requested would substantially impair the value of the company that it sought to acquire.

Client A believes that the law firm should withdraw from its representation of Clients B and C in connection with the FCC proceeding reviewing Client A's merger. It asserts that it would be inappropriate under DC Rule 1.16(b) for the law firm to withdraw from its representation of Client A in the ERISA litigation. The law firm asserts that its continued representation of Clients A, B and C is permissible under the "thrust upon" provision of Rule 1.7(d) because there is no substantial relationship between the ERISA litigation in which it represents Client A and the FCC proceedings regarding Client A's acquisition in which it represents Clients B and C. Alternatively, the law firm suggests that if withdrawal is necessary, the law firm should withdraw from the ERISA litigation because Client A created the conflict by its proposed merger and Clients B and C have attempted to resolve the situation by giving their consent to the multiple representation.

The law firm in fact offered to withdraw from representing Client A in the ERISA litigation and to compensate Client A for possible costs associated with retention of new counsel in that matter. When Client A rejected this proposal, asserting that withdrawal given the advanced stage of the ERISA litigation would be prejudicial, the law firm and Client A jointly filed this inquiry.

connection with the law firm's representation of Client B or Client C on the Competitive Access or Direct Access issues, the law firm also agreed to implement appropriate ethical screens to prevent any confidential information flow within the law firm.

*Discussion*

This inquiry involves interpreting the scope of the "thrust upon" exception provided by DC Rule 1.7(d) to the general prohibition against simultaneously representing two clients whose interests are directly adverse. This provision is a relatively new addition to the D.C. Rules of Professional Conduct and consequently has been the subject of only limited interpretation by this Committee. Nor does it appear that this issue has been addressed by other jurisdictions.

As a starting point, it is useful to identify the specific conflicts of interests presented here. Assuming Client A's pending merger is successfully concluded, Client A will step into the shoes of the acquired firm and become directly adverse to Clients B and C in the Direct Access and Competitive Access proceedings. This will trigger a conflict of interest under DC Rule 1.7(b)(1), which prohibits representation of a client with respect to a matter that:

> [I]nvolves a specific party or parties, and the position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter, even though that client is unrepresented or represented by a different law firm.

Similarly, the law firm's representation of Clients B and C in the FCC proceeding reviewing Client A's pending merger also raises a conflict under Rule 1.7(b)(1) since the conditions to merger approval sought on behalf of Clients B and C are directly adverse to interests of Client A in unconditional approval of its merger.

Rule 1.7(d) provides an exception to the general prohibition of Rule 1.7 by addressing the situation in which a law firm is already representing two clients in unrelated matters and some direct adversity between the clients develops or becomes apparent for the first time. Rule 1.7(d) provides:

> If a conflict not reasonably foreseeable at the outset of a representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

As noted, two separate conflicts involving the application of Rule 1.7(d) are presented by the inquiry here — (1) the representation of Clients B and C with respect to ongoing proceedings involving the Competitive Access and Direct Access issues in which Client A, following its acquisition, will be adverse to Clients B and C and (2) the representation of Clients B and C in the FCC proceeding reviewing Client A's proposed merger, where Clients B and C wish to raise arguments and seek relief similar to that sought in other proceedings involving the Competitive Access and Direct Access issues but adverse to Client A's interest.[3]

The application of Rule 1.7(d) to the first situation — adversity arising from Client A's merger, which gives it for the first time an interest in ongoing proceedings in which the law firm has been representing Clients B and C — is straightforward. The law firm's representation of Clients B and C in ongoing proceedings involving Competitive Access or Direct Access issues is precisely the situation that Rule 1.7(d) sought to address. There is no question that the law firm had been representing Clients B and C in the particular matter in which the conflict has arisen. The conflict was not reasonably foreseeable.[4] At the time the law firm initiated its representations of Clients B and C in these proceedings, the other firm client, Client A, had no interest in the Direct Access or Competitive Access issues. Client A's interest arose only after the representations of Clients B and C commenced, and although a waiver was sought, the conflict was not waived under Rule 1.7(c) by all clients.

In such a situation, Rule 1.7(d) provides that a law firm need not withdraw from any representation unless the conflict also arises under Rules 1.7(b)(2), (b)(3), or (b)(4), which does not appear to

[3] Although the inquiring parties' specific focus is on the conflict issues presented by the FCC merger proceeding, an analysis of Rule 1.7(d)'s application to the conflict presented by the Competitive Access and Direct Access proceedings provides insight into how this rule was intended to operate.

[4] Comment [22] to Rule 1.7 emphasizes that in determining whether a conflict is reasonably forseeable, "the test is an objective one," focusing on such factors as whether the lawyer has an adequate conflict-checking system in place.

be the case here. Thus, after seeking, but failing to obtain Client A's consent, the law firm is permitted under Rule 1.7(d) to continue representing Client A in the ERISA litigation and to continue representing Clients B and C in the ongoing Competitive Access and Direct Access proceedings, subject, of course, to the right of any client to terminate the firm's representation.

A more difficult issue is posed by the law firm's representation of Clients B and C in the FCC proceeding reviewing Client A's proposed merger. The law firm asserts that its ongoing representations of Client B and Client C in various proceedings relating to the Competitive Access and Direct Access issues constitute, for each client, a single and continuing representation in pursuit of a sole objective — success for that client with respect to a specific access right. According to the law firm, the FCC proceeding reviewing Client A's merger is part of this continuing representation because it permits a federal regulatory agency to consider the Competitive Access and Direct Access issues and offers an additional opportunity to obtain the relief Clients B and C seek. The law firm therefore urges that its efforts on behalf of Clients B and C respectively constitute a single ongoing "representation," comprised of a series of efforts to pursue a single objective in multiple forums, that should be viewed as a single and identifiable "matter."[5] Thus, for purposes of Rule 1.7(d), it views the "outset of a representation" here as the first action taken on behalf of Client B or Client C with respect to their particular access issue, and the subsequent initiation of additional discrete proceedings involving that access issue does not give rise to a new representation.

Client A urges a narrower view of the phrase "outset of a representation" as used in Rule 1.7(d). It views the FCC merger proceeding as a new representation on which the law firm's ability to represent Clients B and C was precluded by their adversity with Client A. According to Client A, the fact that the Competitive Access and Direct Access arguments that the law firm may have advanced on behalf of Clients B and C in prior FCC or federal court proceedings also could be raised in the FCC merger proceeding does not make the FCC merger proceeding part of an ongoing representation that falls within Rule 1.7(d)'s narrow exception.

In determining the scope of Rule 1.7(d), the meaning of the phrase "outset of a representation" is critical. Unlike "matter," the term "representation" is not defined anywhere in the DC Rules of Professional Conduct. The phrase "outset of a representation" was considered previously by this Committee in D.C. Bar Op. 272, dealing with so-called "hot potato" conflicts, where we concluded:

> While it would not be unreasonable to interpret the phrase "outset of a representation" to mean the client's initial retention of the lawyer on any matter, it is clear from the context of Rule 1.7(d) that the drafters had in mind the outset of representation in a discrete matter in which the unforeseen conflict arises. The narrow exception to Rule 1.7(b) carved out by the new subsection (d) addresses the situation in which one client potentially has the power to disable the law firm from its ongoing representation of another client in a particular matter already in progress, simply by intervening in the proceeding with separate counsel . . . . It would be a considerable step beyond this narrow class of "thrust upon" conflicts to extend Rule 1.7(d) to situations where . . . there is a current general "representation" of a client but the matter in which adversity develops has not yet begun.

The factual situation considered in Opinion 272 was distinct from the inquiry here. A law firm had represented Client X for a considerable period of time with respect to matters regulated by a specific regulatory agency ("Agency A"). The law firm had successfully represented Client X in a concluded, non-adversarial matter before Agency A and thereafter matters regulated by Agency A. The firm also was representing Client Y on unrelated contract matters when Client Y (represented by separate counsel) initiated an adversarial action against Client X before Agency A. Client Y refused to consent to the law firm's representation of Client X in that action.

The Committee refused to apply Rule 1.7(d) to the situation presented in Opinion 272, concluding that "there was not a discrete matter in existence prior to the time Client [Y] initiated the proceeding against Client [X]" and that the adversarial proceeding before Agency A constituted a new matter.[6] While Opinion 272 makes clear that the "thrust upon" exception of Rule 1.7(d) does not extend to situations where there is a general representation of a client "but the matter in which adversity develops has not yet begun," it does not shed further light on the key phrases on which it relies, including "discrete matter" and "particular matter already in progress."

In the factual situation considered in Opinion 272, there was no ongoing representation in a particular matter, no existing adversity, nor even any identifiable opposing party. It is therefore necessary to consider how Rule 1.7(d) should be applied in the more complicated situation presented here, where there is an ongoing representation on a discrete legal issue with identiable opposing parties that may be raised in multiple proceedings (possibly in more than one forum) and that, depending on one's perspective, can be characterized as one representation or multiple representations.

It is a reality of modern legal practice that the same issues involving the same parties, common facts, similar arguments and legal theories, opposition from the same interests, and seeking identical relief may be asserted (simultaneously or serially) in multiple proceedings. In litigation matters, there may be multiple iterations of the same claim brought in multiple proceedings; in regulatory practice, it is common to have multiple appeals from a single regulatory decision. When a successful removal petition results in the transfer of a lawsuit from

[5] As defined in the terminology section of the D.C. Rules of Professional Conduct, "matter" is "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular Rule." D.C. Rules, "Terminology."

[6] DC Bar Op. 272 (May 21, 1997). The Committee went on to find, however, that the concerns underlying the enactment of Rule 1.7(d) were implicated because Client Y's initiation of an action against Client X in a forum in which Client X would reasonably have expected to be able to avail itself of the services of its long-standing law firm would produce the same "substaintial prejudice" toward Client X that the "thrust upon" rule sought to address. Opinion 272 thus allowed the law firm to continue to represent Client X by withdrawing from its representation of Client Y pursuant to Rule 1.9. While noting that "[e]ach situation must analyzed on its facts," the opinion emphasized that "the more the potential conflict was caused by the actions of the attorney for the benefit of the attorney and/or a prospective or other client, the less justifiable will be the firm's effort to withdraw and to treat the conflict under the principles applying to former clients." Op. 272.

state to federal court, there have been two discrete proceedings with different case numbers and before different judges, but is hard to view this as giving rise to two separate representations.

If "representation" were defined simply by the existence of multiple proceedings with each new proceeding viewed as a separate "discrete matter," Rule 1.7(d) would have a relatively narrow application and, in the absence of conflict waivers, there might be numerous situations in which a client would be precluded from representation by counsel of its choice. Treating each proceeding as a separate matter (and thus new representation) could allow an opponent to disrupt a law firm's ongoing representation of a client for strategic purposes merely by initiating a separate proceeding that continues an existing controversy in a new forum. If existing counsel were unable under Rule 1.7(d) to represent its client in that newly initiated proceeding, the client would face the unenviable choice between retaining multiple counsel (incurring the costs and coordination problems of doing so) or replacing its original counsel due to a conflict associated with a specific aspect of the overall dispute.

Yet a more expansive reading of the term "representation"—one that concludes that so long as some issues, parties, underlying claims or defenses are the same there is a single "representation"—has the potential for turning the narrow exception of Rule 1.7(d) into a broader opportunity for law firms to undertake representation adverse to existing clients. It is easy to conceive of how Rule 1.7(d) might be abused by asserting some tortured linkage to an ongoing representation. Moreover, interpreting Rule 1.7(d) to extend to multiple proceedings makes it inevitable that difficult questions of application will arise. What decree of commonality is required to link various discrete proceedings into a single matter? For example, does the fact that a law firm is the regular counsel for a client with respect to a particular type of lawsuit permit the firm to represent that client if any new lawsuit of that type is brought by another firm client?

It is probably impossible to state a single rule that addresses all situations in which "thrust upon conflicts" claims are raised. However, we believe that for purposes of applying Rule 1.7(d), the concept of "representation" contains enough flexibility to extend beyond a single discrete proceeding to multiple proceedings that raise a particular identifiable issue or issues and involve common facts, legal theories, claims, defenses and parties.[7] For purposes of Rule 1.7(d), the "onset of representation" will be deemed to occur when the law firm first begins to provide legal services that involve the same facts, legal theories, claims, defenses and parties. If the conflict of interest was not reasonably foreseeable at that point, the law firm can continue its representation without client consent even if a conflict with another firm client is triggered by a subsequent legal proceeding.

We believe this approach is consistent with our prior holding in Opinion 272. There, the primary (and, indeed, the sole) linkage between the discrete proceedings was that they involved the same administrative agency before which the law firm had long represented the client. There was no adversity until the firm's other client initiated the proceeding that was the source of the conflict. Thus, it was not possible to find a single representation for purposes of Rule 1.7(d). There were no common facts, issues, or adverse interests.

Applying this analysis to the inquiry here, we find that the law firm's representation of Clients B and C on Competitive Access and Direct Access issues encompasses all proceedings — existing and future — in which these issues are legitimately raised and in which the same parties, legal theories, claims and defenses are present. It includes the FCC proceeding reviewing Client A's proposed acquisition, where the FCC can condition the merger approval in a way that would achieve Client B's and Client C's Competitive Access and Direct Access relief.[8] Thus, even in the absence of consent from Client A, the law firm can continue to represent Client A in the ERISA litigation and Clients B and C in the Competitive Access and Direct Access proceedings.[9]

We caution that the underlying commonality of facts, issues and parties required to find a single "representation" must be objectively verifiable. Efforts to abuse Rule 1.7(d) by artificially interjecting specious issues or claims into a proceeding in order to claim a preexisting representation will not be sufficient to overcome general client conflict principles contained in our Rules.

*Conclusion*

For the reasons discussed above, we believe that the "thrust upon" conflict provision of Rule 1.7(d) extends to the representation of a client with respect to an identifiable set of legal issues involving common facts, legal theories, claims, defenses and parties. Notwithstanding the fact that additional discrete proceedings raising those issues are subsequently initiated by another client of the law firm, the law firm may rely on Rule 1.7(d) to continue to represent both clients even in the absence of client consent.

Inquiry No. 99-1-2
Adopted: June 15, 1999

*Opinion No. 293*

## Disposition of Property of Clients and Others Where Ownership is in Dispute

• In certain situations, a lawyer is obligated to safeguard funds that come into the lawyers possession where ownership interests are claimed by both the lawyer's client and a third party or parties. If the third party has a "just claim" to the property that the lawyer has a duty under applicable law to protect against wrongful interference by the lawyers client, the lawyer must hold any disputed portion of the property until the dispute has been resolved.

**Applicable Rule**

• Rule 1.15 (Safekeeping Property)

*Inquiry*

The Ethics Committee has received numerous inquiries from lawyers concern-

[7] Our analysis conforms to the approach taken by the Alabama Supreme Court in *AmSouth Bank v. Drummond Company, Inc.*, 589 So.2d 715 (Ala. 1991), where the court recognized that the Rules of Professional Conduct are "rules of reason" and require employing a "common sense" approach to questions of lawyer conduct. Requiring that each new proceeding be viewed as a discrete "representation" seems contrary to this common sense approach.

[8] The "same parties" requirement is satisfied in the FCC merger proceeding because the company Client A seeks to acquire is the party adverse to Clients B and C in the Direct Access and Competitive Access proceedings.

[9] Client A, of course, remains free to discharge the law firm and seek new counsel for the ERISA litigation.

ing the proper disposition of settlement funds that a lawyer receives on behalf of a client when persons other than the client assert ownership interests in the funds. The purpose of this opinion is to provide guidance for the lawyer who is unsure how to respond to a third partys claim or her clients dispute with that claim.

*Discussion*

When a lawyer receives property belonging to others, two duties on the part of the lawyer arise: (1) the duty to notify promptly those who have ownership interests in the property of its receipt by the lawyer; and (2) the duty to promptly deliver the property and an accounting, if requested, to its owner. Rule 1.15(b) reads:

> Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

Rule 1.15(c) outlines a lawyers duties with respect to the distribution of property where disputes arise as to its ownership:

> When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of Paragraph (a).

If the text of the rule were all that lawyers had to guide them, the rule would be difficult to interpret. The quoted portions of the rule speak of "interests" in property and "interests" claimed by competing parties. The rules, taken by themselves, do not define what is an interest sufficient to give rise to the safekeeping obligations of the lawyer and what sort of "claim" is sufficient to trigger the lawyers obligation to safeguard the property until the dispute is resolved.

Comment [4] to Rule 1.15, however, provides further guidance:

> Third parties, such as a clients creditors, may have *just claims* against funds or other property in a lawyers 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 shall not unilaterally assume to arbitrate a dispute between a client and the third party.

D.C. R. Prof. Conduct 1.15, comment [4] (emphasis added).

The rules and comments have been further elucidated in decided cases, ethics opinions from this and other jurisdictions, and in the secondary literature. Taken together, these materials offer guidance as to how to handle these matters.

*1. Client Claims.*

One set of considerations applies when a dispute arises between a lawyer and the client concerning the property held by the lawyer. Because of the lawyers duty of loyalty to the client, the clients mere assertion of a claim is enough to prevent the lawyer from withdrawing any disputed property: There is no requirement that the dispute be genuine, serious, or bona fide, . . . The lawyer may not take possession of property the ownership of which is disputed by the client until it is absolutely clear that the dispute with the client has been finally resolved." *In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995).[1]

The lawyers obligation is to safeguard the funds in a segregated account until the dispute is resolved. Moreover, the lawyer should take steps to promote a resolution. The lawyer should reason with the client, suggest mediation, and suggest other alternative dispute resolution mechanisms where those steps fail.[2] If no other device is effective, the lawyer may ultimately be forced to seek a judicial resolution of the clients claim.

*2. Third Party Claims.*

The claims of third parties to property coming into a lawyers possession stand on a quite different footing. For one thing, the mere assertion of a claim by a third party is not enough by itself to freeze property in the lawyers possession until the dispute is resolved. Indeed, the imposition of such a requirement by the Rules of Professional Conduct, which are prescribed by the District of Columbia Court of Appeals and hence have the force of law, could raise significant due process issues as constituting, in effect, a prejudgment attachment. *See* Conn. Informal Op. 95-20 (May 1, 1995) (citing *Conn. v. Doehr*, 500 U.S. 1, 11 (1991) (attachment by private party under state aegis constitutes state action); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (holding prejudgment garnishment of wages unconstitutional); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding prejudgment seizure of goods unconstitutional where application ruled upon by clerk rather than judge, no requirement for detailed affidavit, and no requirement to show exigent circumstances); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (holding prejudgment seizure of bank account unconstitutional notwithstanding requirements of bond and showing of exigency). Unlike the claims of a client, which need not be justified even superficially in order to bar the lawyer from making distribution, *In re Haar*, 667 A.2d at 1353, the claims of the third party must rise to a higher level. The third party must have a "just claim" as to which "applicable law" imposes a duty on the lawyer to distribute the funds to the third party or withhold distribution. D.C. R. Prof. Conduct 1.15, Comment [4].

The focus of this opinion is the precise level to which such a third-party claim must rise to trigger a duty of preservation by the lawyer in the face of a demand that

[1] In *Haar*, the client offered $4,000 -- less than half the fee the lawyer was claiming -- to settle the lawyer's claim. The lawyer rejected the client's offer but withdrew $4,000 on the ground that it was no longer disputed because the client had offered it in settlement. The court found that the lawyer's conduct violated Rule 1.15. *Haar* was decided under DR 9-103(A)(2) of the former D.C. Code of Professional Responsibility but the Court indicated that Rule 1.15 of the D.C. Rules of Professional Conduct is "similar" to the Code provision. *In re Haar*, 667 A.2d at 1352 n. 1.

[2] Of course, if the client demands arbitration of a fee dispute, District of Columbia law requires the lawyer to consent to arbitration. Rule XIII of Rules Governing the Bar of the District of Columbia Court of Appeals.

she make disbursement to the client.[3] To begin with, the rule does not apply to claims of which the lawyer lacks knowledge. *Shapiro v. McNeill*, 92 N.Y.2d 91, 96, 699 N.E.2d 407, 409 (1998) (interpreting N.Y. DR 9-102); Conn. Informal Op. 95-20, at n. 3 (May 1, 1995). Similarly, if there is no legitimate dispute about who is entitled to part or all of the funds, the lawyer must disburse the undisputed portion accordingly. N.Y. State Op. 717 (Apr. 15, 1999); Ariz. Op. 88-06. Further, the lawyer is not required to make ultimate decisions about who is correct in a dispute between the lawyers client and a competing third party for property in the lawyers possession. D.C. R. Prof. Conduct 1.15, Comment [4]. In other words, a lawyer is not called on to decide the merits of the dispute at the lawyers peril, thereby exposing the lawyer to suit from the disappointed party. *See Heffelfinger v. Gibson*, 290 A.2d 390 (D.C. 1972) (lawyer who had contracted to respect medical provider's lien personally liable for funds disbursed to client in knowing disregard of that lien); *Kaiser Foundation Health Plan, Inc. v. Aquiluz*, 47 Cal. App. 4th 302, 54 Cal. Rptr. 2d 665 (Ct. App. 1996) (same). As comment [4] makes clear, the "lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party."

In general, a "just claim" that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client. The problems addressed by this opinion most commonly arise in the context of the disbursement of settlement funds or proceeds of a transaction, such as the sale of real estate. In those cases, several types of claims that frequently are received by lawyers are illustrative of "just claims" that would require the lawyer to give notice, make disbursement promptly where there is no dispute, and safeguard the funds in the event of a dispute until the dispute is resolved. These are:

(1) an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer, *see* Phila. Op. 94-9 (June 1994); Conn. Informal Op. 95-20 (May 1, 1995) ("valid judgment concerning disposition of the property"); Cleveland Op. 87-3 (1988);

(2) a statutory lien that applies to the proceeds of the suit being handled by the lawyer, e.g. D.C. Bar Op. 251 (lawyer must disregard clients direction to disburse settlement proceeds to client in face of statutory Medicaid lien); *see Aetna Casualty Co. v. Gilreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer under duty to recognize statutory lien of clients employer on workers compensation recovery proceeds); Conn. Informal Op. 95-20 (May 1, 1995); R.I. Op. 95-29 (July 13, 1995); Colo. Formal Op. 94 (Nov. 20, 1993);

(3) a court order relating to the specific funds in the lawyer's possession, *e.g.*, S.C. Op. 89-13; Colo. Formal Op. 94 (Nov. 20, 1993); and

(4) a contractual agreement made by the client and joined in or ratified by the lawyer[4] to pay certain funds in the possession of the lawyer (e.g., client expenses in consideration of the suppliers agreement to forebear collection action during the pendency of the lawsuit) to a third party, regardless of whether such an agreement arises from the matter being handled by the lawyer, *Heffelfinger v. Gibson,* 290 A.2d 390 (D.C. 1972); *Florida Bar v. Neely*, 587 So. 2d 465 (Fla. 1991); *Romero v. Earl*, 111 N.M. 789, 810 P.2d 808 (1991); *American State Bank v. Enabnit*, 471 N.W.2d 829 (Iowa 1991); Calif. Formal Op. 1988-101.[5]

The last type of agreement, which is commonly known as an "Authorization and Assignment" in this jurisdiction, is frequently utilized in contingent fee personal injury matters. It may be known by other names in other jurisdictions.[6] The District of Columbia Court of Appeals has held that a lawyer who signs such an agreement remains liable where successor counsel ends up handling the case, at least where the original lawyer retains an interest in the matter and receives a referral fee from successor

[3] This committee "ordinarily will not respond to questions of law, other than those arising under the Rules of Professional Conduct." Rule C-4, Rules of the D.C. Bar Legal Ethics Comm. Because comment [4] to Rule 1.15 incorporates by reference the "applicable law" on attorney liability, though, some reference to civil liability standards is unavoidable. The law in the District of Columbia appears to be that where a lawyer disburses to her client funds claimed by another, the lawyer is liable civilly if she has agreed to protect the third party's interest. *Heffelfinger v. Gibson*, 290 A.2d 390 (D.C. 1972). The D.C. Office of Bar Counsel has taken the position that the same standard obtains under Rule 1.15. Letter from Leonard H. Becker, Bar Counsel, to Irvin B. Nathan, Chair, D.C. Bar Legal Ethics Comm., at 2 (Aug. 23, 1999). The Court of Appeals also has ruled that a lawyer is not liable where she is aware of the client's liability to the third party but has made no independent undertaking to protect the third party. *Travelers Ins. Co. v. Haden*, 418 A.2d 1078 (D.C. 1980). Liability in the former circumstance may continue even after the lawyer has transferred the case to another lawyer unless the creditor has absolved the first lawyer of responsibility. *Heffelfinger*, 290 A.2d at 393 & n. 2. Further, and as noted above, there may be constitutional limitations upon requiring a lawyer to turn client funds over to a third party -- or even to withhold them from the client -- absent a matured claim to the *particular* funds in question. The District of Columbia statutes permit prejudgment attachment only in exigent circumstances, D.C. Code § 16-501(d) (1997), ordinarily require the posting of a bond by the party seeking the writ that is twice the amount of the claim, *id.* § 16-501(e), and require a postattachment hearing, *id.* § 16-506. Even in the post-judgment context, no lien is created until a writ of fieri facias or other writ of execution is issued. D.C. Code § 15-307 (1995).

[4] Some jurisdictions other than the District of Columbia require the lawyer to withhold funds from a client who has agreed to pay them to a third party, even if the lawyer has not joined in or agreed to adhere to that arrangement. *E.g., Advance Finance Co., Inc. v. Clients Security Trust Fund*, 337 Md. 195, 652 A.2d 660 (1995); *Kaiser Foundation Health Plan, Inc. v. Aguiluz*, 47 Cal. App. 4th 302, 54 Cal. Rptr. 2d 665 (Ct. App. 1996); *Herzog v. Irace*, 594 A.2d 1106 (Me. 1991); *Berkowitz v. Haigood*, 256 N.J. Super. 342, 606 A.2d 1157 (1992); *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511 (1994) (lawyer had not executed or acknowledged, but had drafted, assignment agreement); Formal Op. 98-06, Ariz. Comm. on Rules of Prof. Conduct (June 3, 1998); Informal Op. 95-20, Conn. Comm. on Prof. Ethics (May 1, 1995) (requiring withholding but not payment to third party claimant); Op. 93-14, S.C. Bar Ethics Adv. Comm.; Op. 93-31, S.C. Bar Ethics Adv. Comm. (insurer's subrogation claim); Op. 94-20, S.C. Bar Ethics Adv. Comm. This jurisdiction and others appear to disagree. *See Travelers Ins. Co. v. Haden*, 418 A.2d 1078 (D.C. 1980) (mere knowledge of insurer's claim insufficient to create liability on part of lawyer); *Farmers Ins. Exchange v. Zerin*, 53 Cal. App. 4th 445, 61 Cal. Rptr. 2d 707 (1997) (attorney not liable where he made no promise to protect subrogee's rights or property); Op. 95-12, Ohio Bd. of Comm'rs on Grievances and Discipline (Oct. 6, 1995); Op. 94-24, Phila. Bar Ass'n Prof. Guidance Comm. (Nov. 1994) (permissible to pay client where lawyer had made no promise to protect third party's interest); Inquiry 86-134, Phila. Bar Ass'n (no duty to pay medical service provider, or even to withhold funds, where no agreement by client to pay provider from settlement funds).

[5] A valid escrow agreement covering funds in the lawyer's possession conceivably also could be viewed as a "just claim" but such an arrangement involves a fiduciary duty on the part of the lawyer to *all* the parties to the agreement, not just to her own client. *See Janson v. Cozen and O'Connor*, 450 Pa. Super. 415, 676 A.2d 242 (1996) (no lawyer liability for third party claim where valid escrow agreement did not exist).

[6] See the discussion of "letters of protection" in Ohio Op. 95-12, 11 Law Man. Prof. Conduct 366 (1995); Conn. Informal Op. 95-20 (May 1, 1995).

counsel when the matter is settled. *Heffelfinger*, 290 A.2d at 393 & n. 2. The Court of Appeals apparently has not addressed the liability of successor counsel in such a situation. We think that from the standpoint of Rule 1.15, however, successor counsel who is aware of the contractual commitment of her client and of predecessor counsel is prohibited ethically from disbursing the funds to the client.

In a recent decision, the District of Columbia Court of Appeals affirmed disciplinary action against a lawyer who, among other things, failed to retain funds as to which a third party, an insurance carrier, had a statutory lien. *In re Thomas*, 740 A.2d 538 (D.C. 1999). In the Thomas case, the insurance carrier paid the medical expenses of the attorney's client and informed the defendant and the lawyer, who represented the plaintiff, that it was asserting its statutory lien for the amount of its medical payments. Upon settlement, the defendant sent a check to the plaintiff's attorney, made payable to the client, the attorney and the insurance company as the "lienholder." The attorney prepared and sent to his client a settlement statement apportioning funds to the insurance company, which was not disputed by the client. Thereafter, the client and the attorney endorsed the check from the defendant and the attorney deposited the payment in the attorney's client escrow fund, without advising the insurance company that he had received the check or that he had deposited it without the insurance company's endorsement. Ultimately, the attorney wrote checks to himself from that account that effectively depleted the account, paying none of the funds either to the client or to the insurance company.

The Board on Professional Responsibility concluded that the insurance carrier had a statutory lien on some of the funds that came into the lawyer's possession but that the exact amount was unknown. The Board found that the attorney was liable for, among other things, commingling funds in violation of Rule 1.15(a), misappropriation in violation of Rule 1.15(b) and failing to notify a third party promptly of funds in which the third party had an interest in violation of Rule 1.15(b). The District of Columbia Court of Appeals upheld the Board's determination that the insurance carrier had a lien in some amount, leaving unresolved the amount of the lien and whether the lien had been waived. Under these circumstances, the court held that the lawyer should not have withdrawn funds from the account while the insurance company's right to those funds was in legitimate dispute.

We believe that the facts and holding of this case come within standards (2) and (4) above. The insurance carrier was found by clear and convincing evidence to have a statutory lien, although whether it was fully perfected and whether it had been waived were disputed. Further, the lawyer and the client appeared to have had an agreement to recognize the propriety of the third party's claim and a commitment to pay it. While there is very broad language in the opinion suggesting that any third party claim may be sufficient to freeze client funds in the lawyer's possession, we believe that the decision should be limited to its facts, namely that (1) the claim related to particular funds that were made payable to the attorney and third party and (2) the third party had a lien that was recognized both by the lawyer and the client. As noted above, a broader reading that would let a third party freeze a client's funds indefinitely simply by lodging a claim with the client's attorney would raise significant due process questions. We do not believe that such a reading was intended by the Court.

Where a "just claim" exists, the lawyer is ethically obliged to disregard her clients demand for the property. *See* D.C. Op. 251 (1994); S.C. Op. 95-29; Ohio Op. 95-12 (Oct.6, 1995); S.C. Op. 93-14. Thus, this rule concerning "just claims" is an exception to the general principle of client loyalty.

On the other hand, a lawyer is not required to pay the general unsecured creditors of her client, including judgment creditors who have not attached or garnished the funds in the lawyer's possession, where there is not a "just claim" of the type described above. *Scharf v. Statewide Grievance Comm.*, No. Civ. 94-0536033, 1995 Conn. Super. LEXIS 1471, 1996 WL 317090 (Conn. Super. Ct. May 11, 1995) (general unsecured creditor of client does not have interest sufficient to impose duty on lawyer to surrender funds); Conn. Informal Op. 95-20 (1995) (mere assertion of claim insufficient to create duty); Phila. Op. 94-24 (1994) (on lawyers representation that clients had personal injury claim, clients mortgagee stayed foreclosure sale of clients property; lawyers representation notwithstanding, no duty on lawyer to pay claim proceeds to mortgagee); Cleveland Op. 87-3 (1988) (mere judgment, without court order directed to attorney, insufficient to require attorney to pay funds to third party). In the words of the California Court of Appeals,

> as a general matter, an attorney receiving payment of a judgment or settlement on behalf of his or her client has no obligation to satisfy the clients debts out of that fund. The attorney is not obligated to pay, for example, the clients dry cleaning bill or credit card debts even if on notice thereof. It is only when the creditor has some property interest in the fund or a trust relationship exists that such an obligation might arise.

*Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 459, 61 Cal. Rptr. 2d 767 (Ct. App. 1997).

Commentators have also suggested that comment [4] to Rule 1.15 uses the phrases "just claims" and "duty under applicable law" to suggest that the third party must have a "matured legal or equitable claim in order to qualify for special protection." 1 GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, THE LAW OF LAWYERING, § 1.15:302, at 460 (2d ed. 1990). Hazard and Hodes suggest that garnishment of the client's funds in the lawyer's possession is a potential means of protecting the third party's interest, but that the creditor must rely upon a court, rather than the client's lawyer, for such assistance. *Id.* § 1.15:303. Further, a comment to the draft Restatement of the Law Governing Lawyers states:

> If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs.

RESTATEMENT OF THE LAW GOVERNING LAWYERS § 57 comment *d.* (Prop. Final Draft No. 1, 1996) (emphasis added).

Even more difficult problems arise when the proceeds of the recovery (whether by settlement or judgment) are insufficient to satisfy the "just claims" of various service providers. For example, where the litigation results in a recovery in which, after deduction of the lawyers contingent fee,[7]

[7] The D.C. Office of Bar Counsel has "taken the position that the attorney's right to claim a priority for his or her own fees and expenses presents a legal question . . . beyond the scope of [Rule 1.15] to address as an ethical question." Letter of Leonard H. Becker, Bar Counsel, to Irvin B. Nathan, Chair, D.C. Bar Legal Ethics Comm., at 2 (Aug. 23, 1999) (copy in the files of this Committee.

the remainder is insufficient to satisfy all the assignments the client has made to his medical providers, the lawyer is faced with difficult questions of how to disburse the funds. An obvious solution would be to pro rate the funds among the various providers but the disbursing lawyer presumably would be obliged to secure the consent of all the providers before doing so. Otherwise, the question may become one of priority of claims, which is a subject beyond the purview of this Committee. In such a case, a lawyer holding disputed funds would have to permit the competing claimants to resolve the matter among themselves. If the competing claimants were unable to resolve the disputed issues among themselves, filing an interpleader action might be the only avenue open to the lawyer.

Inquiry No. 98-7-21
Adopted: July 20, 1999
Revised: February 15, 2000

*Opinion No. 294*

**Sale of Law Practice By Retiring Lawyer**

- It is not unethical for a retiring lawyer (*i.e.*, a lawyer withdrawing from the private practice of law in the locale in which the lawyer had been practicing) to sell his law practice to another lawyer, provided that he is able to terminate the representation of his clients in a manner consistent with Rule 1.16(d), that clients are suitably informed of the sale transaction and agree to the new representation, and that client confidences and secrets are preserved while negotiating the sale of the practice. Additionally, the purchasing lawyer may not charge a discriminatory fee to the retiring lawyer's clients.

**Applicable Rules**

- Rule 1.5(a) (Reasonableness of fee)
- Rule 1.5(e) (Division of fees)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflicts of Interest)
- Rule 1.16 (Declining or Terminating representation)

*Inquiry*

We have been asked to advise on the propriety, under the District of Columbia Rules of Professional Conduct, of the sale of a law practice incident to the retirement of a lawyer. The only specific facts we have been given are that the inquirer, a solo practitioner, is planning to retire and is contemplating the sale of his law practice to another lawyer. We are assuming that the sale price does not include any physical assets, and that it is predicated essentially on the so-called "goodwill" value of the retiring lawyer's practice.[1] For the purpose of this Opinion, we are also assuming that the retiring lawyer is selling his entire practice and that payment for the sale will be made in a lump sum or in installments.

This Opinion is limited to the sale of an entire law practice to another lawyer upon the retirement of a lawyer. By "retirement," we mean the withdrawal of a lawyer from the private practice of law in the locale in which the lawyer had been practicing. Such retirement could occur when the lawyer decides to stop working because of age, disability, family responsibilities or other reasons; when the lawyer continues to practice law, but in a capacity in which he/she does not serve private clients (such as government service or as in-house counsel to a corporation); or when the lawyer relocates to another geographic locale. Nothing we say here should be taken as having any relevance whatever to attempted transfers of clients or a law practice under any other circumstances. We also do not address the ethics of the sale of a law firm name, the use of which is governed by Rule 7.5. *See also* D.C. Bar Op. 277 (Nov. 19, 1997).

*Discussion*

The retirement of a member of a law firm usually does not produce any discontinuity in client representation. In all likelihood, the firm's partnership or shareholder agreement or other formal or informal understandings will address transfer of responsibility for the client's matters to another lawyer in the firm. Fee-sharing concerns under Rule 1.5, confidentiality concerns under Rule 1.6 and conflict of interest concerns under Rule 1.7 do not exist when a lawyer transfers work to another lawyer in the same firm.

But for a solo practitioner, the situation is different. There is no law firm to continue representation of the lawyer's clients after his retirement, and there is no person or entity to pay the lawyer for his investment (in capital and in years of effort) in the law practice or for any goodwill associated with his practice. Thus, a solo practitioner does not have the means available to a lawyer practicing in a law firm to realize some value from a law practice which, handled by another lawyer, could continue after the lawyer's retirement.

*1. Sale of a Law Practice Under the Code of Professional Responsibility*

While there is no mention in the District of Columbia Rules of Professional Conduct of the ethical implications of the sale of a law practice, the subject is not novel. Under the predecessor Code of Professional Responsibility, a non-binding Ethical Consideration (EC 4-6) stated that "a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets."[2] Under the Code, however, no specific disciplinary rule prohibited the sale of a law practice.

There is authority in other jurisdictions that, under the Code of Professional Responsibility, the sale of a law practice was unethical. In *Raphael v. Shapiro*, 587 N.Y.S.2d 68, 72 (N.Y. Sup. Ct. 1992), for example, the court held that such a transaction was "void and unenforceable under Code of Professional Responsibility EC 4-6 . . . ." *See also Geffen v. Moss*, 125 Cal. Rptr. 687, 693 (1975).

Decisions in other contexts reached similar results. For example, in *Dugan v. Dugan*, 457 A.2d 1 (N.J. 1983), the court was asked to place a value on the goodwill of a sole practitioner's law practice for the purpose of an equitable distribution of property pursuant to a divorce. Citing the Code of Professional Responsibility, a state ethics opinion and various treatises and case law, the court explained that a sole practitioner was prohibited from selling his practice, and concluded that this prohibition had "an adverse effect" on the value of the practice's goodwill. *Id.* at 8-9.

[1] Goodwill has been described as "the value assigned to *Detroit Bank & Trust Co. v Cooper*, 287 N.W.2d 266, the expectation of future business." 268 (Mich. Ct. App. 1979), or "the probability that old customers of a concern will continue their custom and recommend it to others." *O'Hara v. Ahlgren, Blumenfeld and Kempster*, 537 N.E.2d 730 (Ill. 1989) (internal quotations and citations omitted).

[2] The Code of Professional Responsibility was in effect in the District of Columbia between 1972 and 1990.

*2. Sale of a Law Practice in the Era of the Model Rules of Professional Conduct*

While the American Bar Association's original 1983 Model Rules of Professional Conduct did not address the sale of a law practice, a 1990 amendment, Model Rule 1.17, did so.[3] The Model Rule, which has not been adopted in the District of Columbia or considered by the Court of Appeals, would permit a retiring lawyer to sell his law practice if the practice is sold in its entirety to another lawyer or law firm, notification and certain disclosures are made to the affected clients, and the transferee lawyer does not increase fees to be paid by the affected clients.[4]

At least twenty-one jurisdictions have adopted Model Rule 1.17 (or a variation of it) and thus permit the sale of a law practice when accomplished according to its conditions and requirements.[5] Two other jurisdictions (Kansas and Washington) that have not adopted Model Rule 1.17 have nevertheless approved the sale of a law practice, subject to the satisfaction of conditions imposed under the general ethical rules in effect in those jurisdictions. *See* Wash. Ethics Op. 192 (May 3, 1996); Kan. Ethics Op. 93-14 (Dec. 8, 1993).

At least one jurisdiction appears to adhere to the more traditional view that a sale of a law practice, under any circumstances, is unethical. *See* Arizona Ethics Op. 92-8 (June 22, 1992) (concluding that a sole practitioner cannot sell or lease the goodwill of his law practice). Maryland is also in this category (*Prahanski v. Prahanski*, 582 A.2d 784, 790-91 (Md. 1990)), but its law will change in January, 2000 when it adopts a version of ABA Model Rule 1.17.

We are aware of no decisions in the District of Columbia on this subject.

*3. Sale of a Law Practice in the District of Columbia*

In addressing the sale of a law practice under the District of Columbia Rules of Professional Conduct, we act against a background of mixed opinions and conclusions elsewhere. We begin our analysis with the observation that our Rules do not directly address the sale of a law practice. Since no Rule directly addresses the subject, its ethical status depends on an analysis under the Rules of Professional Conduct of the conduct of which it is comprised. This conduct includes:

a. termination of the representation of clients by the retiring lawyer;

b. communication with clients by the retiring and transferee lawyers;

c. transfer of responsibility for client matters to another lawyer;

d. transfer of client information and files to another lawyer; and

e. receipt of funds by the retiring lawyer from the purchasing lawyer.

These types of activities are addressed in the Rules, and we discuss them below in the context of the sale of a law practice.

*a. Termination of the Representation of a Client*

A lawyer, even a retiring lawyer, may not terminate a representation without proper regard for his client's interests. Absent "cause" for termination (such as a physical or mental condition that impairs the lawyer's ability to represent the client, *see* Rule 1.16(a)(2), or certain client misconduct, *see* Rule 1.16(b)), a lawyer may terminate a client representation only "if withdrawal can be accomplished without material adverse effect on the interests of the client . . . ." *Id.* The termination must be accomplished in a manner that does not prejudice the client's interests. *See* Rule 1.16(d).

The retiring lawyer who plans to sell his law practice will be making a wholesale termination of all of his client representations. That there may be another lawyer (the proposed transferee of the practice) available to continue the retiring lawyer's work does not diminish the retiring lawyer's responsibilities under Rule 1.16(b), because his clients are not obliged to accept representation by the transferee lawyer. Thus, merely making another lawyer available to a client does not satisfy the lawyer's responsibilities under Rule 1.16. *Cf.* D.C. Bar Op. 273 (Sept. 17, 1997); D.C. Bar Op. 270 (March 19, 1997); D.C. Bar Op. 266 (June 19, 1996). If the retiring lawyer's clients do not specifically agree to representation by the proposed transferee lawyer, the retiring lawyer will have to seek other ways of satisfying his continuing obligations to his current clients, such as by completing the representations himself, identifying another lawyer acceptable to these clients, or giving the client sufficient advance notice of his retirement to allow the client to himself obtain successor counsel. *See* Rule 1.16(d).[6]

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[3] The text of ABA Model Rule 1.17 reads as follows:

A lawyer or a law firm may sell or purchase a law practice, including goodwill, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted.

(b) The practice is sold as an entirety to another lawyer or law firm;

(c) Actual written notice is given to each of the seller's clients regarding:

(1) the proposed sale;

(2) the terms of any proposed change in the fee arrangement authorized by paragraph (d);

(3) the client's right to retain other counsel or to take possession of the file; and

(4) the fact that the client's consent to the sale 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 information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to undertake the representation 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.

[4] We have been advised that ABA Model Rule 1.17 has been before the District of Columbia Bar's Rules Revision Committee, but has not received substantive evaluation by the Committee.

[5] These jurisdictions are: Alaska, Colorado, Florida, Hawaii, Indiana, Iowa, Maryland (effective January, 2000), Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Virginia (effective January, 2000), West Virginia, and Wisconsin.

[6] There may be some circumstances, perhaps not unique in retirement, in which a lawyer seeking to withdraw from a representation, through no fault of the lawyer, is unable to communicate with his client or receives no communication from his client in response to a notification of withdrawal. Where, for whatever reason, the withdrawal is ethically correct and must occur notwithstanding such inability to communicate, it may be proper for the retiring lawyer to transfer responsibility for the representation to another lawyer for the limited purpose of preventing the occurrence of an event (such as the passage of a limitations period or the date of a mandatory governmental filing) which might

*b. Client Communications*

An obvious premise of any sale of a law practice is the transferee lawyer's access to the retiring lawyer's practice, i.e., his client relationships. But those relationships (unlike many ordinary commercial contract relationships) cannot be sold or assigned by the retiring lawyer, because they are personal and terminable at will by the client. (*See, e.g.*, Rule 1.16 cmt. [4]). So, to facilitate a transfer of the retiring lawyer's practice, the transferee lawyer might require as part of the transaction that the retiring lawyer make a suitable introduction of his clients to the transferee lawyer. Such a referral might take the form of a personalized or general mailing or other communication by the retiring lawyer to his clients announcing his intention to retire and introducing the transferee lawyer to the addressee clients.

That conduct by the retiring lawyer, which is really an effort by that lawyer to persuade his clients to agree to terminate their relationship with him and to retain another lawyer, is fraught with ethical concerns. For one, the effort presents a significant conflict of interest on the part of the retiring lawyer. In communicating with current clients, asking them to transfer their legal work from him to another lawyer, the retiring lawyer is promoting his personal financial and other interests, in addition to his clients' interests in an orderly and competent continuation of their legal representation. The conflict is one described in Rule 1.7(b)(4), where "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests."

Such a communication does not appear to be anywhere prohibited in the Rules, but it must be accompanied by a disclosure (preferably in writing; *see* Comment [20] to Rule 1.7) that meets the requirements of Rule 1.7(c), so the client is aware of the lawyer's financial interest in seeking the client's agreement to terminate the representation and to be represented by another lawyer, so that the client can give an informed consent to such action, and so that the client understands that he is not obliged to accept representation by the proposed transferee lawyer and may select his own lawyer. Such a disclosure would, at a minimum, have to include the following:

- notification that the proposed transfer is pursuant to the lawyer's decision to retire;
- a description of the business arrangement between the retiring and transferee lawyers sufficient to inform the client of the retiring lawyer's financial interest in the requested transfer of the matter to the new lawyer;
- a description of the proposed transferee lawyer's experience and ability to represent the client, including any reasons why the client might be less favorably represented by the new lawyer; and a notification that the client is not obliged to accept the proposed transfer and that, if he does not, the retiring lawyer may withdraw from the representation (if that can be ethically accomplished under Rule 1.16).

The retiring lawyer, while still representing his clients, is obliged under Rule 1.1 to provide competent representation to them. In the context of a recommendation of another lawyer to his clients, Rule 1.1 would require the retiring lawyer to act competently in selecting a transferee lawyer.

The proposed transferee lawyer may also wish to communicate with the clients proposed for transfer. Before providing client identifying information (*e.g.*, names and addresses) to the transferee lawyer, the retiring lawyer should determine whether it is ethical to disclose such information to the transferee lawyer. (*See* discussion below concerning the confidentiality of client identities.) Such a communication by the transferee lawyer is not unethical in the District of Columbia so long as it is not false or misleading and does not violate any other general regulation of contacts with prospective clients under Rule 7.1(b). *See* D.C. Bar Op. 249 (July 19, 1994).

*c. Transfer of Responsibility for the Representation*

If the client agrees to the new representation by the proposed transferee lawyer, the retiring lawyer will have all of the responsibilities of a lawyer terminating a representation.[7] That lawyer will need to return to the client any property he holds (including any advances of fees and/or expenses) (Rules 1.15(b), 1.16(d)), and will need to transfer files to the transferee lawyer and take such other steps as will facilitate an orderly transfer of responsibility to the transferee lawyer.[8]

The transferee lawyer should treat the transferred client as he would any new client, by investigating whether any conflict of interest might affect the new representation and taking steps to disclose the conflict and seek the client's consent to the representation, all as provided under Rule 1.7. The fee communication required under Rule 1.5(b) is also necessary.

*d. The Transfer of Client Information and Files to Another Lawyer*

During the course of the retiring lawyer's discussions/negotiations with the prospective purchaser of his practice, questions about the nature of the retiring lawyer's practice, clientele and perhaps individual client matters will surely be asked, or such information may be volunteered by the retiring lawyer. Rule 1.6 (Confidentiality) provides guidance on what client-related information the retiring lawyer can use or reveal under these circumstances.

Rule 1.6(a) defines the information to be protected by a lawyer as client confidences and secrets. "Confidences" are that information protected under the common law attorney-client privilege, and "secrets" include all information gained in the course of the representation, whether from the client or from another source, "that the client has requested be held inviolate, or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6, cmt. [6]. Under Rule 1.6 (b), such information may only be used by the lawyer for the benefit of the client. Since the retiring lawyer's efforts to sell his law practice are primarily for the lawyer's benefit, and not the client's, no information protected by Rule 1.6(a) may be dis-

prejudice the client. Exactly how the retiring lawyer should proceed under these circumstances would depend on the facts, including the nature of the anticipated prejudice to the client and the confidential or secret information that would have to be disclosed to the transferee lawyer to allow that lawyer to protect the client's interest.

[7] There is no requirement in the Rules that the termination and transfer agreement be in writing, but the interests of both the retiring lawyer and the client would be better served by a written agreement.

[8] Rule 1.15(a) also requires a lawyer to preserve records of client funds and property for five years after termination of the representation. As regard the disposition of files of a former representation, *see* D.C. Bar Op. 283 (July 15, 1998).

closed by the retiring lawyer in this activity without the affected clients' informed consent.

Nevertheless, some information about the retiring lawyer's practice can be discussed with the prospective purchaser without the consent of the affected clients. Some of such information is clearly not confidential and some may not be secret, depending on the circumstances. The number of clients proposed for transfer, the retiring lawyer's aggregate billing, receivables and income history, and general descriptions of the nature of the retiring lawyer's cases usually can be disclosed without risk of violating Rule 1.6. No confidential or secret information would likely be contained in this information. If it does not reveal information about specific clients, the retiring lawyer also may be able to provide some information about specific cases, such as the claims or areas of advice or consultation involved and the billing history of the matter.

Disclosure of specific client and adverse party identities is more problematic. It may be that, in some settings, the identity of a client and an adverse party will not be confidential or secret, as when these names are mentioned in a public document, such as a complaint or answer. But even if included in a public document, the names could be a secret. As we noted in D.C. Bar Op. 124 (March 22, 1983), "even if the fact of representation were known by someone other than the attorney or the client, thereby destroying the confidentiality necessary to the attorney-client privilege, the fact of the representation could still constitute a 'secret' if the avoidance of additional disclosure was, nevertheless, desirable." (*See also* D.C. Bar Op. 246 (Revised) (Oct. 18, 1994) for a further discussion of the application of Rule 1.6 to information that has appeared in publicly filed documents.) In many settings, particularly in a counseling (as distinct from a litigation) practice, the fact that a person has sought legal advice by a lawyer may be confidential. *See. e.g.*, D.C. Bar Op. 124 (opining that the identities of clients who sought tax advice, including several members of Congress, should be protected under Rule 1.6).

Substantive information about a specific representation is most likely to be confidential, and so not disclosable by the retiring lawyer without client consent.

*e. Fees to be Paid to the Retiring Lawyer*

There are many different methods by which the transferee lawyer could pay the retiring lawyer for the transfer of the latter's law practice. These would include a lump sum payment at the time of sale, installment payments not tied to the fees earned from the clients transferred to the purchasing lawyer, and periodic payments related in some way to the fees earned from such clients.

Where the payment (lump sum or installment) to the retiring lawyer is unrelated to the fees to be earned by the purchasing lawyer, we see no ethical concern for the retiring lawyer. For the transferee lawyer, Model Rule 1.17(d) requires that "[t]he fees charged clients shall not be increased by reason of the sale," although it would permit the transferee lawyer to charge higher 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." We observe only that, under Rule 1.5(a), the fees charged by the transferee lawyer to transferred clients must be "reasonable."[9]

Where the payment to the retiring lawyer is tied to the receipt of fees by the purchasing lawyer, Rule 1.5 (e) is implicated. That Rule prohibits the sharing of legal fees with a lawyer not practicing in the same firm as the lawyer receiving the fees unless the division is in proportion to the services rendered by each lawyer or the lawyers assume joint responsibility for the representation; the client is informed of, and consents to, the division of fees; and the total fee is reasonable. In D.C. Bar Op. 286 (Nov. 17, 1998), we held that a payment of something of value to someone which is tied to the receipt of legal fees is a form of fee-sharing subject to Rule 1.5(e). In the situation before us, the payments to the retiring lawyer, if tied to the receipt of fees from the transferred clients, would be a form of fee-sharing. Unless the arrangement met the conditions of Rule 1.5 (e), this form of payment for the transfer of a retiring lawyer's practice would be unethical.

Inquiry No. 98-7-20
Approved: December 21, 1999

[9] Rule 1.5(a) lists the following as factors to be considered in evaluating the reasonableness of a lawyer's fee:

(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.

*Opinion No. 295*

## Restriction on Communications with a Represented Parent by a Lawyer Acting as Guardian Ad Litem in a Child Abuse and Neglect Proceeding

• A lawyer appointed to act as a guardian ad litem in a child abuse and neglect proceeding in the District of Columbia represents the child and the best interests of the child. In the absence of a conflict between the two interests, the guardian ad litem is the child's lawyer. Each of the child's parents may be represented by separate counsel. Under Rule 4.2, the guardian ad litem may not communicate about the subject of the representation with either of the child's represented parents without notification of and consent from the parent's lawyer. The guardian ad litem may communicate directly with a represented parent if the sole purpose of the communication is to obtain information about how to contact the child or to schedule a meeting with the child. Such communication would be administrative in nature and would not be "about the subject of the representation."

### Applicable Rules

• Rule 3.5 (Impartiality and Decorum of the Tribunal)
• Rule 4.2 (Communication Between Lawyer and Opposing Parties)
• Rule 8.4(a) (Misconduct)

*Inquiry*

The inquirer seeks advice about whether a lawyer appointed to act as guardian ad litem in a child abuse and

neglect proceeding may communicate with a parent of the child she represents, who is represented by counsel, without permission from the parent's lawyer. The inquiry posits that "Because of the nature of the work, it is sometimes very difficult to avoid all communications without prior attorney permission. . . . The attorneys who are appointed as Guardian Ad Litem are required to talk to the respondent and, . . . because of the respondent's age or mental capacity, the GAL may have no alternative but to inquire of the parent or caretaker about the welfare of the respondent."

The inquiry poses several hypotheticals for discussion, which are summarized below.

1. The GAL and the parent who is the alleged abuser have arrived early for the initial hearing. Counsel for that parent has not yet arrived. That parent is the only person present who knows the whereabouts of the child. The GAL wants to talk to the child before the initial hearing and wants to ask the parent for the child's address and telephone number. May the GAL do so without waiting for parent's counsel to arrive?

2. The social worker/probation officer/education advocate and opposing counsel, including the GAL, are in a meeting. During the meeting, is it permissible for the social worker to call the allegedly abusive parent and ask questions posed by the GAL without the knowledge or permission of the parent's lawyer?

3. The respondent is a child under the age of six or is mentally incapacitated. The GAL wants to talk to the parent about the child's progress or condition. The parent might give information to the GAL that would be detrimental to the parent. May the GAL talk to the parent to obtain information about the welfare of the child without the permission of the parent's counsel?

4. The parent's counsel wants to talk to the child with only the parent present. May the GAL insist on being present when the parent s lawyer interviews the child?

*Discussion*

In the District of Columbia, allegations of child neglect are adjudicated in the Superior Court. The D.C. Code provides:

> Superior Court shall in every case involving a neglected child which results in a judicial proceeding, . . . appoint a guardian ad litem who is an attorney to represent the child in the proceedings. The guardian ad litem shall in general be charged with the representation of the child's best interest. D.C. Code section 16-2304(b)(3) (1999).

The parent(s) or guardian of the child also may be represented by counsel. The D.C. Court of Appeals explained that the child's guardian ad litem occupies a dual role, as "neutral fact-finder" for the judge and as "zealous advocate" on behalf of the child's best interests. *S.S. v. D.M.*, 597A. 2d 870, 875 (1991). Both the statute and the case law make clear that, additional responsibilities notwithstanding, the GAL in neglect proceedings is the child's lawyer.[1] As such, there is no question but that a lawyer acting as a guardian ad litem is bound to comply with the Rules of Professional Conduct.[2]

DC Rule 4.2(a) draws a relatively bright line on communications between lawyers and persons who are represented by counsel. The rule states:

> During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This committee has interpreted Rule 4.2 to impose a clear prohibition on communication by a lawyer with a represented party absent consent of that party's counsel. The committee read the rule to apply to a lawyer representing himself in a proceeding in which the other party was represented by counsel. Opinion No. 258 (1995). We also found the rule to require consent of counsel before a lawyer contacted a represented opposing party about a part of a proceeding in which the opposing counsel was not representing his client. D.C. Bar Op. 263 (1996)

*1. Communication with Represented Persons without Notice and Consent of Opposing Counsel*

Once the role of the GAL (as lawyer for the child) is clarified, the answer to the main question posed in the first and third hypotheticals above is relatively straightforward. The parent who is alleged to have engaged in abuse or neglect is a party to the proceeding and is represented by counsel. Therefore, the GAL may not communicate with that parent about the substance of the matter without the consent of the parent's lawyer.

The GAL has a dual role as advocate and as fact-finder, but the authorizing legislation gives no indication that a GAL is "authorized by law" to collect information from the child's parent without the consent of the parent's lawyer.[3]

In interpreting Model Rule 4.2, the ABA Committee on Ethics and Professional Responsibility said that the purpose of the rule is to:

> provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests. ABA Formal Op. 95-396 (1995).

[1] The one exception to the assertion that the GAL is the child's lawyer is if there is a conflict between the child's preferences and the child's best interests. In the absence of a conflict, the GAL can represent both the child and her best interests. If there is a conflict, then the GAL should represent the child's best interests and should ask the court to appoint another lawyer for the child. *In re L.H.*, 634 A.2d 1230 (1993). In this opinion, we address the obligations of a GAL whose responsibilities include acting as a child's lawyer.

[2] *See S.S. v. D.M.*, 597 A.2d 870, 877 (1991) (discussing the application of Rule 3.7 to a GAL); Opinion No. 252 (1995) (addressing the obligations of a lawyer appointed as a guardian ad litem in a child abuse and neglect proceeding with respect to potential tort claims of the child).

[3] The appointment of lawyer GALs for children in neglect proceedings is authorized by D.C. Code section 16-2304(a) (1999) and by D.C. SCR-Neglect Rule 27 (1999). Neither lays out specific powers or duties of the guardian at litem. The duties are spelled out in a set of informal guidelines issued by the Superior Court called "Practice Standards for Attorneys in Neglect Cases in the District of Columbia Superior Court". These standards describe the GAL's duties as counsel for the child, explain what the GAL should do in the case of a conflict between the child's wishes and the GAL's view of the child's best interests, and describes the GAL's fact-finding duties. These include obligations to interview the client and "all significant persons who have information about the family" including the child's parents. In the absence of an explicit statement that the GAL may conduct these interviews without the consent of the other parties' counsel, the guidelines cannot be found to exempt GALs from compliance with Rule. 4.2.

The fact that the client is a child does not excuse a GAL from respecting the rights of other parties as required by the rule. The child's parent may be at risk of termination of parental rights because of child abuse and neglect. That parent is entitled to the protection afforded by legal representation. The boundary set by the rule may be inconvenient or cumbersome, but it is a boundary nevertheless.

The parent not charged with abuse or neglect also may be represented by counsel. That parent may not be a party to the proceeding, but Rule 4.2 still applies. Although Rule 4.2(a) is worded to refer to a "party" represented by counsel, Comment [4] states: "This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." Under Rule 4.2, the GAL may not communicate with any parent or guardian who is represented by counsel about anything relating to the child abuse and neglect proceeding without the consent of that person's lawyer.

*2. Communication about Scheduling or Administrative Matters*

The first hypothetical posed in the inquiry posits a situation in which the GAL wishes to speak to the child's parent merely to obtain information about how to contact the child. While Rule 4.2 states no exception for contact limited to purely administrative or ministerial questions, such contact would not thwart the purpose of the rule, because the parent is not being asked for information about which advice of counsel might be sought. As counsel for the child, the GAL must be entitled to information about the whereabouts of the child.

The comments to Rule 4.2 do not address this "ministerial information" question directly, but they do interpret the rule to allow direct contact to obtain non-substantive information from an organization. Comment [5] states:

> This Rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this Rule require.

The comments to Rule 4.2 also provide that a lawyer may communicate with another party about matters outside the representation. While a request for information about the location of the child is not unrelated to the representation, neither is it a request for information relating to the substance of the representation.

The rules prohibiting ex parte communication with judges offer useful guidance here. The 1990 Model Code of Judicial Conduct, Canon 3B(7)(a) permits ex parte communications for "scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits . . . "[4] DC Rule 3.5(b), like the Model Rule, says "A lawyer shall not . . . communicate ex parte with a [judge] except as permitted by law." This rule does not articulate the "administrative matters" exception explicitly, but is widely understood not to prohibit communication relating to administrative or scheduling matters." The rule against ex parte communications, like Rule 4.2, is intended to ensure that both lawyers in a case have the opportunity to participate in discussion of matters of substance relating to the case. But a lawyer who contacts a judge's chambers to get an address or to find out a filing deadline does not violate the rule.

We conclude that a GAL may contact a child's parent to get contact information, to schedule a meeting with the child, or for other administrative purposes. To read the rule otherwise would add needless burdens to the already difficult task of representing a child in an abuse and neglect proceeding.

*3. Communication Through a Third Party*

If the GAL may not talk to the parents on any matters of substance without permission from their lawyers, may the GAL relay questions to a parent through a social worker without permission? Again, the answer is clearly "no". Rule 4.2 states: "During the course of representation of a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party known to be represented by counsel" absent consent of the lawyer for the other party or other legal authority. Rule 8.4 states: "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." A GAL may not use a social worker or any other third party as a go-between to circumvent Rule 4.2.

If a social worker called a parent to ask questions that the social worker needed to get answered and then shared the answers to those questions with the GAL, Rule 4.2(a) would not apply. In such circumstances, the lawyer might learn information that she would not be entitled to seek directly from the parent without the consent of the parent's counsel. Child neglect proceedings are intended to be less adversarial and to involve more sharing of information than most proceedings that involve only adults. Rule 4.2 does not prohibit a lawyer from learning information through that process, only from "communicat[ing] or caus[ing] another to communicate about the subject of the representation with a party known to be represented by another lawyer" without the consent of the other lawyer. A GAL must not initiate such an inquiry or direct another person to do so.

If during a meeting between a GAL and a social worker, the GAL poses questions and the social worker calls one of the child's parents to ask the questions, the GAL has violated Rule 4.2 by doing through the acts of another something that the GAL is prohibited from doing. It is no solution to this problem for the lawyer and the social worker to agree that the lawyer's questions are really the social worker's questions. In fact if the social worker calls a parent during the meeting to ask a question raised by the lawyer at the meeting and reports the conversation to the GAL, Rule 4.2 has been evaded. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (stating that a lawyer would be responsible for ex parte contacts made by an investigator under her supervision if she had not made reasonable efforts to prevent the contacts, if she had directed the investigator to make them, or if she knew that the investigator was going to make the contacts and failed to instruct him not to do so.)

[4] The ABA Model Code of Judicial Conduct has not been adopted by the District of Columbia Court of Appeals, but is referred to as guidance in the D.C. Rules of Professional Conduct, Rule 3.5, comment [1].

*4. Communication with Parents about Very Young or Mentally Disabled Children*

The inquiry asks whether the barrier to direct contact with a parent is lower if the client is very young or is mentally incapacitated. Again the answer is no, except for contact for administrative or scheduling purposes. The GAL may not be able to communicate directly with a young or mentally disabled child, and might need to get information through the parent. It may be frustrating that another barrier is added to this one—that the GAL may not contact the parent but must first contact the parent's lawyer. Still, the parent is represented by counsel and is entitled to have the GAL contact the parent's lawyer before contacting the parent.

*5. Communication with the Child by Opposing Counsel*

Another question is whether the parent's lawyer may interview the child without the GAL being present. The answer is still no, unless the parent's lawyer contacts the GAL to ask permission to interview the child without the GAL being present, and the GAL allows this interview to take place. If the GAL declines, the parent's lawyer must not communicate with the child except in the presence of or through the GAL. Rule 4.2 applies equally to protect child clients and adult clients. *See* South Carolina Advisory Op. 97-15 (Dec. 1997) (concluding that under Rule 4.2, the parent's lawyer must notify the guardian ad litem and her or his counsel and gain consent prior to communicating with a child in a child abuse proceeding); North Carolina Ethics Op. RPC 249 (April 3, 1997) (concluding that a lawyer representing a parent in a child abuse proceeding may not communicate with a child who is represented by a GAL and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.); New York Ethics Op. 656 (1993) (concluding that a parent's attorney in a child custody proceeding may not communicate with a child for whom the court has appointed a law guardian without the law guardian's consent).

Child abuse and neglect proceedings involve multiple parties, often multiple lawyers, and some non-lawyer participants. Each parent may have a separate lawyer. Another lawyer represents the government. There may be a social worker, a probation officer, or an education advocate. In addition to the multiplicity of parties, child abuse and neglect matters involve both formal hearings and informal meetings. The barrier imposed by Rule 4.2 may produce a cost in terms of loss of informality and sometimes loss of access to direct communication.

A more worrisome problem is that a GAL might ask a parent's lawyer for permission to talk to the parent, and consent might be denied, or the parent's lawyer might not respond to the request. This committee addressed this problem as it relates to a lawyer representing a client in a civil protection order proceeding in D.C. Bar Op. No. 263 (1996). The committee stated that a lawyer may not:

> use 4.2(a) . . . to prevent any . . . communications between the petitioner's lawyer and the respondent. The petitioner's lawyer needs to be able to communicate in some way with the respondent . . . be it directly or through counsel. . . . If the respondent's lawyer refuses to allow such communication with the respondent directly, then the lawyer must accept communication from the petitioner's lawyer and take appropriate steps in response, such as transmitting the information to his client and acting on his client's wishes. . . . To fail to do so would, in our opinion, constitute a violation of Rule 1.4 (requiring a lawyer to keep his client informed about the status of a matter).

The same point might be made here; that while Rule 4.2 imposes a barrier on one lawyer, Rule 1.4 imposes a duty on the other lawyer to communicate promptly with his client a request for contact by the child's lawyer. Also Rule 4.4 says that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." The comment to rule 4.4 states that although the interests of others are subordinate to those of the client, the responsibility to a client "does not imply that a lawyer may disregard the rights of third persons." This point is particularly critical in neglect proceedings, where in some cases (e.g., if the client is very young) the GAL cannot get any information about her client except from a represented party. In every case, the GAL has an affirmative duty to talk to all of those who have information relevant to the determination of the child's best interests. The parents' lawyers' diligence in responding to requests for consent is essential to the functioning of the process. Lawyers for parents in neglect proceedings should be conscientious in responding to requests from GALs to communicate with the parents of the children they represent.

Inquiry No. 99-1-4
Adopted: February 15, 2000

*Opinion No. 296*

**Joint Representation: Confidentiality of Information**

- A lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another.

- Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to satisfy his duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information or ask the client to disclose the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal.

- Where the disclosed confidence involves fraud or criminal activity that may detrimentally affect others involved in the representation in the future, in withdrawing, the lawyer may retract or disaffirm documents that were premised on the fraud.

**Applicable Rules**

- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest)
- Rule 1.16 (Terminating Attorney – Client Relationship)

*Inquiry*

The inquirer, a private law firm ("Firm"), has asked whether it is allowed

or obligated to advise an employer, who paid the law firm to obtain a work trainee visa from the Immigration and Naturalization Service ("INS") for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her for the visa.

The Firm was originally contacted by an alien who had been referred by a law firm ("Employer") who wanted to employ her with the objective of becoming work authorized. At the outset it was clear that the Employer would be responsible for the Firm's legal fees. The Firm drafted a retainer agreement, addressed only to the Employer, stating that the Firm would jointly represent the alien and the Employer. The retainer agreement did not address the impact of joint representation on client confidences or seek consent for the Firm to share confidences of one party to the joint representation with the other. Nor did the retainer agreement address the potential that a conflict of interest between the Employer and the alien employee could arise in the future or the consequences of such a conflict. The agreement provided signature lines for both the alien and the Employer but it was never signed or returned to the Firm. Neither the alien nor the Employer disputed the terms of the retainer and the subsequent representation was consistent with the terms of the unsigned retainer agreement.

The Firm prepared an INS filing in reliance on interviews with the alien and the Employer and entered an appearance with the INS on behalf of both the alien and the Employer. However, the petition for the visa was signed only by the Firm and by the Employer as petitioner, under penalty of perjury. The petition was granted.

Subsequently, the alien communicated with the Firm to request advice regarding obtaining an extension of her alien-trainee visa. A memo was provided to the alien containing brief instructions and fee terms. The Employer issued a check for that fee and signed the extension petition under penalty of perjury.

After the work was completed and approvals and extensions issued, the alien spontaneously disclosed to the Firm that she had falsified the credentials that were submitted by the Firm in support of the filings. Absent the falsified credentials, she would not have qualified for the visa. Promptly upon learning of the falsification, the Firm sent the alien a letter confirming that neither it nor to the best of the Firm's knowledge, the Employer, knew of the falsification when the petitions were filed. The Firm also notified the alien that due to the falsification the firm was withdrawing from further representation of the alien. The Firm did not ask the alien to correct the record with the INS or to inform the Employer of the false application. Nor did the Firm ask the employee to consent to the Firm informing the Employer. The Firm did not contact the Employer to withdraw from representation.

The Firm desires to advise fully at least the petitioning Employer of the alien employee's falsification. However, it does not wish to violate any duty under Rule 1.6 to protect client confidences or secrets that may exist between the alien and the Firm. The Firm emphasizes that the alien did not predicate her revelation to the Firm with any questions regarding confidentiality nor were there any assurances that the conversation would be confidential. The Firm suggests that the retention may have ended once the visa and extension were obtained.

*Discussion*

*1. Is the admission a protected confidence or secret under Rule 1.6?*

At the outset, we must evaluate who enjoys the benefit of the attorney-client relationship on the facts presented. The mere fact that the Employer agreed to pay the legal fees incurred in obtaining a visa for the alien does not establish client status for the Employer. Conversely, it would be possible that the Firm represented only the Employer and thus owed no duty to maintain the confidences of the alien employee. In this case, however, the retainer agreement confirming representation of both the Employer and the alien coupled with the entry of appearance at the INS on behalf of both parties reflects the law firm's intent to undertake a joint representation of the Employer and the alien seeking the visa. Thus, the alien and the Employer are each entitled to the protection of Rule 1.6.

Rule 1.6 prohibits in relevant part 1) disclosure of client confidences and secrets and 2) the use of a confidence or secret of the lawyer's client to the disadvantage of the client. A threshold question is whether the alien's spontaneous statement that she had lied is a "confidence or secret" within the meaning of the Rule. Rule 1.6(b) defines the terms as follows:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Based on the facts provided by the Firm, there is some question as to whether the alien employee's disclosure would qualify as information protected by the attorney-client privilege in that the communication may not have been made in order to obtain legal advice. This is a legal question beyond the Committee's purview because questions of privilege arise under the law of evidence, not the Rules of Professional Conduct.

It does appear, however, that the information is a "secret" for purposes of Rule 1.6 in that the information was obtained in the course of the professional relationship and disclosure, at a minimum, would be embarrassing and would likely be detrimental to the client. There is some suggestion by the inquiring law firm that, because the legal assignment had been completed, the representation of the alien had terminated. It is noteworthy in this regard, that upon learning of the falsification, the Firm wrote to the alien advising her that the firm was withdrawing from representation. Thus, it would appear that the law firm believed that an attorney-client relationship still existed at the time it learned of the falsification. Thus the strictures of Rule 1.6 obtain unless an exception applies.

*2. The effect of joint representation on the lawyer's duties under Rule 1.6.*

A necessary predicate to a decision to undertake joint representation is an initial determination that the interests of the joint clients can be pursued without conflict. No matter how consistent the apparent interests of clients in a joint representation may appear at the onset, however, such a relationship poses inherent risks of future conflicts of interest. Such conflicts arise under Rule 1.7(b)(2) and (b)(3), where the representation of one client would be, or is likely to be, adversely affected by the representation of another client.

By way of analogy, Rule 2.2, which addresses the lawyer's role as intermediary, provides guidance. In summary, Rule 2.2 permits a lawyer to act as intermediary between two clients only where (1) there is consultation "with each client concerning the implications of the common representation and [the lawyer] obtains each client's consent"; (2) the lawyer reasonably believes each client's best interests will be served and each will be able to make "reasonably informed" decisions; and (3) the lawyer reasonably believes the joint representation can be accomplished impartially and without improper affect on the other ethical responsibilities to the clients. Rule 2.2(a). The Rule provides that except in unusual circumstances, disclosure of risks involved in "common representation" must be in writing, as well as the client's consent to the representation with those risks disclosed.

While the joint representation posed here does not involve the attorney as "intermediary", the provisions of Rule 2.2 nonetheless provide an analogous framework to evaluate the ethical concerns of representing more than one client in the same matter. In a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client. A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences. Other state bar associations have reached results consistent with the analysis. New York State Bar Op. No. 555 ("mere joint employment" not sufficient to imply consent to disclosure); Florida Formal Op. 92-5 (in joint representation of husband and wife in estate planning where husband reveals confidence to attorney, duty of confidentiality prevails); Association of the Bar of the City of New York Op. 1999-07; New York State Bar Op. No. 1994-10.

Comment [8] to Rule 2.2 underscores the difficulty of balancing ethical duties to two clients in the same manner:

> In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. *See* Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

Because of this "delicate" ethical balance, Rule 2.2. generally requires the lawyer to provide "both clients with an explanation in writing of the risks involved in the common representation and of the circumstances that may cause separate representation later to be necessary or desirable. The consent of the clients shall also be in writing." Rule 2.2(b). Comment [2] to Rule 2.2 underscores that the explanation of risks and consent must be in writing because "the potential for confusion is so great." A written explanation requires the lawyer to "focus specifically on those risks" and educates the client to "risks that many clients may not otherwise comprehend."

While Rule 2.2 is addressed to the lawyer as intermediary, its requirements suggests the difficult ethical issues under Rule 1.7(b)(2) and (b)(3) posed by joint representations of any kind. The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation.

*3. Express Consent*

Rule 1.6 allows disclosure of client confidences "with the consent of the client affected, but only after full disclosure to the client." The prudent course for a lawyer undertaking a joint representation is to address the issue of disclosure at the outset of the retention and to obtain written consent from both clients that the lawyer may divulge to each client all confidences received during the course of the retention that relate to the representation. *See* Rule 2.2.

Where consent is sought at the outset of a joint representation, the lawyer must assure that the client has been advised of the potential adverse consequences of any such consent.

As noted above, in the case presented, the Firm did not seek advance consent to share all information regarding the representation with both clients. Nor did the law firm seek the client's consent to advise the employer of the apparent fraudulent filings after the fraud was revealed. At the same time that the law firm owed a duty to maintain the employee client's confidences and secrets, it owed the Employer client a duty under Rule 1.4 to keep it "reasonably informed" about the status of the representation. Rule 1.4(a). Comment [3] to Rule 1.4 explains that: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with (1) the duty to act in the client's best interests, and (2) the client's overall requirements and objectives as to the character of representation."

Where duties to the two clients conflict, and no advance consent has been obtained, the law firm should make an effort to fulfill its duties to the employer by seeking the employee's informed consent to divulge the information. In the alternative, the Firm should encourage the employee client to divulge the facts to the Employer client. The Firm's fiduciary duty to the Employer requires an affirmative effort to achieve disclosure within the bounds of Rule 1.6 before withdrawing from the representation.

*4. Implied Authorization*

Absent express consent, disclosure of client secrets is permissible "when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure . . . in order to carry out the representation." Rule 1.6(d)(4). In this case, the Firm understood that it had been retained to represent jointly the alien and the Employer for the limited purpose of obtaining a valid visa for the alien so that the Employer could legally employ her. The Employer needed to rely on the alien for the facts necessary to file the INS petition, which the Employer signed. As discussed above, the mere fact that the Firm was jointly representing the alien employee and the Employer does not provide a basis to infer consent to disclosure of confidences. D.C. Bar Op. 290 (1999). *See also* N.Y. State Bar Op. No. 555, *supra*. Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client.

None of the other exceptions set forth in Rule 1.6 applies. Thus, absent client consent, the Firm may not divulge the secret. This result may seem unpalatable to the extent that the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury. Striking the balance in favor of protect-

ing client confidences and secrets is nonetheless required by our Rules. The guarantee of confidentiality of communication between client and attorney is a cornerstone of legal ethics.

A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. Comment [4] to Rule 1.6.

Rule 1.7(b) prohibits a lawyer from representing a client with respect to a matter if the representation of another client "will be or is likely to be adversely affected by such representation." Because a conflict of interest arises between the interest of the alien employee in protecting the confidence that she lied in connection with the INS filing and the interest of the Employer in knowing that the work visa was fraudulently obtained, the lawyer must withdraw from representing both clients unless the retainer agreement permits the firm to continue representing one of the parties. Rule 1.16(a)(1).

*5. Notice of Withdrawal*

Rule 1.6 does not prohibit giving notice of the fact of withdrawal to parties other than the client "without elaboration." Comment [19] to Rule 1.6 confirms that such notice is "not proscribed by this Rule or by Rule 1.16(d)." In terminating the relationship with the Employer, the Firm can advise the Employer that the relationship with the employee client was terminated. While the Rules do not address what can be said to a client as to the basis for terminating the relationship, the Employer client is entitled to know at least what ethical provision led to the termination.

The question arises whether in notifying the Employer, the Firm may engage in a so-called "noisy" withdrawal. Comment [19] to Rule 1.6 provides that after withdrawal under Rule 1.16(a)(1), the lawyer "may retract or disaffirm any opinion, document, affirmation or the like that contains a material misrepresentation by the lawyer that the lawyer reasonably believes *will be relied* upon by others to their detriment." (emphasis added) Thus, a lawyer may signal that a problem exists by disaffirming earlier written statements but only if there is a reasonable basis to expect that future harm may occur without such disavowal. It is unclear from the facts presented whether future detriment may result to the Employer from the previous issuance of a visa based on false representations of which it was unaware. If there is reasonable basis to believe that the employer or the INS could rely on the petition to their detriment, the firm could disaffirm the INS petition in giving notice of its withdrawal. It may not, however, go beyond notice of disaffirmation to explain the basis for its disavowal.[1]

Inquiry No. 98-11-31
Adopted: February 15, 2000

*Opinion No. 297*

## Representation of Client in Negotiated Rulemaking Proceeding for Which Lawyer Was Responsible While In Government

• Absent a statutory bar, a former government attorney is not automatically prohibited from representing a private client in a negotiated rulemaking in which he participated while employed by the government, provided that he uses or divulges no confidences or secrets of his former agency. In determining whether to accept the proposed representation, the attorney must assess whether his professional judgment on behalf of the prospective client will be or reasonably may be adversely affected by his responsibilities to his former agency and, if so, must seek the prospective client's consent to the representation.

**Applicable Rules**

• Rule 1.11 (Successive Government and Private Employment)
• Rule 1.6 (Confidentiality of Information)
• Rule 1.7 (Conflict of Interest)

*Inquiry*

The Committee has received an inquiry from an attorney regarding his proposed representation of an Indian tribe in a negotiated rulemaking in which he was previously involved on behalf of the U.S. Department of the Interior as an attorney. In his capacity as a government attorney, the inquirer's responsibilities included providing legal advice on implementing a federal statute. Pursuant to that statute, a formal negotiated rulemaking committee was established to negotiate and promulgate a general rule of applicability for implementing the statute.[1] This negotiated rulemaking committee was established pursuant to the Negotiated Rulemaking Act, 5 U.S.C. §§ 561 *et seq.* (1994). The inquirer provided legal advice and assisted in the negotiations regarding language that preceded the proposed regulations that were published for public comment. The inquirer then prepared written comments and rendered advice on the proposed regulations. The negotiated rulemaking committee is now reviewing the public comment and conducting ongoing negotiations with interested parties apropos of developing its recommendations on final regulations. Various Indian tribes have participated in this rulemaking.

The inquirer, now in private practice, has asked whether he can now represent an Indian tribe in the negotiated rulemaking regarding the proposed regulations. The inquirer has represented that some of the positions that he advocated as a government employee may be adverse to the positions taken by either the prospective client tribe or the caucus of negotiating tribes as a whole.

*Discussion*

*Restrictions on Post-Government Employment*

As a threshold matter, we address the federal conflict of interest statute that, at first blush, would appear to apply to the proposed representation. We do so only to explain that a novel exception, set forth in another statute, limits its application.

[1] As it is beyond the purview of this Committee, which opines exclusively on the interpretation of the D.C. Rules of Professional Conduct, we have not researched or analyzed whether any provision of federal law that may be applicable to INS petitions purports to override attorney-client confidentiality rules to require disclosure to INS under the circumstances described in this opinion.

[1] A negotiated rulemaking involves rulemaking through the use of a negotiated rulemaking committee, which is essentially an advisory committee established by an agency to consider and discuss issues for the purpose of reaching a consensus in the development of the proposed rule. This may involve the agency's submission of draft regulations to groups that are likely to be significantly affected by the regulations, in advance of a notice and comment rulemaking proceeding, and to negotiate with them over the form and substance of the regulations. *See, e.g., USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996) ("negotiated rulemaking . . . does not envisage that the negotiations will end in a binding contract. The [Negotiated Rulemaking] Act simply creates a consultative process in advance of the more formal arms' length procedure of notice and comment rulemaking.").

The general restrictions on postemployment conduct for former government employees are set forth in 18 U.S.C. § 207 (1994 & Supp. IV 1998). The inquirer informs the committee that he is subject to the prohibitions found at 18 U.S.C. § 207(a), which provides in pertinent part:

> (a)(1) Any person who . . . ., after the termination of his or her service or employment with the United States . . ., knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or courtmartial of the United States . . . . on behalf of any other person (except the United States . . . ) in connection with a particular matter –
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) in which the person participated personally and substantially as such officer or employee, and
> >
> > (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.
>
> (2) Any person subject to the restrictions contained in paragraph (1) who, within 2 years after the termination of his or her service or employment with the United States .... knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or courtmartial of the United States .... on behalf of any other person (except the United States ... ), in connection with a particular matter –
>
> > (A) in which the United States . . . is a party or has a direct and substantial interest,
> >
> > (B) which such person knows or reasonably should know was actually pending under his or her official responsibility as such officer or employee within a period of 1 year before the termination of his or her service or employment with the United States . . . and
> >
> > (C) which involved a specific party or specific parties at the time it was so pending,
>
> shall be punished as provided in section 216 of this title.

* * * * * *

*Id.* The statute also contains a definition of "particular matter":

> (i) For purposes of this section
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> * * * * * *
>
> (3) the term "particular matter" includes any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding.

18 U.S.C. § 207(i)(3). Subsection (a)(1) prohibits a former Government employee covered by the statute from representing another entity before the Government on a case, contract, or other similar matter, if the employee participated "personally and substantially" on the matter. Also, a prohibited matter is one that involves specific parties and is the same matter in which the former employee now attempts to represent another party before the United States. Subsection (a)(2) prohibits a former Government employee from representing another entity before the Government on a "particular matter" which was actually pending under the former employee's official responsibility during the last year of service. Rulemaking is specifically included within the definition of "particular matter" under subsection (i).[2] As the inquirer provided advice and comment regarding the proposed regulations, we assume for purposes of this Opinion that the inquirer's involvement was "personal and substantial."[3]

Under most circumstances the statutory consideration would end with § 207. There is, however, an exception to the prohibitions set forth in § 207. The Indian SelfDetermination Act, Title I of Pub. L. No. 93638, 88 Stat. 2203, provides in pertinent part:

> Anything in sections 205 and 207 of Title 18 to the contrary notwithstanding, ... former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection [with] any matter pending before any department, agency, court, or commission including any matter in which the United States is a party or has a direct and substantial interest: *Provided*, That each such officer or employee or former officer or employee must advise in writing the head of the department, agency, court, or commission with which he is dealing or appearing on behalf of the tribe of any personal and substantial involvement he may have had as an officer or employee of the United States in connection with the matter involved.

25 U.S.C. § 450i(j) (1994).[4]

Under this statute, a former government employee employed or retained by an Indian tribe is not subject to the restrictions set forth in 18 U.S.C. § 207 while representing the tribe, so long as the former employee provides written notice to the head of the department, agency, court or commission before which the representation is made of any personal and substantial involvement the former employee may have had in connection with the underlying matter. The inquirer has informed the Committee that he has submitted this statutory notification.

With this statutory framework in mind, we now consider whether the Rules of Professional Conduct permit the proposed representation.

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[2] The Office of Government Ethics ("OGE") issued its post-employment conflict of interest regulations, found at 5 C.F.R. § 2637, in 1980. The continued vitality of these regulations is unclear, however, in light of changes to § 207. In 1989, Congress amended 18 U.S.C. § 207 and added the definition of "particular matter," which specifically includes rulemaking. OGE, however, has yet to promulgate new or revised regulations implementing 18 U.S.C. § 207(a). The 1980 regulations provide that generally, rulemaking is not a "particular matter." *See* 5 C.F.R. § 2637.201(c)(1) ("[A] matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.").

[3] The regulations implementing section 207(a) note that "personal and substantial participation" is:

> exercised "through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise." To participate "personally" means directly . . . . "Substantially," means that the employee's involvement must be of significance to the matter, or form a basis for a reasonable appearance of such significance.

*Id.* § 2637.201(d)(1) (1994).

[4] The legislative history of the Indian Self-Determination Act reveals the genesis of this exemption to stem from concerns regarding the rigidity of various laws that applied to tribal contracts with the federal government. Congress determined that more flexibility than the federal statutes provided was needed "to give substance and credibility to the concept of Indian self-determination." See H.R. Rep. No. 93-1600, at 20, reprinted in U.S.C.C.A.N. 7775, 7782.

Rule 1.11 of the District of Columbia Rules of Professional Conduct expressly addresses successive government and private employment. Rule 1.11(a) prohibits an attorney from accepting "other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee."[5] The Court of Appeals has explained that "[t]he inquiry is a practical one asking whether the two matters substantially overlap." *In re Sofaer,* 728 A.2d 625, 628 (D.C. 1999) (footnote omitted). That determination is a function of whether the "matters" are the same or substantially related.

The Rules, in their Terminology section, broadly define the term "matter" as "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular Rule." Rule 1.11 is such a "particular Rule," containing as it does a limiting provision. The limitation on the definition of matter for purposes of Rule 1.11 is found in Rule 1.11(g), which provides that Rule 1.11 "applies to any matter involving a specific party or parties." Comment [3] reinforces this concept, providing in pertinent part that Rule 1.11(g) defines matter "so as to encompass only matters that are particular to a specific party or parties." *Id.* Cmt. [3]. The Comment then sharpens the focus of this boundary in stating that "[t]he making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11."[6]

The rationale for this position appears to be that a rule is considered as applying broadly to a generic class of persons. *See* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.1, at 226 (3d ed. 1994). While a rulemaking may be addressed to named persons, agencies rarely use rulemaking to address named persons. *Id.* § 6.1. Generally, all potentially affected members of the public are given an opportunity to participate in a rulemaking proceeding. This enables interested persons to participate in the process of formulating the rules that affect them and to which they must conform.

As such, a rulemaking of general application is not "particular to a specific party or parties." The view that rulemaking is not particular to specific parties is supported by the Administrative Procedures Act ("APA") and its distinction between rulemaking and adjudication. The APA, in § 551(5), defines "'rule making'" as "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1994). A "rule" is defined in the APA as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes [various substantive agency functions] . . . or practices bearing on any of the foregoing." 5 U.S.C. § 551(4) (1994). [7]

In contrast to a rulemaking, agencies conduct adjudication proceedings. APA § 551(7) defines "'adjudication'" as "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1994). Section 551(6) defines "'order'" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing . . . ." 5 U.S.C. § 551(6) (1994). An order issued in an "adjudication" is regarded as being directed to the particular parties to the adjudication. Davis, *supra,* § 6.1, at 226.

While this committee has not previously addressed the application of Rule 1.11(a) to a rulemaking proceeding, several prior opinions did focus on the issue under the former ethics rules. Opinion 106 addressed the applicability of the District of Columbia Code of Professional Responsibility to a former government attorney's representation of a private client in challenging the validity of a rule for which the attorney had substantial responsibility in its promulgation. The Opinion concluded that DR 9-101(B) would not prohibit the attorney's representation in subsequent employment.[8]

Consulting a frequently quoted ABA Opinion and a prior Committee opinion, the Committee concluded that rulemaking was excluded from the scope of "matter" encompassed by DR 9-101(B).

> Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. *By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws,* or in briefing abstract principles of law, *does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations,* procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

D.C. Bar Op. 106, at 6 (Sept. 22, 1981) quoting ABA Formal Op. 342. (alteration in original)

At the same time, Opinion 106 cautioned the attorney that he "would run a serious risk" of violating DR 5-105 and DR 4-101 by undertaking the representation. The Opinion observed that a former government attorney who personally and substantially participated in drafting agency rules was likely to

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[5] D.C. Rules of Professional Conduct Rule 1.11(a). Comment [3] to Rule 1.11 emphasizes its rigidity, explaining that Rule 1.11(a) "flatly forbids a lawyer to accept other employment in a matter in which the lawyer participated personally and substantially as a public officer or employee . . . . There is no provision for waiver of the individual lawyer's disqualification." *Id.*, Cmt.[3].

[6] Id. See Laker Airways, Ltd. v. Pan Am. World Airways, 103 F.R.D., 22 (D.D.C. 1984). That case involved the interpretation of the predecessor to Rule 1.11, DR 9-101(B) of the Code. In Laker, the court stated that "rulemaking and policy-making activities do not constitute a 'matter' within the meaning of the Disciplinary Rule for the purposes of disqualifying counsel from a subsequent private lawsuit, and they do not become so unless the activity is narrow in scope and is confined to specified issues and identifiable parties such that it may properly be characterized as 'quasi-judicial' in nature." 103 F.R.D. at 34 (footnote omitted). The court's holding was qualified by its admonition: "To be sure, the Disciplinary Rule would bar counsel from representing a private party in a regulatory or rulemaking proceeding when he previously participated as a government attorney *in the same proceeding.* Such a practice of 'switching sides' is the primary target of the Rule." *Id.* at 34 n. 40.

[7] For a discussion of the many forms that "rules" can take, *see* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 17.3, at 108 (3d ed. 1994); Peter L. Strauss, *Comment, The Rulemaking Continuum,* 41 Duke L.J. 1463 (1992).

[8] DR 9-101(B) provided at the time: "A lawyer shall not accept private employment in a matter in which he has substantial responsibility while he was a public employee." The term "matter" was not then defined in the Code.

have gained the client confidences and secrets that were protected from disclosure by DR 4-101(B). Moreover, an attorney who drafted agency rules that are challenged by a subsequent employer would have to carefully assess whether his previous involvement with the rules would affect the exercise of his professional judgment on behalf of his employer. DR 5-101(A) provided that a lawyer must decline employment if the exercise of his independent professional judgment his representation of a client "will be or is likely to be adversely affected" by his personal interest.

This Committee visited this issue again in D.C. Bar Op. 187 (1987). There, we concluded that a former government employee was not automatically prohibited from representing a private client in challenging an agency's regulations for which he had been responsible while employed by the government, provided that he divulge no confidences or secrets of his former agency. The definition of "matter" under the Code in effect at that time was not as broad as the current definition in the Rules and did not include administrative proceedings. Again, however, we cautioned that the attorney would need to assess whether his previous responsibility for the rule would affect the exercise of his independent professional judgment consistent with DR 5-101(A):

> [A]n attorney who finds himself in this position must either seek the agency's consent to reveal the confidences and secrets he previously learned or determine that he can zealously represent his current employer while at the same time protecting the agency's confidences and secrets. The latter course may well prove impossible.

D.C. Bar Op. 187, at 6.

We reach a similar conclusion under Rule 1.11. A particular matter may be a discrete and isolatable transaction or set of transactions. *See Brown v. District of Columbia Bd. of Zoning Adjustment,* 486 A.2d 37, 42 (D.C. 1984) (*en banc*). While a matter may be a single particular lawsuit, it also may encompass an "administrative proceeding" involving a specific party or parties according to the definition provided in Rule 1.11(g). Indeed, representation involving a rulemaking is specifically contemplated in the Rules as one type of representation comprising a "matter," as long as it involves a specific party or parties, as required by Rule 1.11(g). The issue, then, is whether the negotiated rulemaking here is particular to a specific party or parties.

To be sure, the members of the rulemaking committee are identifiable parties. Presumably, the committee members participate because they possess an interest in whatever regulations are ultimately promulgated. We do not think, however, that the participation of interested parties makes the rulemaking proceeding particular to them. Whatever regulations that are issued may, but not necessarily will, apply to committee members; they will also apply generally to any persons or entities subject to their terms. Put another way, the rulemaking here is not addressed to named parties but applies broadly to a generic class of potentially affected persons. The overall process includes a notice and comment component addressed to the general public and is designed to generate a rule of general applicability. This process, although involving a rulemaking committee comprised of specific parties, is far more rulemaking than adjudication. These characteristics disqualify the negotiated rulemaking from "matter" status as that term is used in Rule 1.11. As such, successive representation is not per se prohibited by Rule 1.11(a) and (g) where the initial representation is in connection with a rulemaking of general applicability.[9]

Our analysis does not conclude with that determination, however. There remains the issue of confidentiality. The point of departure for that analysis is Rule 1.6, which states in part:

> (a) [A] lawyer shall not knowingly . . . (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.
>
> (b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Comment [6] to Rule 1.6 further states that the rule of attorney-client confidentiality applies not merely to matters communicated in confidence by the client, but also to all information gained in the course of the professional relationship that the client requests be held inviolate. "This ethical precept . . . exists without regard to the nature or source of the information or the fact that others share the knowledge." *Id.*

Consistent with our prior opinions decided under the Code of Professional Responsibility, we conclude that successive representation is allowable in the unique circumstances here if the attorney can honor the strictures of the confidentiality obligations and the conflict rules. While the circumstances here do not, as explained above, involve the same matter or substantially related matters under Rule 1.11, Rule 1.6 still applies but does not necessarily bar successive representation. That is, where counsel received information in representing the government that is subject to Rule 1.6, the requirement that the attorney hold such information inviolate does not, without more, preclude successive representation in a negotiated rulemaking. That conclusion does not end the analysis, however.

We believe that the inquirer must honor his confidentiality obligations to the government not only as a general matter, but must do so with enhanced vigilance in undertaking any proposed representation relating to the very same rulemaking in which he counseled the government. Serious consideration should be given by the attorney to seeking consent from his former client, the Interior Department.[10] If consent is obtained, then the limitations of Rule 1.6 are not implicated. *See* Rule 1.6(d)(1). Absent consent, the confidences and secrets that the inquirer received in his capacity as a government attorney are protected by Rule 1.6 from disclosure and cannot be used by the inquirer or revealed to the prospective client. This restriction may well preclude the inquirer from undertaking the proposed representation. Concomitantly,

[9] Our judgment here is also informed by the Congressional policy reflected in 25 U.S.C. § 450 (1994), which manifestly permits a former government attorney to switch sides to undertake the representation of an Indian tribe.

[10] Rule 1.6(j) provides that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order.

observing this limitation could conceivably violate the inquirer's duties of zeal and loyalty to the prospective client. Toward that end, in determining whether to accept the proposed representation, the attorney must adhere to the dictates of Rule 1.7. Specifically, the attorney must assess whether his professional judgment on behalf of the prospective client will be or reasonably may be adversely affected by his responsibilities to his former client, the Department of the Interior. If that examination yields an affirmative conclusion, the attorney must then seek the prospective client's consent to the representation "after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." Rule 1.7(c). As with the proposed representation that we examined in Opinion 187, these considerations may prevent undertaking the representation contemplated here.

Inquiry No. 99-2-6
Adopted: March 21, 2000

*Opinion No. 298*

**Sale or Assignment of Accounts Receivable to a Collection Agency**

• Lawyers may utilize collection agencies to recover unpaid fees for legal services rendered only to the extent that debt collection efforts by such agencies are consistent with the lawyer's ethical obligations. Because the outright sale of client accounts receivable to a collection agency would prevent a lawyer from fully complying with the D.C. Rules of Professional Conduct and District of Columbia Bar Rules, such sales are not permitted. Assignments of accounts receivable must be carefully reviewed on a case-by-case basis and are permitted only when the assignment conforms to a lawyer's ethical obligations. In utilizing the services of a collection agency, disclosure of specific details relating to the representation should be limited to the minimal information necessary to collect the debt unless client consent is obtained. Even in such situations, the lawyer must ensure that the collection agency treats such information confidentially.

**Applicable Rules**

• Rule 1.5 (Fees)
• Rule 1.6 (Confidentiality of Information)
• Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
• Rule 5.4 (Professional Independence of a Lawyer)

*Inquiry*

The inquirer, a private law firm, has been approached by a collection agency which has proposed that the inquirer sell and assign its receivables (including open accounts, closed accounts, promissory notes per contracts, and judgments) to the agency for collection purposes. According to the inquirer, the collection agency operates by purchasing receivables from creditor companies and then collecting the receivable in its own name, not in the name of the creditor firm.

The collection agency's brochure, provided by the inquirer, states that part of the agency's operating philosophy is to "[r]emove our client [*i.e.*, the lawyer or law firm] completely from the debt collection practice by purchasing the debt C [the collection agency] is now the creditor, not the client." The brochure also states that the agency will "[r]esolve cases rapidly," has the "[a]bility to litigate," and will "use litigation if necessary" with the agency as the plaintiff. The brochure implies that the decision whether to bring litigation will be solely in the discretion of the collection agency.

The inquirer asks whether it may sell its client account receivables to the collection agency under these conditions. The inquirer further asks whether it may provide the following types of information to the collection agency as evidence of the receivable: (a) billing files, (b) signed retainer agreements/contracts, (c) signed fee schedules, and (d) signed promissory notes.

*Discussion*

*1. Sale of debts for legal services to a collection agency is not permitted under the D.C. Rules; assignment of debts may be permissible if the lawyer retains control over the collection process.*

This Committee previously addressed the use of collection agencies to recover unpaid fees for legal services in Opinion 60 (undated), rendered under our prior rules. While DR 3-102(a) declared that "a lawyer or law firm shall not share legal fees with a nonlawyer," the Committee found that this rule did not prohibit agreements with collection agencies to share a percentage of a legal fee as compensation for the agency's services in attempting to collect that fee. The Committee based its conclusion on D.C. Bar Op. 23 (1976) and ABA Formal Op. 338, which "represent an implicit acknowledgment of the propriety of lawyers referring fee collection matters to an agency, part of whose practices may involve fee collection."

DR 3-102(a) has been superseded by D.C. Rules of Professional Conduct (Rule) 5.4, which, like DR 3-102(a), states "[A] lawyer or law firm shall not share legal fees with a nonlawyer." Nothing in the language of Rule 5.4 or its accompanying comments are contrary to the conclusions of Opinion 60, and we see no reason to reach a different result here. In affirming the conclusion of Opinion 60, we note that the use of collection agencies by lawyers has been deemed consistent with ethical requirements in the vast majority of jurisdictions to consider the question. The sale or assignment of legal debts to a collection agency raises more difficult questions. Because a lawyer cannot transfer more than he owns, sale or assignment of a debt owed to a lawyer for legal services rendered is encumbered by ethical requirements that would apply to the lawyer's own collection efforts. Thus, a debt owed to a lawyer may be collected by third parties only in a fashion consistent with ethical principles applicable to members of the Bar.

Our Rules require in the first instance that disputes over fees should be avoided to the extent possible. In Opinion 60, this Committee observed that "[Fee] litigation should only be a last resort to collect a delinquent fee where an lawyer has made every effort to settle amicably with his client any differences concerning either the amount or the timing of collection of fees." *See also* Ohio Bd. of Comm'rs on Grievance & Disc. Op. 91-16 (June 14, 1991) (lawyer may use collection agency only if he first determines that the fee is reasonable and not illegal, makes personal and amicable attempts to collect the legal fee owed, and reveals only confidences and secrets necessary to establish or collect the fee). Thus, all appropriate efforts to resolve the matter should be pursued by the lawyer before referral to a collection agency. *See, e.g.,* New York State Bar Ass'n Comm. Prof. Ethics Op. 608 (May 10, 1990) (only if all other reasonable efforts short of litigation have been undertaken and have been unsuccessful may a lawyer employ the services of a collection agency).

In particular, District of Columbia Court of Appeals Rule XIII requires that, when requested by the client, lawyers arbitrate fee disputes with present or former clients.[1] See also Comment [15] to Rule 1.5 ("If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it."). This arbitration procedure binds both the lawyer and any collection agency acting on the lawyer's behalf in connection with a debt for legal services.

Further, Rule 1.6(d)(5) addresses fee litigation, and specifies that a lawyer may disclose client confidences or secrets only "to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee." This obligation continues after the termination of the lawyer's employment. Rule 1.6(f). A lawyer may not avoid his duties under this Rule by selling or assigning a debt to a collection agency and allowing it to institute litigation in the agency's name against a former client. Comment [24] to Rule 1.6 imposes upon a lawyer engaged in fee litigation a continuing duty to "evaluate the necessity for disclosure of information at each stage of the action." Comment [25] to the same Rule provides that the "lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having a need to know it." These comments suggest several possible methods (use of John Doe pleadings, entry of protective orders and in camera proceedings) to avoid disclosure of confidential information during fee litigation.

To the extent that a collection agency is acting in the lawyers name for the lawyer's benefit pursuant to an assignment, any services provided by the agency must be consistent with the ethical rules that directly bind the lawyer. Rule 1.6 and D.C. Bar Rule XIII are inconsistent with sale or assignment of a debt by which a lawyer steps entirely out of the collection process and the collection agency controls the debt collection process.[2] A lawyer ethically may not remain indifferent to the means utilized to collect his or her debts.

The Committee therefore has little difficulty concluding that the proposed sale to the collection agency described in the inquiry would run afoul of the D.C. Rules of Professional Conduct.[3] As indicated in the collection agency's brochure, the proposed arrangement removes the lawyer-creditor "completely" from the debt collection process. In such circumstances, the lawyer-creditor apparently has no say whether a lawsuit is to be brought, whether the suit is to be compromised or settled, whether a client's demand to arbitrate should be honored, and whether and how confidences and secrets may be disclosed during the course of arbitration or litigation. This type of arrangement is not permissible under our Rules.

The Committee does not believe our Rules impose insuperable ethical barriers to the use by lawyers of collection agencies to assist in recovery of accounts receivable. Thus, there may be types of assignments of accounts receivable that can be made consistent with a lawyer's ethical obligations. The key consideration is whether the lawyer retains sufficient control over the collection process (including any fee litigation that may arise) to satisfy his or her ethical responsibilities. *See, e.g.,* Bar Ass'n of City of New York Comm. Prof. Jud. Ethics Op. No. 1993-1 (Nov. 5, 1993) ("A lawyer who assigns his accounts receivable . . . remains responsible to the former clients to ensure that all relevant ethical rules are followed in the collection process"). Sufficient control would require, at a minimum, that the lawyer remain informed about efforts to collect the debt, and be able to veto activities that are inconsistent with the lawyer's legal or ethical requirements. In addition, disclosure of the assignment should be made to the client to avoid confusion. *Id.* These issues must be addressed in each case of assignment of accounts receivable.[4]

*2. Disclosure of protected client information to a collection agency without the client's consent is permitted only if the information is reasonably necessary to recover the debt and the lawyer can assure confidentiality.*

A related but equally important issue that arises with respect to the use of collection agencies or the assignment of accounts receivable is the need to preserve client confidences and secrets. Rule 1.6, which prohibits a lawyer from knowingly revealing a client confidence or secret, using a confidence or secret to the client's disadvantage, or using a confidence or secret for the advantage of the lawyer or a third person, applies to questions of client fee disputes. We reiterate the broad scope of Rule 1.6 which protects both "confidences" - information protected by the lawyer-client privilege - and "secrets" - other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

The inquirer has asked the Committee to opine on the propriety of disclosing billing files, signed retainer agreements, fee schedules, and signed promissory notes to a third party to aid in the collection of a client debt. A preliminary question, however, must be addressed - whether it would be permissible even to disclose the client's identity, contact information, and debt to the collection agency. The existence of a client debt as well as client contact information arguably is a "secret," assuming it was obtained in the course of the professional relationship, and its disclosure

[1] Rule XIII (a) provides: "A lawyer subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client, if such client was a resident of the District of Columbia when the services of the lawyer were engaged, or if a substantial portion of the services were performed by the lawyer in the District of Columbia, or if the services included representation before a District of Columbia court or a District of Columbia government agency."

[2] The Committee also notes that debt collection practices are heavily regulated at the federal and state levels by statutes such as the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692. While interpreting such statutes is beyond the role of this Committee, lawyers should ensure that their actions, and the actions of anyone providing services on their behalf, comply fully with these statutes and regulations.

[3] The small number of states that have permitted sales of client accounts receivables have required that the client expressly consent to the sale. *See, e.g.*, Iowa Sup. Ct. Bd. of Prof. Ethics & Conduct Op. No. 81-37 (Nov. 24, 1981); Tex. Prof. Ethics Comm. Op. 464 (Nov. 1989). We do not consider in this Opinion whether there is some form of client consent that would completely address the ethical concerns described above.

[4] Somewhat different issues are raised when a client debt to lawyer has been pursued through litigation or arbitration and reflected in an enforceable judgment against the client entered by a tribunal with appropriate jurisdiction. Because the ethical issues discussed above are unlikely to be presented by such judgments, an lawyer who chooses not to enforce the judgment may, consistent with our Rules, sell or otherwise monetize the judgment by transferring it to a third party.

arguably would be detrimental to the client's interest. Indeed, under some circumstances, the client's identity could constitute a "secret." For the reasons discussed below, however, the Committee believes that disclosure of the client's name, address, and debt amount to a collection agency does not violate Rule 1.6, provided the lawyer complies with the requirements of Rule 5.3 and ensures that the collection agency and its personnel maintain the confidentiality of that information.

Comment [11] to Rule 1.6 explains that "it is not improper for a lawyer to give limited information from client files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential." A collection agency acting on the lawyer's behalf is performing a service akin to a bookkeeping or accounting function by attempting to recover delinquent debts on the lawyer's books. It would be within the scope of the duties of an accountant or bookkeeper employee to collect a debt; the lawyer simply has made a business decision to delegate this duty to a collection agency. *See* Fla. State Bar Ass'n Op. 81-3 (Apr. 15, 1981) (collection agency should be viewed as "nonlawyer personnel" under the Florida counterpart to D.C. Rule 5.3). Moreover, a contrary conclusion would preclude the use of collection agencies or similar third party entities because a client simply could refuse consent to sending any information about the debt to a collection agency. Assuming the lawyer takes steps to ensure that the agency keeps the client's name, contact information, and debt amount confidential, the mere transmission of this limited information to a collection agency does not require the client's prior consent. Signed retainer agreements, fee schedules, and signed promissory notes reflecting the client's debt may be disclosed to the collection agency under these same principles.

Revealing further information concerning the representation - including detailed billing information and other details concerning the representation - involves different considerations identified in Comments [24] and [25] to Rule 1.6, discussed above. In our recent Opinion 290, we concluded that disclosure of detailed client billing statements and other confidential information to an insurer (and to the insurer's auditor) that was funding the client's litigation could not be made absent client consent. The Committee found Comment [11] to Rule 1.6 inapplicable to that situation because "the information sought is substantive and the lawyer neither selects the auditor nor controls its use of the information." We also were concerned that such disclosure during the course of a representation might allow discovery of such information to the client's detriment.

These same considerations apply to some extent in the instant situation, although the lawyer has selected the collection agency and, for reasons explored above, must ensure that the collection agency not disclose the information beyond what is necessary to carry out its debt collection practices. Detailed billing records reflecting descriptions of legal work undertaken are "substantive" in nature, and therefore, their non-consensual disclosure generally does not fit within the bounds of Comment [11]. Moreover, detailed billing information normally is not reasonably necessary to the collection agency's efforts to recover the debt. *See* Ohio Bd. of Comm'rs on Grievances & Disc. Op. 91-16 ("information regarding the nature of the legal services would not always be necessary to establish or collect the fee, [so] it should not be revealed to the collection agency unless necessary").

Where the former client has contested the debt by claiming that the lawyer has engaged in professional misconduct, we conclude the lawyer may disclose details of the representation to the collection agency sufficient to respond to that claim on the lawyer's behalf, provided the lawyer ensures that the agency maintains the information confidentially.[5] Moreover, Rule 1.6(d)(5) allows limited disclosure of such information in fee litigation instituted by the lawyer.[6] Rule 5.3 again requires that such disclosure be accompanied by the collection agency's agreement to maintain the confidentiality of the information revealed and steps must be taken to ensure that any form of public disclosure be kept to a strict minimum. *See also* Comment [23] to Rule 1.6 (such disclosure "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable"); Florida State Bar Ass'n Comm. on Prof. Ethics Op. 81-3 (Apr. 15, 1981) (lawyer must be "careful to divulge to the collection agency no details regarding the representation of the client that are not relevant to the debt owed").

But where the client has disputed all or portions of the debt on more general grounds, *see* Comment [23] to Rule 1.6, or the lawyer reasonably believes that only such a general objection to the fee will arise, this exception to Rule 1.6 does not apply. In such circumstances, the limited disclosure to accountants, bookkeepers and the like authorized by Comment [11] to Rule 1.6 does not extend to information in excess of that necessary to establish the fact of a debt. Nor can Rule 1.6(d)(3)'s specific authorization of limited disclosure in response to certain claims of misconduct be extended to permit disclosure. Disclosure of confidential information, even to a collection agency under orders to maintain such information confidential, may raise questions of waiver of privileges and open the door to subsequent disclosure of such information to the client's detriment.[7] Informed client

[5] A lawyer also could disclose such information if the client formally instituted a civil, criminal or disciplinary claim against the lawyer (which would include a demand for arbitration under D.C. Bar Rule XIII) under the exception for revelation of client secrets "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client" contained in Rule 1.6(d)(3).

[6] However, unlike Rule 1.6(d)(5), which applies to fee litigation instituted by the lawyer, Rule 1.6(d)(3) is not limited to formal debt collection actions instituted by the lawyer or someone acting on her behalf. Moreover, Comment [23] to Rule 1.6 states that "[i]f a lawyer's client, or former client, has made specific allegations against the lawyer, the lawyer may disclose the client's confidences and secrets in establishing a defense, *without waiting for formal proceedings to be commenced.*" (emphasis supplied).

[7] This Committee normally does not interpret substantive law and thus is not in a position to opine upon the applicability of the lawyer-client or other privileges in situations such as this. Nonetheless, we note that broad disclosure of information to a collection agency creates the risk of waiver of an applicable privilege, and that such disclosure may be substantively detrimental to the client independent of the mere fact of debt collection.

consent to such disclosure therefore is required under Rule 1.6 before this information can be shared with the collection agency.[8]

Inquiry No. 98-2-6
Adopted: May 16, 2000

*Opinion No. 299*

**Duty of Confidentiality to aCorporate Client That Has Ceased Operations**

• The duty of confidentiality under Rule 1.6 encompasses the attorney-client privilege and continues after the termination of the client-lawyer relationship. Therefore, unless one of the exceptions to Rule 1.6 applies, an attorney must preserve the client's confidences even though the corporate client has ceased operations.

**Applicable Rule**

• Rule 1.6 (Confidentiality of Information)

*Inquiry*

The inquirer provided legal advice concerning federal government contracts to a non-profit corporation organized under the laws of the jurisdiction in which the corporation operated (not the District of Columbia). Approximately four years ago, the inquirer terminated the representation of the corporation due to nonpayment of fees. Since then, the corporation has ceased operating, and its current legal status is unknown. Former officers of the corporation have been indicted for offenses that may relate to or concern matters within the scope of the inquirer's former representation. Counsel representing an indicted former officer has contacted the inquirer and requested information relating to the inquirer's representation, including matters that the inquirer believes are covered by the attorney-client privilege. The inquirer requests our advice regarding his duty of confidentiality to the former corporate client that has ceased operations.

*Discussion*

The inquirer has informed us that counsel for a former officer of a corporate client seeks information covered by the attorney-client privilege — one of the oldest recognized privileges for confidential communications. *Swidler & Berlin v. United States*, 118 S. Ct. 2081, 2084 (1998), citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888). The privilege is intended to encourage full and frank communication between attorneys and their clients regarding embarrassing or legally damaging information because clients can expect that such information will be protected from disclosure. *See Upjohn*, 449 U.S. at 389. The privilege also applies when the client is a corporate entity. *Id.*, at 391.

The principles underlying the attorney-client privilege are incorporated into Rule 1.6, which provides that "a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client" except in certain circumstances delineated under paragraphs (c) and (d) of the rule. "Confidence" refers to information protected by the attorney-client privilege under applicable law. Rule 1.6(b). "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client." Rule 1.6(b). The inquirer's duty to preserve the client's confidences and secrets survives the termination of the inquirer's representation of that client.[1] *See* Rule 1.6(f); Comment [28] to Rule 1.6 ("The duty of confidentiality continues after the client-lawyer relationship has terminated); D.C. Bar Op.180 (same). Accordingly, unless one of the exceptions to the duty of confidentiality provided in paragraphs (c) or (d) of Rule 1.6 is applicable, the inquirer may not disclose the requested information. *Cf. Swidler & Berlin*, 118 S. Ct. at 2081 (generally the attorney-client privilege survives the death of the client). Paragraph (c) of Rule 1.6 allows a lawyer to reveal a client's confidences or secrets, "to the extent reasonably necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm" or "to prevent the bribery or intimidation" of persons "involved in proceedings before a tribunal." The inquirer has not provided us with any facts suggesting that either circumstance is presented here.

Paragraph (d) of Rule 1.6, on the other hand, allows a lawyer to reveal client confidences or secrets: "(1) with the consent of the client affected, but only after full disclosure to the client," or (2) when permitted by another Rule or required by law or court order.[2] The inquirer informed us that the corporation (the former client) has ceased operations but its legal status is unknown. The Committee cannot determine on the basis of the limited facts presented in the inquiry whether the corporate client still exists or whether another entity has succeeded to its management. However, we infer from the inquiry that the former officer, whose counsel contacted the inquirer, cannot consent to the disclosure of the client's confidences on behalf of the corporation because, even if he had such authority when the corporation was in operation, he no longer has any management authority as a former officer. If some entity has assumed managerial control of the corporation, the inquirer may reveal the requested information if the successor management consents. To obtain permission to disclose information, the inquirer must fully disclose all relevant facts to the successor management to allow it to make an informed decision on whether to allow the lawyer to reveal confidential information. *See, e.g., Maleski v. Corporate Life Ins. Co.*, 641 A.2d 1, 3 (Pa. Commw. 1994), and cases cited therein (authority of successor management to act on corporation's behalf).[3]

Even if the corporate client no longer exists and no one is authorized to consent to the disclosure of the corporation's confidences,[4] the former officer still may

[8] In D.C. Bar Op. 289 (1999), we set forth the general standard applicable for prospective waivers. The permissibility of advance waivers of disclosure of confidential information to collection agencies, *e.g.*, in an initial engagement letter, is beyond the scope of this opinion. We note that in cases where disclosure of the fact of representation could be independently detrimental to the client, informed consent also would be required under our Rules.

[1] Accordingly, our analysis would be no different if the inquiry involved the client's "secrets" instead of of "confidences."

[2] No other Rule apparently applies to the facts of this case. Likewise, the other exceptions in Rule 1.6(d) -- (1) disclosure when the lawyer is responding to a criminal charge, disciplinary charge, or civil claim; (2) disclosure when the lawyer believes that the client has given implicit authorization to carry out the representation; or (3) disclosure necessary to establish or collect a fee -- are not applicable.

[3] Such a result is consistent with Rule 1.13 which "makes clear that, when a lawyer is retained to represent a corporation, the lawyer's client is the corporation *only*, acting through its duly authorized constituents (such as officers and employees)." D.C. Bar Op. 269 (italics in original and footnote omitted).

[4] *See Maleski*, 641 A.2d at 1; *see also FDIC v. Amundson*, 682 F. Supp. 981 (D. Minn. 1988)(dissolved corporation ceases to exist and no entity retains management authority to act on its behalf); *FDIC v. McAtee*, 124 F.R.D. 662 (D. Kan. 1988)(same).

have recourse to the corporation's confidences if he or she seeks and obtains a court order compelling disclosure of the information sought. *See* Rule 1.6(d)(2)(A). When such an order is received, the inquirer's duty of confidentiality to the client would be overridden by the order, and the inquirer may comply with the order. *See* Comment [26] to Rule 1.6 ("The lawyer may comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client. But a lawyer ordered by a court to disclose client confidences or secrets should not comply with the order until the lawyer has personally made every reasonable effort to appeal the order or has notified the client of the order and given the client the opportunity to challenge it"). Likewise, the former officer also may be able to petition a court to appoint a receiver or trustee for the corporation to decide whether to exercise the corporation's right to consent to the disclosure. *See* discussion above on Rule 1.6 (d)(1).

Inquiry No. 99-5-19
Adopted: June 20, 2000

*Opinion No. 300*

**Acceptance of Ownership Interest In Lieu of Legal Fees**

• It is not unethical for a lawyer to receive an ownership interest in a corporate client as compensation for legal services, so long as the fee arrangement is a reasonable one, is objectively fair to the client, and has been agreed to by the client after being informed of its implications and given an opportunity to seek independent counsel on the fee arrangement. A lawyer's current or expected ownership interest in a client may create a conflict of interest that may prevent the lawyer from undertaking the representation unless informed client consent is received.

**Applicable Rules**

• Rule 1.5(a) (Fees)
• Rule 1.7(b), (c) (Conflict of Interest: General Rule)
• Rule 1.8(a) (Conflict of Interest: Prohibited Transactions)

*Inquiry*

Inquirer is a lawyer who has represented a limited liability company in a traditional fee-for-service relationship. The client has asked the inquirer to serve, on a part-time basis, as the client's general counsel. In lieu of fees for this work, the client has proposed to give inquirer an approximately 20 percent ownership interest in the limited liability company and a percentage of the company's profits, if any. If the inquirer accepted this position, he would continue his private practice representing other clients. Inquirer asks about the ethics of this fee arrangement.

*Discussion*

*1. Reasonableness of the Fee Arrangement*

This inquiry is one of only a few in which this Committee has opined on the ethics of particular fee agreements between lawyers and clients. The ethical principles derive primarily from the six-word first sentence of District of Columbia Rule of Professional Conduct 1.5(a): "A lawyer's fee shall be reasonable." Rule 1.5(a) then continues with a list of factors to be considered in determining the "reasonableness" of a fee, including the time involved, the amount involved in the representation, and the lawyer's experience. Relevant to this particular inquiry is Comment [4] to Rule 1.5 which states that:

> A lawyer may accept property in payment for services, such as an ownership interest in an enterprise. However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

As reflected in Comment [4], there is nothing in the "reasonableness" standard of Rule 1.5(a) that would prohibit a lawyer's receipt of an ownership interest in the lawyer's client (e.g., shares of stock in a corporation) as a fee.[1] Thus, the pertinent question is not whether such a fee arrangement is ethical in principle; it clearly is. Rather, the question is whether a particular ownership-in-lieu-of-fees arrangement is "reasonable" which calls for an analysis of reasonableness factors similar to that we have described in prior opinions. *See, e.g.,* D.C. Bar Op. 42 (1977) (decided under Code of Professional Responsibility). Such an analysis would be the means of determining whether a specific fee arrangement was reasonable under the circumstances of the particular representation. Not to be ignored in evaluating the reasonableness of the fee is factor (8) under Rule 1.5(a) ("whether the fee is fixed or contingent"), since there is a risk that stock of a non-public start-up company received as a fee may be worthless if the client's business does not succeed.

Also relevant to the reasonableness analysis would be the disclosures and explanations made by the lawyer to the client concerning the proposed stock-for-fees arrangement. The listing of reasonableness factors in Rule 1.5(a) does not mention such conduct, but that list is not exhaustive and we have no doubt that reasonableness would be measured, at least in part, by the extent to which the client's acceptance of the fee arrangement was informed by its understanding of its financial implications. Managers and owners of start-up companies may be unsophisticated consumers of legal services or may not appreciate the financial implications of paying for legal services in stock instead of cash. It may be necessary under such circumstances for the lawyer to explain how the use of stock to pay for legal fees may provide significant near-term benefits to the client but may result in a cost for legal services greatly in excess of what would have been paid under more traditional means.[2]

[1] The Committee has once before addressed the ethics of stock-in-lieu-of-fees. In D.C. Bar Op. 179 (1987), decided under former Code of Professional Responsibility, we were asked to opine on an arrangement wherein a lawyer was to be compensated with stock of a client for representing it in a Federal Communications Commission license proceeding. The client's only potential asset was the hoped-for license, such that the stock received by the lawyer would have value only if the license were granted to the client.

The Committee examined this arrangement under DR 5-103(A), which prohibited a lawyer from acquiring "a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client," except for a reasonable contingent fee in a civil case. The Committee concluded that, while receiving stock under the circumstances of the inquiry was the acquisition of an interest in the subject matter of the litigation, it was tantamount to a contingent fee and so was excepted from the general prohibition of the rule. The Committee's opinion noted that compensating lawyers with the stock of cash-poor start-up companies was a way of providing access to legal services for clients that might otherwise be unable to afford a lawyer.

[2] D.C. Bar Op. 115 (1982) adverted to this concern in connection with a proposed fee arrangement in which a lawyer would receive a portion of revenue to be earned by athletes, artists and performers just beginning in their professions in return for current legal services to them. It urged explanation of the fee arrangement because "a person just embarking on his or her career, because of youthfulness or other factors, may be quite naive about contingent fee matters."

We have been given no information about the magnitude or difficulty of the legal work that will be expected of the inquirer under the proposed compensation arrangement or about the value of the 20 percent interest in the client and the profit distributions.[3] Even if we had such information, we would be judging it under the standard of "reasonableness," an amorphous concept under which, in the context of our ex parte proceedings in which we make no searching factual inquiries, we could likely condone or reject only those arrangements falling well inside or outside its indistinct boundaries. The "reasonableness" factors listed in Rule 1.5(a) should assist inquirer in applying the law to the details of his proposed fee arrangement.[4]

*2. Stock in Lieu of Fees as Conduct Under Rule 1.8(a)*

We agree with the commentators who have written on the subject (*see* Hazard & Hodes, *Law of Lawyering* (2d ed. 1998) at §1.8:202 *et seq.*; C. Wolfram, *Modern Legal Ethics* (1986), §8.11.2) that a stock-as-fees arrangement is subject to Rule of Professional Conduct 1.8(a), which governs certain transactions with or related to clients. The Rule provides as follows:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3) The client consents in writing thereto.

In many respects, Rule 1.8(a) codifies the well-established common law principle that a lawyer occupies a fiduciary position vis-à-vis his client which means that all transactions between lawyer and client are suspect and must be fair to the client. *See Connelly v. Swick & Shapiro*, 749 A. 2d 1264 (D.C. 2000); *Curtis v. Fabianich*, 200 A. 2d 382 (D.C. 1964).

There is some overlap of the ethical requirements of Rules 1.8(a) and 1.5(a). Adequate disclosure of the terms and implications of the fee arrangement and the reasonableness of the arrangement are common. But Rule 1.8(a) adds to the lawyer's ethical obligations to his client the requirements that the fee arrangement be "fair" to the client, that the fee arrangement and the disclosure be in writing, that the client be given an opportunity to seek the advice of independent counsel concerning the proposed fee arrangement, and that the client's consent to it be in writing.[5]

*3. Conflict of Interest*

A conflict of interest question is also presented when a lawyer receives an ownership interest in a client or the client's business venture as compensation, in full or in part, for legal services to be provided to the client. The relevant ethics principle is found in Rule 1.7(b)(4), which prohibits a lawyer from

> represent[ing] a client with respect to a matter if . . . the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's . . . own financial, business, property, or personal interests.[6]

Depending on a number of factors, including the extent and value of the ownership interest acquired by the lawyer, its relationship to the total fees to be earned from the engagement, its relationship to the lawyer's total income and total assets, and the type of legal services being provided, an ownership-in-lieu-of-fees arrangement might affect a lawyer's exercise of professional judgment on behalf of the lawyer's client. For example, in a situation in which a lawyer is offering advice concerning the legality of a proposed transaction which, if consummated, will have a significant positive effect on the client's business and the value of its shares, under some circumstances the lawyer's judgment in the matter could (wittingly or unwittingly) be influenced by his ownership of the shares.

Opinions from this and other jurisdictions have long identified the conflict of interest implications of the relationship between a lawyer's personal financial interests and the interests of the lawyer's clients. For example, our Opinion 144 commented on the ethical conflict created when a lawyer was assigned a Criminal Justice Act representation before a judge who had a practice of inadequately compensating appointed counsel. We wrote as follows concerning the application of DR 5-101(A) (the predecessor to Rule 1.7(b)(4)):

> This provision clearly prevents an attorney from accepting employment, without the client's consent, where the attorney's financial interests will impair, or "reasonably" may impair, his professional judgment. Thus, *before* he accepts a CJA case, inquirer must determine whether the assignment of Judge X, a circumstance that "reasonably" might occur, would affect his judgment. (Emphasis in original.)

While we can readily identify the theoretical potential conflict of interest in an ownership-in lieu-of-fees arrangement, determining when it exists and rises to the level of an ethical bar to a representation is difficult. The ethical prohibition is invoked only when the lawyer's professional judgment "will be or reasonably may be adversely affect-

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[3] Where the stock received by the lawyer is not publicly traded, its value at the time it is transferred to the lawyer may be difficult to determine - a factor that may further complicate the Rule 1.5(a) analysis.

[4] We are not aware that our Committee has ever opined whether a specific fee arrangement was reasonable or, under Code of Professional Responsibility DR 2-106, "clearly excessive."

[5] Rule 1.8(a) and the commentary thereto are silent on how fairness is to be determined and whether it is to be determined only by reference to facts and circumstances existing at the time the arrangement is accepted by the parties, or by reference to subsequent developments (for example, a huge appreciation in the value of the shares received as fees such that the lawyer is effectively compensated at 100-fold the reasonable value of his services). For ethics purposes (and not for purposes of assessing common law fiduciary duties), we believe that the "fairness" of the fee arrangement should be judged at the time of the engagement. In other words, if the fee arrangement is "fair and reasonable to the client" at the time of the engagement, no ethical violation could occur if subsequent events beyond the control of the lawyer caused the fee to appear unfair or unreasonable. *See* Restatement of the Law Governing Lawyers (Preliminary Final Draft No. 1, 1996) § 207, comment e ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as the facts later develop.").

[6] This prohibition is waivable by the affected client following disclosure by the lawyer of the circumstances of the conflict. *See* Rule 1.7(c). As reflected in Comment [7] to Rule 1.7 and as we have previously noted (*see, e.g.*, D.C. Bar Op. 257 (Sept. 20, 1995)), if an objective observer would find any reason to question the lawyer's ability to provide competent and zealous representation uninfluenced by the lawyer's financial, business or property interests, the lawyer should seek and obtain the client's informed consent to the representation.

ed" by the lawyer's personal financial interests. Unlike the bright lines created in Rules 1.7(a) and 1.7(b)(1) (prohibiting adversities with a lawyer's own client), the prohibition of Rule 1.7(b)(4) (like the simultaneous representation prohibitions of Rules 1.7(b)(2) and (b)(3)), is one which is highly dependent on the circumstances of the representation and the lawyer's own circumstances. In this Opinion, we can do no more than identify the conflict of interest considerations, and leave it to the inquirer to determine whether the particular circumstances of his representation of his client are such that his judgment "will be or reasonably may be adversely affected" by the fee arrangement. The test to be applied is an objective one, that is, whether a lawyer's judgment "will be or reasonably may be adversely affected" by certain circumstances is determined by the position of a reasonable lawyer under the circumstances. *See* note 6. The conflict is waivable by the client based on full disclosure by the lawyer. *Id.* [7]

Inquiry No. 00-2-2
Approved: July 25, 2000

*Opinion No. 301*

**Conflict of Interest: Simultaneous Representation of Two Plaintiffs Against a Common Defendant in Separate but Related Lawsuits**

• A lawyer representing plaintiffs in a class action lawsuit is not precluded from representing a member of the class who wishes to bring a tort action involving related subject matter against the same defendant. The test is whether representation of one client will be or is likely to be adversely affected by representation of the other. If not, dual representation is permissible without client consent. If so, dual representation is permissible only after informed consent of all affected clients is obtained. The situation must be reassessed if adversity arises in the course of the representations.

**Applicable Rule**

• Rule 1.7 (Conflict of Interest: General Rule)

*Inquiry*

An inquiring law firm represents plaintiffs in a class action suit against the District of Columbia that is currently pending in the United States District Court. The class is composed of approximately 3,000 special education students in the District of Columbia who complain that the District is not meeting its obligations under the Individuals with Disabilities Education Act (20 U.S.C. §1400, *et seq.*) to provide a free, appropriate education (and related services) that meet each individual student's unique special education needs. Among other things, the court has ordered the District of Columbia Public Schools to pay tuition bills in a timely manner and to provide appropriate transportation services.

During the pendency of the suit, an individual class member was abducted and assaulted allegedly as a result of the failure to provide adequate transportation services. Once the law firm learned of these events, it filed in the class action a Motion for Injunctive Relief on behalf of the individual class member. The class member and his mother have now asked the law firm to represent them in a tort action against the District of Columbia. The law firm has requested our opinion as to whether potential conflicts of interest preclude it from accepting the proffered representation.

*Discussion*

Rule 1.7 of the District of Columbia Rules of Professional Conduct states general rules governing conflicts of interest as between current clients. It is important to note at the outset that the District of Columbia Court of Appeals "adopted a version of Rule 1.7 which substantially differs from the American Bar Association's Model Rule 1.7." *Griva v. Davison,* 637 A.2d 830, 842 (D.C. 1994). Thus, while interpretations of the ABA Model Rule may be helpful, they must be applied with caution.

"The legislative history of our Rule 1.7 reflects an intention to divide potential conflict of interest situations into three categories: (1) cases in which representation is absolutely forbidden, (2) cases in which dual representation is permissible after informed consent of all affected clients is obtained, and (3) cases in which dual representation is permitted without client consent." *Griva v. Davison*, 637 A.2d at 842. This is not a situation (prohibited by Rule 1.7(a)) where a lawyer is being asked to advance adverse positions on behalf of different clients in the same matter.[1] Rather, the law firm has been asked to represent two clients whose interests seem to be similar in separate law suits with an overlapping subject matter. We must look to Rule 1.7(b) for guidance.

Rule 1.7(b) states, in pertinent part, that "a lawyer shall not represent a client with respect to a matter if:

* * *

> (2) such representation will be or is likely to be adversely affected by representation of another client; [or]
>
> (3) representation of another client will be or is likely to be adversely affected by such representation[.]"

These are not absolute prohibitions, however.

> A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

Rule 1.7(c). Thus, representation of both clients is permitted if each gives informed consent. The more difficult question is whether the law firm even needs to seek such consent. The answer to that question depends, in turn, on whether the representation of one client "will be or is likely to be adversely affected" by representation of the other.

This test has objective as well as subjective elements. "Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests." Rule 1.7, Comment [7]. However, the conflict must be likely not merely hypothetical. In Opinion 265 we explained that "[t]he rule focuses on those conflicts that would be apparent to a reasonably conscientious lawyer." D.C. Bar Op. 265 (1996). "[I]n a wide variety

[7] The conclusions reached in this Opinion are similar to those reached in other jurisdictions and by the ABA on the subjects addressed. *See, e.g.,* Assoc. of the Bar of the City of New York Formal Op. 2000-3 (2000), Utah Ethics Op. 98-13 (1998) and ABA Formal Op. 00-418 (2000).

[1] Rule 1.7(a) provides that "[a] lawyer shall not advance two or more adverse positions in the same matter."

of routine cases where no concrete adverse effect by one representation on another is foreseeable, the inquirer is not obliged to make disclosure or to seek consent." *Id.* In other words, "[t]he mere possibility that a result in one representation will affect the outcome of another is not enough to trigger a conflict as to which waiver must be sought." *Id.*

Nevertheless, "if an objective observer can identify and describe concrete ways in which one representation may reasonably be anticipated to interfere with the other, then a cognizable conflict arises under our rules, and disclosure must be made and a waiver sought." *Id.* "If the lawyer determines or can foresee that an issue with respect to the application of paragraph (b) exists, the only prudent course is for the lawyer to make disclosure, pursuant to paragraph (c), to each affected client and enable each to determine whether in its judgment the representation at issue is likely to affect its interests adversely." Rule 1.7, Comment [9]. "It is much to be preferred that a representation that is likely to lead to a conflict be avoided before the representation begins, and a lawyer should bear this fact in mind in considering whether disclosure should be made and consent obtained at the outset." *Id.*, Comment [22].[2]

"Central to deciding whether adverse effect, and therefore a conflict, exists will be issues such as: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation. . . . [T]he focus of the analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients." D.C. Bar Op. 265.

Given the facts presented in the inquiry, it seems unlikely that representation of either client "will be or is likely to be adversely affected" by representation of the other. Most importantly, there is no present adversity of positions, and it seems unlikely that direct adversity will arise in the future. In both law suits the plaintiffs are, or will be, asserting the obligation of the District of Columbia to provide adequate transportation services. Thus, they are on the same side of the issue. *See Rodick v. Schenectady*, 1 F.3d 1341, 1350 (2d Cir. 1993) (not improper for single lawyer to represent police officers and city in malicious prosecution action even though city's only liability arose under doctrine of respondent superior; although city might have defended by claiming that officers were not acting within the scope of their official duties, in this case both city and officers argued that officers were acting in their official capacities and lawyer advanced all possible defenses available to officers); *Molitoris v. Woods,* 618 A.2d 985 (Pa. Super. Ct. 1992) (no conflict of interest when law firm represented plaintiff in personal injury suit and employee benefit plan in its subrogation claim arising from payment of medical benefits to plaintiff; subrogation interest of plan identical to interest of plaintiff in recovery against defendants).

Moreover, the potential for conflict is lessened because the plaintiffs seek different relief. In the class action, plaintiffs seek injunctive relief and from time to time submit claims for attorneys' fees. There is no claim for money damages. The tort action, by contrast, will present solely a claim for money damages. Success by one client should not interfere with the other client's chances of winning its suit. *Cf. Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) (counsel for class of female inmates seeking improved facilities should have been disqualified when defendants offered to settle suit on advantageous terms which were contrary to the interests of a class of plaintiffs which counsel represented in a separate action); *North Carolina State Bar v. Whitted,* 347 S.E.2d 60 (N.C. Ct. App. 1986) (improper to undertake representation of two wrongful death claimants in obtaining settlement from limited fund; any apportionment would benefit one client to other's detriment).[3] Similarly, a ruling against one client should not preclude relief for the other.

It has been suggested that a conflict may arise in the course of defining the District's obligation to provide adequate transportation services for special education students. The tort plaintiff likely will assert that the District breached its obligations because the bus driver did not wait long enough for the plaintiff to arrive for pick-up or did not take additional steps to determine whether the plaintiff was planning to go to school that day. However, extending the time required to pick up one student will necessarily lengthen the ride and extend the waiting time of other students. This possibility does not seem to create a conflict that is any more concrete than the fact that the law firm is representing a class of approximately 3,000 students. Inevitably, increased attention to the transportation needs of one class member may divert resources from the others. These facts without more do not create a conflict but the law firm should remain sensitive to the possibility that a conflict may arise.

The prospect of a conflict developing is lessened by the fact that claims for equitable damages and attorneys' fees are decided by the court. A claim for money damages is ordinarily decided by a jury. A conflict will be even less likely if the tort action is filed in the Superior Court or is assigned to a different federal judge.[4] Moreover, it is unlikely that any actual conflict will escape notice because the representations are public in nature and will be monitored by the judges presiding over the litigation.

Because there is no present or likely conflict, the law firm may accept the second representation without obtaining the consent of both clients. However, it must reassess the situation as both lawsuits progress. If a conflict as defined by Rule

[2] In a recent opinion this committee discussed the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed. D.C. Bar Op. 296 (2000).

[3] A conflict may arise is it appears that the cost of complying with a judgment in favor of one client will render the defendant financially unable to satisfy the claims of another client. There is no suggestion that such a risk has arisen here.

[4] This situation is unlike that discussed in ABA Formal Op. 93-377 (1993). Interpreting Model Rule 1.7(b), the ABA Committee opined that if "two matters are being litigated in the same jurisdiction, and there is a *substantial risk* that the law firm's representation of one client will create a legal precedent, even if not binding, which is likely *materially* to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or (if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters." (emphasis added). This conclusion was based on the premise that the lawyer was being asked to advocate "directly contrary" positions with respect to a substantive legal issue presented in the two matters. Here, by contrast, it does not seem likely that the law firm will face the prospect of arguing "directly contrary" legal positions.

1.7 develops and the lawyer nevertheless is "satisfied that [both representations] can be wholeheartedly and zealously undertaken," Rule 1.7, Comment [7], the firm must seek consent of both clients or withdraw if that is possible in compliance with Rule 1.16.

*Conclusion*

Based on the facts presented, Rule 1.7 does not preclude the law firm from undertaking the second representation. The most cautious approach would be to seek the informed consent of both clients as the second representation begins. However, the District of Columbia's version of Rule 1.7 recognizes that there are cases where dual representation is permitted without client consent. Because it does not appear that representation of one client "will be or is likely to be adversely affected by" representation of the other, we conclude that the law firm may undertake the second representation without seeking client consent, subject to reassessment if at a later time adversity between the interests of the client in the second representation and those of the class in the first representation should arise.

Inquiry No. 99-7-22
Adopted: June 20, 2000

*Opinion No. 302*

**Soliciting Plaintiffs for Class Action Lawsuits or Obtaining Legal Work Through Internet-based Web Pages**

• It is permissible for lawyers to use Internet-based web pages to seek plaintiffs for class action lawsuits, provided they comply with all applicable D.C. Rules of Professional Conduct. It also is permissible for lawyers to obtain legal work through Internet-based web pages on which potential clients post requests for bids on legal projects.

**Applicable Rules**

• Rule 1.6 (Confidentiality of Communications)
• Rule 3.6 (Trial Publicity)
• Rule 4.3 (Dealing with Unrepresented Person)
• Rule 5.4 (Professional Independence of a Lawyer)
• Rule 7.1 (Communications Concerning a Lawyer's Services)

*Inquiry*

The Legal Ethics Committee has received numerous inquiries concerning lawyers' use of Internet-based web pages as a means of obtaining clients. One such inquiry asks whether the D.C. Rules of Professional Conduct prohibit an attorney from using the Internet in seeking plaintiffs for a class action lawsuit. Another asks whether it is permissible to obtain legal work through Internet services that offer web pages on which potential clients post requests for bids on legal projects. We address these inquiries together because each raises the general issue of Internet communications regarding lawyers' services.

With respect to the issue of using web pages to obtain plaintiffs in class action lawsuits, we have not been asked to evaluate any particular web site for its conformity to the D.C. Rules of Professional Conduct. As background to preparing this opinion, however, we visited a variety of web sites found through use of Internet search engines in order to see how lawyers are making use of new cyberspace technologies to communicate with potential clients. We came across hundreds of such web sites, ranging from extremely professional presentations to ones of marginal quality. Some described class action lawsuits that had already been filed; others contained information on class action lawsuits lawyers or sponsoring organizations were hoping to file, and urged visitors to contact the plaintiffs' attorneys to sign up for the suit. With respect to this latter group of web sites, it was often impossible to tell whether a lawyer was involved in the contemplated litigation. We discuss additional features of the web sites we examined in more detail below.

With respect to lawyers' use of web sites providing bulletin boards on which prospective clients post requests for bids to provide legal services, we found a handful of such web sites. Information at most of these sites was not available without registering to use the service, but one web site, which describes itself as the "premier business-to-business exchange for legal services," provided what appeared to be clear and comprehensive information to visitors from the general public. We therefore use this site as a template for our general discussion of web-based bulletin board services, without intending to pass judgment on the specifics of this particular service.

The site invites attorneys to register to bid on legal projects by submitting information about themselves, including their practice areas, firm size, location, years in business, technological capacities, and (at the option of the firm) its "diversity profile." Corporations are invited to post requests for proposals ("RFPs") on the web site. They may identify themselves or may, in "special circumstances" not further explained, post RFPs anonymously. Corporations may block other corporations from seeing their RFPs and may also select which registered law firms may view them. Law firms respond to RFPs by filling out a summary of their bid and fee structure, which they must submit to the corporation through the web site. The prospective parties may then correspond with each other, either through encrypted communications over the web site or off-line, at their own option. At the end of this process, corporations make their decisions about which law firm to hire for a particular posted project.

The web site sponsor states that it does not participate in any discussion corporations or law firms have during the selection process. It does offer, however, to assist corporations in preparing RFPs and to assist law firms in preparing their responding bids in appropriate formats as required by the corporations. It also states that it will assist corporations by seeking to register new law firms, by researching and recommending law firms not yet registered at the site, and by verifying bar admissions and good standing of counsel responding to RFPs. The web site sponsor charges a percentage fee (2%) of the amount paid by the corporation to the law firm selected for work, which the corporation pays directly to the web site sponsor at the same time that it pays its legal bills. The web site further discloses the principals in this venture, including its directors, managers, outside counsel, and advisory board, all of whom are described in depth; the user agreement; and mock sample RFPs and firm registrations.

*Discussion*

We start our analysis by noting that, consistent with the approach of ethics committees in many other jurisdictions, we see nothing untoward in lawyers communicating about their services through web sites, provided that such communications comply with our general rules

governing lawyer communications with clients.[1] Indeed, questions regarding how a lawyer may use a web site in seeking to obtain clients are at bottom no different than any other question about lawyer communications about legal services. Such questions are governed by D.C. Rule 7.1.[2] Unlike many other jurisdictions, D.C. does not have special rules or restrictions that apply to client solicitation; D.C. Rule 7.1 applies to all forms of lawyer communications about legal services. The touchstone of Rule 7.1 is whether lawyers' communications about themselves or their services are "false or misleading." 7.1(a). Thus, regardless of whether using web sites to obtain clients is viewed as advertising or solicitation, the same fundamental restriction prohibiting "false or misleading" communications will govern the analysis.

We note at the outset that many sources of law in addition to the D.C. Rules of Professional Conduct may apply to lawyer communications with potential class action plaintiffs. These sources of law include Federal Rule of Civil Procedure 23 and its state law counterparts, the orders of the court supervising the class action lawsuit once it has been filed, constitutional restrictions on regulating attorney communications with potential class action members as discussed in *Gulf Oil v. Bernard*, 452 U.S. 89 (1981), and so forth. As always, we assert no opinion on these other sources of law potentially relevant to the question of legal restrictions on a lawyer's ability to communicate with potential class action clients, but confine our discussion to the requirements of the D.C. Rules of Professional Conduct.

Another area of law we do not address concerns the applicability of other jurisdictions' rules of professional conduct and related choice of law issues under Rule 8.5. We note, however, that the distinctive nature of the communications medium under discussion deeply implicates these issues. The very name, "World Wide Web," highlights the reach of such communications far beyond the bounds of any particular legal jurisdiction. Not surprisingly, our search for web sites concerning class action lawsuits turned up English language sites from all over the world. We thus wish to emphasize at the outset that this opinion, limited to the application of the D.C. Rules of Professional Conduct to web sites seeking class action clients, in no way resolves questions of utmost importance to practitioners—namely, the potential applicability of other jurisdictions' rules of professional conduct.

With these caveats in mind, we turn back to the requirement of D.C. Rule of Professional Conduct 7.1 that lawyers' communications about their services not be false or misleading. There are a number of ways communication about a class action lawsuit could run afoul of this requirement. Most obviously, the communication must accurately state the nature of the lawsuit. In addition, a communication may be false or misleading if it uses words such as "Notice" or otherwise suggests that it is required or authorized by a court when that is not in fact the case. *Cf. In re McKesson HBOC, Inc. Securities Litigation*, 2000 U.S. Dist. LEXIS 5828 (N.D. Cal. May 1, 2000) (deciding issue under Fed. R. Civ. P. 23). As we noted in Opinion 249, Rule 7.1 allows truthful claims about lawyer specialization, provided that the basis for making the claim is capable of substantiation. Comparative claims about the superiority of the lawyer's services that cannot be substantiated are prohibited, as discussed under Rule 7.1(a)(2), Comment [1]. Similarly, as we further noted in Opinion 249, lawyers may not make claims that they "can help you" since "there is no way such a claim can be accurate in the abstract and the practitioner cannot know whether or not he can help any client until some facts are known about the client's case."

Unlike other jurisdictions, D.C. does not prohibit the use of for-profit agencies to provide advertising or referral services to lawyers. Thus, lawyers may pay outside services or agents for posting information about pending or contemplated class action litigation from which the law firm stands to gain clients. This situation may in some circumstances be analogous to purchasing space in the yellow pages or newspaper to run a paid advertisement, which is permissible under Rule 7.1 as long as it is clear that the communication is a paid advertisement.

In other situations, however, the relationship between the lawyer and the web site host may be less obvious. Here, as Rule 7.1(b)(5) and accompanying Comment [6] explain, a lawyer who employs a paid intermediary in seeking legal business must take all reasonable steps to ensure that the potential client is informed of the consideration paid by the lawyer to the intermediary and the effect of such payment on the fee charged.[3] Thus, attorneys must disclose their financial relationship to third-party intermediaries hosting web sites through which the lawyer may gain legal business. In our search of web sites advertising for plaintiffs for class action lawsuits, we came across many sites in which the affiliation between a lawyer and the group or individual sponsoring the web site was unclear. This may well have been because no lawyer was affiliated with the contemplated litigation. In cases in which a lawyer is financially affiliated with an organization or individual who is advertising for potential plaintiffs for contemplated class action litigation, however, this relationship must be made clear to potential clients.

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[1] Other opinions that have concluded that lawyers may advertise legal services on a web page or through other electronic means include N.Y. State Legal Ethics Op. 709 (1998) ("advertising via the Internet...is permissible as long as the advertising is not false, deceptive or misleading, and otherwise adheres to the requirements set forth in the Code"); Conn. Legal Ethics Op. 97-29 (1997) ("In our opinion the same rules apply to Internet advertising that apply in other media"); Ill. Legal Ethics Op. 96-10 (1997) ("The Committee believes that the existing Rules of Professional Conduct governing advertising, solicitation and communication concerning a lawyer's services provide adequate and appropriate guidance to a lawyer using the Internet."); Utah Legal Ethics Op. 97-10 (1997) (attorneys may advertise their legal services through Internet provided they comply with states' ethics rules governing advertising); N.C. Legal Ethics Op. RPC 239 (1996) ("All communications by a lawyer concerning the lawyer or the lawyer's services including communications via computer, are subject to the prohibition...against false or misleading communications."); Pa. Legal Ethics Op. 96-17 (1996) ("Any content that would be permissible under [our rules] should also be permissible on a web page," with the fundamental restriction being against "false or misleading communication about the lawyer or the lawyer's services").

[2] D.C. Rule of Professional Conduct Rule 7.1(a) provides:

> 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:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

[3] Rule 7.1(b)(5) provides that a lawyer should not solicit employment if "the solicitation involves the uses of an intermediary and the lawyer has not taken all reasonable steps to ensure that the potential client is informed of (a) the consideration paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged."

Lawyers' financial interests in class action litigation raise still another concern under D.C. Rule 4.3. As Rule 4.3 provides, a lawyer who represents a client in a matter may not state or imply to unrepresented persons that the lawyer is disinterested when the unrepresented person might assume the lawyer is providing disinterested advice with regard to the matter. Lawyers sponsoring web sites describing contemplated or pending class action lawsuits in which they are involved obviously are not disinterested, both because they are representing clients with interests in the litigation and because the size of their fees may depend in part on the number of class action members they are able to obtain. Thus, lawyers engaged in Internet communications about class action lawsuits must disclose their interests in the legal issues or cases under discussion. Lawyers may not pretend that information provided on a web page or in another cyberspace format is from a disinterested perspective, motivated merely by a desire to inform the public about legal matters.

Finally, we note in passing that lawyers' web site communications about a class action lawsuit could potentially raise issues under Rule 3.6, which concerns lawyer statements about a case being tried to a judge or jury. Rule 3.6 applies to lawyer statements that "a reasonable person would expect to be disseminated by means of mass public communication." Since web sites with unrestricted public access provide such a means of mass public communications, lawyers should ensure that web site communications to the general public do not create "a serious and imminent threat to the impartiality of the judge or jury."

In sum, use of web sites as a means of obtaining plaintiffs for class action lawsuits in many ways resembles the use of other forms of mass media, such as newspaper advertisements, and can be analyzed in much the same way. In other respects, however, cyberspace communications raise new issues by virtue of the distinctive nature of the technology. For example, because web pages allow multilayered communications, questions may arise about whether a visitor to a web page may be misled because relevant disclosures are hidden many clicks away from the main pages. Indeed, on some of the web sites we examined, relevant disclosures, such as the relationship between a group of lawyers and the class action litigation being discussed, were buried in links several clicks removed from the main pages. The information needed to prevent a web site communication from being false and misleading should be readily available to visitors. Here a helpful analogy might be fine print in a newspaper ad; the relevant question would be whether the public to which the communication is being directed would be likely to be misled or deceived by the web site's design and layout.

Practitioners may be guided in designing web sites by the advice of e-commerce experts. One such e-commerce expert suggests that key disclaimers be provided on "click through" boxes or pages, which require visitors to verify they have read important information by clicking on a specified area of the screen before proceeding. *See* Walter A. Effross, "A Web Site Checklist," Legal Times, Mar. 1, 1999. Prof. Effross further emphasizes the need to take care in designing web sites that allow visitors to send e-mail to a site owner. Indeed, in our survey, we found quite a few sites that invited potential class action members to submit detailed profiles about themselves to the web site sponsor. Lawyers may want to use "click through" pages with disclaimers to ensure that visitors are not misled about the nature of the relationship established through such communications. Lawyers should also take steps to ensure that they are receiving the e-mail sent to them via their web pages. Lawyers may want to state that they will send a reply message confirming that e-mail communications have been received, and caution visitors not to assume that their message has been received until they have received such confirmation. This confirmatory message might also present an opportunity to clarify the nature of the relationship formed by such communications.

Following yet other suggestions of Prof. Effross, lawyers may want to take steps to standardize the responses visitors can make to web pages so that visitors cannot communicate online about matters other than those about which the lawyers are seeking information. Effross further notes that web sites can include disclaimers stating that they are not intending to solicit clients outside particular jurisdictions, or may take even stronger measures such as accepting communications only from persons with zip codes within appropriate jurisdictions. These suggestions do not, of course, serve as a definitive guide concerning the safeguards lawyers should institute in using web sites to obtain legal business; given the rapid pace of technological development in this area, additional protections may be warranted in the future.

Lawyer contacts with potential class action members through Internet communications are potentially less intrusive than in-person contacts, but lawyers must nevertheless take care that, in communicating with potential clients over the Internet as in any other form of communication, they conform to the restriction in Rule 7.1(b)(3) against seeking employment by a person who has not sought the lawyer's advice where "the potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer." Likewise, Rule 7.1(c) provides that lawyers may not assist organizations in promoting the use of their services or those of other affiliated lawyers if the promotion activity involves the use of "coercion, duress . . . or vexatious or harassing conduct." Thus lawyers may not use Internet communications in a vexatious or harassing manner.

Practitioners must also, of course, ensure that they have in place workable means of conducting conflicts checks and otherwise assessing the suitability of any potential client before agreeing to the representation. The fact that communications about the lawyer's services are occurring over the Internet does not in any way minimize the attorney's obligations to avoid conflicts of interest.

Finally, our topic raises the question of preserving confidentiality in communicating with clients over the Internet. As we have already discussed in Opinion 281 (1998), the transmission of information from a lawyer to a client by unencrypted electronic mail will not violate Rule 1.6 unless special circumstances require greater means of security. All of the same considerations we discussed in Opinion 281 would apply in analyzing the need to encrypt e-mail communications in the context at issue here.

* * *

We now turn to inquiries we have received on the subject of attorneys' use of web sites on which clients post

requests for bids of legal projects. Our response to such inquiries is motivated in part by the Association of the Bar of the City of New York's ("ABCNY") recent release of an opinion approving this practice with certain restrictions. New York City Ethics Op. 2000-1 (2000).

Yet another of the many ways in which the cyberspace communications revolution has affected law practice is in the birth of web sites offering a service, perhaps best analogized to a bulletin board, on which potential clients may post legal projects and invite attorneys to bid on them. This practice, as the ABCNY noted, is similar to the Requests for Proposals procedure already used by the government and increasing numbers of other clients to select counsel for particular legal projects. The ABCNY, applying the New York Lawyer's Code of Professional Responsibility, approved the use of an Internet-based legal services bidding system in its Opinion 2000-1, provided that four conditions obtain: (1) the client's invitation is not initiated by the lawyer; (2) the fee charged is paid only by the client; (3) no legal fees are shared with the service provider, and (4) the responding lawyer is not prescreened, approved, or otherwise regulated by the web site sponsor. Although we concur with the ABCNY's basic views about the type of Internet-based bidding system described above, the differences between our legal ethics rules and those of New York lead us to different conclusions about the restrictions to be imposed on this practice.

At the outset, we note that we see no ethical evils lurking in the practice; on the contrary, we view it as a potentially positive development in more efficiently matching attorneys and clients seeking legal services. As we noted in Opinion 225 (1992), where we discussed law firms participation in prepaid legal services programs, this "committee encourages the development of new approaches to the provision of legal services, so long as those approaches conform to the general and accepted norms of ethical conduct designed to protect the public and the profession" (quoting D.C. Bar Ethics Op. 91 (1980)).

Again, the touchstone for analyzing such communications is the Rule 7.1(a) standard barring lawyer communications about their services that are "false or misleading." Accordingly, lawyers participating in Internet-based bidding systems must satisfy themselves that their responses to requests for bids on legal projects are not false or misleading in the ways discussed above or in other ways. Claims lawyers make about their services must be evaluated in light of their likelihood to mislead or deceive their intended recipient.

An inquirer has asked whether the restriction articulated by the ABCNY against lawyers paying a fee to access web sites containing postings of legal projects applies under the D.C. Rules of Professional Conduct. We conclude that it does not. The ABCNY's views are based on the New York State ethical prohibition against participation in for-profit referral plans. D.C. Rule 7.1, on the other hand, as we have already noted, explicitly permits the payment of consideration to a non-lawyer intermediary to assist a lawyer seeking employment. Comment [6] to Rule 7.1 explains that this rule "permits a lawyer to pay another person for channeling professional work to the lawyer. . . . Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs." Thus, it is permissible under the D.C. Rules of Professional Conduct for lawyers to pay a fee or other consideration in order to access a web site containing postings of legal projects. Rule 7.1(b)(5) provides that lawyers must take "all reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged." Thus, lawyers paying fees to participate in a web-based bidding service must inform potential clients in their bids on a legal project of the consideration paid in order to access the web site and the effect, if any, of this payment on the proposed fee to be charged the client.

Our rules lead us to a different approach than that of the ABCNY with respect to another consideration in the use of Internet-based bidding services as well. In its Opinion 2000-1, the ABCNY analyzed whether the Internet-based bidding procedure violated restrictions on solicitation contained in the New York Lawyer's Code of Professional Responsibility that do not exist in the D.C. Rules. The ABCNY concluded that the described bidding procedure did not violate New York's anti-solicitation rules because all communications between potential clients and lawyers were initiated by the potential clients. The ABCNY reasoned that it was "the clients who, in effect, have 'solicited' those attorneys who are interested to submit a bid on the project" and thus concluded that the Internet-based bidding system was permissible, provided that clients initiated all communications with lawyers. he same analysis does not apply under the D.C. Rules of Professional Conduct, because application of the D.C. Rules does not turn on the sometimes fine distinction between advertising and solicitation. Instead, Rule 7.1, as most relevant here, prohibits a lawyer from soliciting employment through an intermediary only if the solicitation involves use of a statement that is false or misleading. Rule 7.1(b)(1).

The ABCNY opinion further notes that the arrangement it reviewed did not permit the Internet service to screen, approve, or otherwise direct or regulate attorneys' professional presentations in their RFP responses. The sample site we examined for purposes of preparing this opinion similarly focuses its offers of support services on corporations seeking law firms rather than on law firms responding to RFPs. Unlike the arrangement reviewed by the ABCNY, however, the sample site we reviewed does offer to assist law firms in responding to RFPs in order to ensure compliance "in appropriate formats as required by the corporations." We view such limited involvement in law firms' formulation of RFP responses as permissible under Rule 5.4, since it appears intended merely to ensure that potential clients' informational needs are met. It does not, in other words, appear that the Internet service intends to "direct or regulate the lawyer's professional judgment in rendering such legal services," which would be prohibited under Rule 5.4(c).

The ABCNY opinion states that any fee a law firm pays to a service provider cannot be linked to or contingent on the amount of legal fees the lawyers obtain from a posted project. We agree with this aspect of the ABCNY's opinion, since such an arrangement would violate D.C. Rule 5.4's prohibition against lawyers sharing legal fees with non-lawyers. *See* Opinion 286 (payment to non-lawyer of referral fee contingent on or tied to a lawyer's receipt of legal fees constitutes an impermissible sharing of fees). The web site we examined in preparing this opinion appears to avoid such problems because it is the client who pays all

charges for using the Internet service. These charges are calculated as a portion of the legal bills the client incurs in using a lawyer obtained through the Internet service, but since it is the client who pays the Internet service these bills, there is no impermissible fee sharing under Rule 5.4.

We also agree with the ABCNY that potential confidentiality and conflicts problems may arise under the contemplated arrangement. The inquirer in the ABCNY case proposed to assist responding attorneys in avoiding potential conflicts troubles by giving attorneys the name of the potential client on whose project they intended to bid, along with the name of the adverse party, if any. We agree with the ABCNY's observation that such a procedure, though well meaning, poses potential problems where providing this information could result in disclosure of secret client information, such as an intent to file a future lawsuit or concern about a potential source of liability exposure. The web site we examined attempts to mitigate these problems in several ways, including by blocking corporations from seeing each other's RFPs, allowing RFP access to only those law firms a corporation authorizes, and permitting anonymous RFP postings in some (undefined) circumstances. These procedures help protect against conflicts and confidentiality problems, but do not fully solve them. In particular, we are troubled by the possibility that an unsophisticated client could disclose in an RFP information that could be potentially damaging to it if viewed by lawyers having a conflict of interest. Lawyers should thus assure themselves that any Internet bidding service in which they participate has adequate procedures in place to avoid such problems.

Law firms must also conduct their own internal conflicts reviews in the course of the procedure contemplated for making matches between law firms and clients. Because the procedures we reviewed allow for direct communications between a lawyer and potential client after the first contact, to which the web site sponsor would not have access, it would appear that law firms could rely on their usual protections for confidential information and procedures for undertaking conflicts checks.

To summarize, our approach differs from the ABCNY's in that the D.C. Rules of Professional Conduct allow lawyers to initiate communications with potential clients and to pay a fee to access web sites containing postings of legal projects. On the other hand, we agree with the ABCNY that, when lawyers pay a fee to use such services, the lawyers' charge should not be linked to the size of the legal bills they generate through the service. We also agree with the ABCNY that such services are permissible to the extent that web site sponsors are not involved in directing or regulating attorneys in such a way as to interfere with lawyers' professional judgment in how they would render legal services. Finally, we agree that lawyers must ensure that web sites they use to bid on legal projects have taken adequate steps to protect against confidentiality and conflict of interest problems.

In closing, we reiterate that this opinion discusses the rules that apply to attorneys making use of web sites providing legal project bidding services only to the extent that our rules provide the applicable rules of decision. Questions that arise about substantive law, unauthorized practice of law, and the applicability of other states' rules of professional conduct by virtue of the accessibility of Internet sites to lawyers outside this jurisdiction, are beyond the scope of this committee's mandate.

Inquiry No. 00-8-25
Adopted: November 21, 2000

*Opinion No. 303*

**Sharing Office Space And Services By Unaffiliated Lawyers**

- Unaffiliated lawyers may share office space and related services so long as the arrangements for such sharing do not compromise the confidentiality of each attorney's client information, the independence of each attorney, and the separate obligations of each attorney to comply with the Rules of Professional Conduct. In addition, the sharing arrangements must be structured in a way that does not suggest to the public that the lawyers are affiliated when they are not.

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflicts of Interest)
- Rule 1.10 (Imputed Disqualification)
- Rule 7.1 (Communications Concerning Lawyer's Services)
- Rule 7.5 (Firm Names and Letterheads)

*Inquiry*

This Committee has been asked to address the ethical issues that arise when two or more attorneys agree to share office space and/or office services without forming a law firm or otherwise associating their practices. Similar issues arise when a sole practitioner rents office space and/or services from a law firm. Like the other jurisdictions that have considered this issue, we conclude that unaffiliated lawyers may share office space and/or office services subject to the continuing obligations of the individual attorneys to comply with rules of professional conduct.

*Discussion*

It has become increasingly common, especially in high cost metropolitan areas like the District of Columbia, for attorneys to practice law in shared office suites, often utilizing shared office staff and facilities. Through such sharing arrangements, an individual attorney's overhead expenses for receptionists, support staff, meeting rooms, libraries, copy and fax machines, and the like can be proportionately reduced by the financial contributions of the other attorneys participating in the arrangement. These economic benefits, in turn, help attorneys to deliver cost-effective legal services to their clients.

As other jurisdictions have recognized,[1] and we confirm, nothing in the rules of professional conduct prohibits attorneys from sharing office space, personnel, equipment, or expenses. However, while such sharing arrangements may provide undeniable economic benefits, they also have the potential to create ethical problems that must be recognized and avoided by all attorneys participating in the arrangement.

[1] At least eight other state bar organizations (California, Colorado, Connecticut, Maryland, Michigan, Ohio, Rhode Island, and Virginia) have addressed office and/or service sharing arrangements between unaffiliated attorneys. All have approved such arrangements subject to varying qualifications designed to ensure compliance with the ethical rules addressed herein. *See, e.g.*, California Ethics Opin. 1997-150 (1997); Colorado Ethics Opin. 89 (1991); Connecticut Ethics Opin. 90-27 (1990); Maryland Ethics Opin. 88-10 (1987); Michigan Informal Ethics Opin. CI-1045 (1984); Ohio Ethics Opin. 89-36 (1989); Rhode Island Ethics Opin. 88-5 (1988); Virginia Ethics Opin. 874 (1987).

*Public Confusion*

Office-sharing arrangements by unaffiliated attorneys create a risk of public confusion that the attorneys involved in such an arrangement are in fact affiliated with each other when no such professional relationship exists. D.C. Rule of Professional Conduct 7.1 provides that "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." This proscription applies to both material misrepresentations and material omissions about the lawyer's services, including the professional affiliations of the lawyer.

Messages conveyed to the public, explicitly or implicitly, about the nature of an office- and/or service-sharing arrangement between attorneys are fully subject to Rule 7.1 and must comply with its terms. For example, if attorneys A, B and C are in an office-sharing arrangement that is identified on common letterhead as "The Law Offices of A, B and C," then the public would quite naturally assume that A, B and C were affiliated with each other in the joint practice of law. *See* D.C. Rule of Professional Conduct 7.5(d), Comment [2] ("lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, Smith and Jones, for that title suggests partnership in the practice of law"). If there were no such affiliation, the public would be misled as to the true nature of the relationship among these attorneys.[2]

Similarly, if solo attorney A is renting space and services from law firm B, C & D and the only sign in the vicinity of the office identifies the facilities as "The Law Firm of B, C & D," then the public would quite naturally assume that attorney A is affiliated with the law firm of B, C & D. Once again, the public would be misled as to the true nature of the relationship among these attorneys. To avoid this potential for confusion, all attorneys in office-sharing arrangements should prominently display signage at the entryway to the office space that accurately describes the nature of the separate legal practices operating within that space. *See* Virginia Commw. Bar Cmte. on Ethics & Prof. Op. 874 (1987) (sole practitioner sharing office with law firm should ensure signage and directory indicate lawyer's solo practice and lack of affiliation with law firm).

Another source of public confusion about office-sharing arrangements is the manner in which shared office telephones are answered. A receptionist answering a shared office telephone with the greeting "Good morning, Law Offices of A, B and C" disseminates the same misleading message to the public as the letterhead example discussed above. It would be preferable, of course, for the sharing attorneys to have separate telephone lines that could be answered individually in the name of each attorney by the shared receptionist, but this may not always be practical. When it is not, the shared receptionist must be circumspect in implying an association of the unaffiliated attorneys by the manner in which the office telephone is answered or by any other acts suggesting relationships between the attorneys when none exist. To avoid any implication of affiliation between the individual attorneys, the proper greeting in answering the common telephone line is simply "Law Offices." *See, e.g.,* Ohio Ethics Op. 95-1 (1995); Connecticut Ethics Op. 89-3 (1989); Rhode Island Ethics Op. 88-5 (1988).

Attorneys involved in an office-sharing arrangement must ensure that in all communications made about the nature of their practice, the public is not confused, deceived or misled that there is any firm, partnership, corporate, "of counsel" or other relationship between the attorneys when no such relationship exists.[3] At a minimum, this includes avoiding the use of any written communications – such as letterhead, business cards, office signs, or advertisements – that combine or link the practices of the sharing attorneys in a manner suggestive of an actual affiliation. *See* ABA Formal Op. 310 (1963). If a potential client appears confused about the relationship among the attorneys in such an arrangement, the attorney should take steps to resolve this confusion, including making an affirmative disclaimer of any affiliation with the other attorneys in the shared office space.

*Client Confidentiality*

Another concern in office- and/or service-sharing arrangements between unaffiliated attorneys is preserving the confidences and secrets of each attorney's clients as required by D.C. Rule 1.6. The attorneys involved in the office-sharing relationship must ensure that their own actions and those of the professional and support staff they are responsible for supervising fully comply with this obligation and protect client confidences and secrets.

There are myriad logistical possibilities in office-sharing arrangements that could conceivably threaten client confidentiality. Individual attorney files and storage space in common or shared office areas must be treated in a way that preserves client confidentiality. An attorney in an office-sharing arrangement should not leave confidential client files in any unlocked file cabinets or storage areas within shared office space where they might be accessed and confidentiality compromised by unauthorized individuals.

The same confidentiality concerns apply equally to computerized records and work files. It would be impermissible for unaffiliated attorneys to have unrestricted access to each other's electronic files (including e-mails and word processing documents) and other client records. If separate computer systems are not utilized, each attorney's confidential client information should be protected in a way that guards against unauthorized access and preserves client confidences and secrets.[4] Similarly, attorneys sharing office space should consider the ethical implications of sharing a single fax line, which might permit confidential client information to come into the hands of unauthorized parties, including the unaffiliated attorneys who share office space. *See* Rhode Island Ethics Op. 93-99 (1994); *see also* Colorado Ethics Op. 89 (1991).[5]

[2] The same potential for confusion can arise from the manner in which the sharing attorneys' relationship is denoted on directory listings, office signs, and advertisements and the manner in which the sharing attorneys introduce each other to clients and other members of the public.

[3] It is generally considered inappropriate to use the term "of counsel" to refer to a lawyer who merely shares office space. Kansas Ethics Opins. 83-84 (1983), 83-34A (1984); Michigan Informal Ethics Opin. CI-1081 (1984); Oregon Ethics Opin. 1991-12 (1991).

[4] To the extent a shared computer system is used, it is likely that the same employees or third-party contractors would provide technical support and otherwise service the system. In such cases, the individuals providing technical support, like all shared employees or contractors, must be instructed regarding their obligations to maintain client confidences and secrets, and the lawyers involved must ensure that this occurs.

[5] Where use of private fax lines is not possible, it may be necessary to make clear to potential uses, particularly clients, that the faxed communications are not private. *See* Michigan Informal Ethics Opin. RI-249 (1996).

Regardless of the specific measures taken in the context of particular office-sharing arrangements, the bottom line is that attorneys participating in such arrangements must take all steps reasonably necessary to protect the confidentiality of their individual client information. This includes the appropriate exercise of caution by individual attorneys to refrain from divulging, without client consent, confidential client information in discussions they might have within the shared office space about their respective cases and the appropriate oversight of employees to ensure that they similarly protect client confidences and secrets. In circumstances where the office-sharing relationship involves shared employees, the lawyers participating in the arrangement should take affirmative steps to instruct these employees on their obligations to preserve client confidences and undertake the continuing oversight necessary to ensure that this is done.

*Professional Independence*

Attorneys sharing office space and/or services with other unaffiliated attorneys also must diligently protect the independence of their respective practices. It is only natural that attorneys involved in an office-sharing arrangement might rely on each other as a source of business referrals, back-up coverage when absent from the office, or simply as a sounding board for advice on difficult legal issues. But, in so doing, attorneys must take be careful to protect the attorney-client relationship that exists between them and each of their clients. No matter how convenient the intra-office relationships may become over time, attorneys in office-sharing relationships are not partners in the practice of law together and cannot treat each other as such.

*Conflicts of Interest*

The issue of professional independence is more than a mere aspirational concern, since it directly affects the treatment of potential conflicts of interest among clients represented by office-sharing attorneys. The requirements of D.C. Rule 1.7, dealing with general conflicts of interest, and the other conflict of interest rules are imputed to other lawyers "associated with a firm" under D.C. Rule 1.10. Comment [1] to Rule 1.10 provides that "[T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." The commentary goes on to recognize that in making this determination, it is important to take into account not only the terms of any formal agreement between the lawyers but also whether "they have mutual access to confidential information concerning the clients they serve." *Id.; see also* D.C. Bar Ethics Op. 247 (1994) (imputed disqualification under Rule 1.10 appropriately found where office-sharer was listed as "of counsel" to disqualified attorney).

This is an inherently factual inquiry turning upon the unique facts and circumstances of particular office-sharing relationship. But it is important to recognize that office-sharing arrangements can, in certain circumstances, create conflict issues potentially disqualifying the attorneys participating in those arrangements. *See, e.g.,* ABA Informal Ethics Op. 1486 (Feb. 8, 1982) (lawyer may rent space from a law firm even though the lawyer and the law firm represent potentially adverse interests provided that appropriate care is taken to protect client confidences and clients consent to representation after disclosure); ABA Informal Ethics Op. 1474 (Jan. 18, 1982) (military lawyers working in same office and sharing common secretaries and filing facilities should avoid representing conflicting interests); Virginia Ethics Opin. 677 (Apr. 2, 1985) (lawyer sharing office space and expenses with another lawyer may not represent husband in divorce if office-sharer previously represented husband and wife in property settlement that is at issue in divorce action); *In re Sexson*, 613 N.E.2d 841 (Ind. 1993) (where lawyers shared office space, secretary, letterhead, phone lines, and apparent access to confidential information, it was reasonable for client to assume that lawyers were members of same firm; lawyer could not represent wife in divorce action when another office-sharer represented husband in personal injury claim). Attorneys who wish to share office space must ensure that these arrangements do not create the appearance of an impermissible conflict of interest or otherwise adversely affect their ability to zealously represent their clients.

Inquiry No. 00-8-32
Adopted: February 20, 2001

*Opinion No. 304*

## Management of a Law Firm's Human Resources Functions by an Employee Management Company

• A law firm may contract out its human resources functions (even to the extent that the firm's employees are considered, for certain purposes, employees of an unrelated company), but only if the arrangement does not prevent or inhibit any lawyer from abiding by the applicable Rules of Professional Conduct and does not attempt to insulate any lawyer from liability for her own malpractice.

### Applicable Rules

• Rule 1.8(g)(1) (Conflict of Interest; Malpractice Liability)
• Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer)
• Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
• Rule 5.4 (Professional Independence of a Lawyer)
• Rule 5.5(b) (Unauthorized Practice of Law)

*Inquiry*

The Legal Ethics Committee has been asked whether the Rules of Professional Conduct permit a law firm to have all its workers—lawyers as well as nonlawyers—employed by an unrelated employment management company. The inquirer's firm includes two lawyers, one of whom is the owner of the firm. Both would become employed by the employee management company along with the approximately sixteen nonlawyer employees. The employee management company would be responsible for payroll services, employee benefits, withholding and similar tax payments, compliance with employment laws (e.g., Fair Labor Standards Act, immigration, Family and Medical Leave Act, Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)), personnel recordkeeping, unemployment compensation, workers' compensation, and the like.

The inquirer advises that regardless of whether the law firm's workers are considered employees of the law firm, of the employee management company, or of both for purposes of the laws governing labor and employment, the law firm (in the person of its single owner) would retain, full management and supervisory authority (e.g., hiring, firing, promotion, setting of compensation, assignment and

supervision of work). Moreover, the law firm would have custody and control of all client files, firm accounting information (other than employment-related information) information, and the like.

Put differently, the management company would not be an owner of the firm in lay terms, would not share in the profits of the law firm, would have no authority to make employment decisions, and would have no say in directing lawyers or legal assistants what duties to perform or how to carry out those duties. The management company would perform functions unrelated to the provision of legal services in much the same way that a cleaning service, messenger service, or photocopying company may assist a law firm.

The employee management company might provide similar services to other companies, including other law firms. Although the employee management company might in some cases be considered the employer or co-employer of the employees of all these firms from the standpoint of human resources law, these individuals would work at their separate law firms just as if they were employees of those firms. Indeed, the individual law firms will not necessarily even know the identities of the other firms doing business with the employee management company, and there would be no contact between the firms by virtue of their use of the same employee management company.

*Discussion*

In recent years, an increasing number of businesses have engaged unrelated companies to perform one or more human resources functions. In some cases the employee management company acts as a co-employer (as opposed to merely performing human resources functions). The principal advantage of such contracting out is that the business does not have to handle the administrative functions. Additional benefits of a co-employment arrangement include the creation of larger employee groups for purposes of purchasing health and other benefits and the coverage of the employee management company by the workers' compensation laws.

The relationship between a business—in this instance, a law firm—and an employee management company can take many forms. Two of these are the "professional employer organization," or PEO, and the administrative service organization, or ASO. A PEO is "a company which contractually assumes and manages . . . human resource and personnel responsibilities . . . for . . . small to mid-sized businesses." National Ass'n of Professional Employer Organizations, *Common Questions About PEOs Answered*, at 1 (downloaded from http://www.napeo.org/ind-questions.htm, Aug. 28, 2000). In some forms, a PEO can assume the role of the employer or co-employer of the work force of its client business (in this case, the law firm). Seventeen states currently require registration or licensing of PEOs, *id.*, though the District of Columbia is not one of them. A typical PEO client is a small business with about sixteen employees. *Id.* at 2. For the reasons discussed below, at least some PEOs appear to have policies and practices that are impermissible under the Rules of Professional Conduct.

Another form of employee management arrangement, called the ASO, administers a "client's" (in this case, the law firm's) human resource functions, payroll, employee benefits, workers' compensation, and government compliance, but does not "rely upon or assume an employment relationship with the employees, leaving the [law firm] as the sole employer." Rufus E. Wolff, "Client Service Agreements for ASO Clients," PEO Insider, Oct. 2000, at 6. The ASO provides its services as an administrative agent and advisor rather than as a co-employer, and hence ordinarily exercises no legal authority over the employees themselves. *Id.* at 6-7. Thus wages and employment taxes are paid under the Employer Identification Number of the client business, the client business remains the sponsor of employee benefit programs, and any workers' compensation claims are made under a policy issued to the client business. *Id.* at 6. Unlike a PEO, an ASO ordinarily is not liable for payment of employee wages or taxes. *Id.* at 7. Finally, an ASO is not subject to the state licensing requirements that apply to PEOs. *Id.* at 6.

A lawyer in this jurisdiction may practice alone, be a partner, associate or of-counsel in a private firm, work "in house" as a corporate or labor union counsel, toil in an accounting firm, labor in a public interest position, serve as a government lawyer, teach the law, or engage in any of a host of other activities. Whatever the nature of a lawyer's employment, however, she must abide by the D.C. Rules of Professional Conduct. Put differently, the Rules forbid employment arrangements that may impair such responsibilities of a lawyer as the duties to exercise independent professional judgment on behalf of her client, D.C. Rule 2.1; *see* Rule 1.8(e)(2), to maintain the confidentiality of information gained during the course of a representation, Rule 1.6, 1.8(e)(1), to act zealously on behalf of her client's interests, Rule 1.3(a), to avoid situations in which her client's interests conflict with those of another client or of the lawyer herself, Rule 1.7, and to supervise adequately the conduct of her organization's other lawyers, Rule 5.1, and nonlawyers, Rule 5.3.

Note that the supervisory responsibilities imposed by Rule 5.1 are not limited to employees of the supervising lawyer but extend to all lawyers over whom the lawyer has "direct supervisory authority." D.C. Rule 5.1(b). In the case of nonlawyers, the responsibility covers those "employed *or retained by or associated with*" the lawyer, Rule 5.3 (emphasis added), "whether employees or independent contractors," Rule 5.3 comment [1]. "The key is supervision, and that supervision must occur regardless of whether the [nonlawyer] is employed by the attorney or retained by the attorney." *In re Opinion No. 24*, 128 N.J. 114, 127, 607 A.2d 962 (1992). Thus even if a lawyer or nonlawyer at the firm technically is the employee of the management company, the lawyers retain their full supervisory responsibilities under the Rules of Professional Conduct.[1]

The only practical difference between the proposed arrangement and the situation in a typical private law firm is that the mechanical aspects of employment will be handled by an entity other than the law firm. The employee management company will have no supervisory authority over any lawyer or nonlawyer in the firm, will play no role in employment decisions, will have no access to client confidences, and will occasion no conflicts by virtue of its presence. The supervisory lawyers in the firm will retain their responsibilities under Rules

[1] This is consistent with our prior ruling permitting the employment of temporary lawyers - a ruling that made no distinction based on whether the temporary lawyer is an employee of the employment agency or the law firm. *See* D.C. Bar Ethics Op. 284 (1998).

5.1 and 5.3 to oversee the work of the other lawyers, and the nonlawyers, in the firm. *Cf. Florida Bar v. Flowers*, 672 So.2d 526 (Fla. 1996) (disciplining lawyer who allowed independent consultant to hold himself out as being employed by lawyer).

The involvement of the employee management company will not result in the sharing of any individual employees working on client matters—lawyers or nonlawyers—among firms that use the services of the employee management company. Because there will be no sharing of employees between law firms, and the various firms using the employee management company will not thereby have access to one another's files or offices, we see no client confidentiality or conflict of interest problems.[2]

We said in permitting the use of temporary lawyers that such individuals "and their employing lawyers each have an obligation to ensure that the appropriate standards and requirements are met." D.C. Bar Ethics Op. 284 (1998). These include the ethical obligations of competence, independent professional judgment, undivided loyalty, and preservation of a client's confidences and secrets. *Id.* The same holds here: The management company may not exercise any control—formal or informal, direct or indirect—that would affect these or any other ethical obligations attendant upon the provision of legal services. This extends to decisions about the hiring, firing, promotion, compensation, and work assignments of lawyers and legal assistants (though such control may be permissible where only clerical or secretarial employees are involved and the control exercised is unrelated to the provision of legal services). Moreover, the management company may not take over, wholly or partly, any of the lawyer's responsibilities outlined above.

The inquiry does not indicate the basis on which the management company will be compensated for its work. So long as the employee management company's compensation is not a function of the fees earned by the law firm, however, the arrangement will not implicate the fee-splitting prohibition of Rule 5.4. D.C. Bar Ethics Op. 284 (1998) (payment of fee to agency providing temporary lawyers not fee splitting); ABA Formal Op. 88-356 (1988) (payment of fee to agency providing temporary lawyers not fee splitting, even where cost passed on to client); Ill. Op. 90-23 (1991); Mich. Informal Op. RI-310 (1998) (permitting fee based upon hours worked by leased lawyer but not upon fees collected for such work); Va. Legal Ethics Op. 1712 (1998); N.C. Op. RPC 104 (1991); N.J. Op. 631 (1989); *cf. Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (prohibiting union that employed—and had supervisory control over—lawyers from receiving attorney fees above union's actual costs). Unlike the consulting firm whose "loans" of its lawyer-employees were disapproved in our Opinion 182 (1987), the employee management firm here will not—and may not—exercise supervisory authority over the lawyers or legal assistants. That the employee management firm presumably will realize a profit from its services to the law firm does not alter our position. *See* D.C. Bar Ethics Op. 284 (1998) (permitting, by implication, agencies to profit from making lawyers employed by them available to law firms on a temporary basis); ABA Formal Op. 88-356 (1988) (expressly permitting same).

Moreover, we do not believe that the employee management agency would be engaged in the unauthorized practice of law because the agency would not be holding the lawyers out to clients (and indeed would not be dealing with clients at all), would have no control over the selection of lawyers to work for the firm, and would not supervise the practice of law by such lawyers. *See* D.C. Unauth. Prac. of Law Op. 6-99 (1999) (holding that activities of temporary lawyer placement agencies do not constitute unauthorized practice); ABA Formal Op. 88-356 n. 12 (1988) (furnishing temporary lawyers directly to clients would constitute unauthorized practice of law); Ill. Op. 90-23 (1991). As with the engagement of a temporary lawyer, the arrangement should be disclosed to clients if it is "material to the representation." *See* D.C. Bar Ethics Op. 284 (1998) (establishing materiality threshold); ABA Formal Op. 88-356 (1988) (disclosure that lawyer is employed on temporary basis not required where she is working under direct supervision of regular firm lawyer). Because the hiring, firing, and conditions of employment are to be under the control of the lawyer-owner of the firm, we have little concern that the employee management arrangement will be used (and stress that it may not be used) to avoid the prohibition against invidious discrimination by lawyers in conditions of employment. *See* D.C. Rule 9.1.

A lawyer may not limit prospectively her liability for her own malpractice, D.C. Rule 1.8(g)(1); D.C. Bar Ethics Op. 235 (1993), and a lawyer who did so using the device of an employee management company would violate Rule 1.8(g)(1). We note, though, that lawyers may in some instances avoid liability for the malpractice of their partners by practicing in a limited liability partnership or limited liability company, D.C. Bar Ethics Op. 235 (1993); *see* D.C. Code §§ 29-1314 (1996) (professional limited liability corporations), 41-153.6(c) (1998) (limited liability partnerships). We normally do not address issues of law outside the Rules of Professional Conduct, and accordingly offer no view on whether the proposed arrangement would affect the malpractice liability of the lawyer-owner for errors and omissions of the other lawyers and nonlawyers working at the firm. "Whether a lawyer may be civilly or criminally liable for another lawyer's conduct is a question of law beyond the scope of [the Rules of Professional Conduct]." D.C. Rule 5.1, Comment [7]. We do observe, however, that from a professional responsibility standpoint, the supervisory responsibilities of an owner-lawyer are personal to her, extend to everyone acting under her direction regardless of whether such individuals are her "employees," and would not be altered by the fact that the firm's employees were co-employed by another entity. Rules 5.1, 5.3. Thus we do not see how the arrangement would—or could, consistently with the requirements of Rule 1.8(g)(1)—avoid liability for the owner's own errors and omissions, including whatever liability may result from inadequate supervision of others in the firm, and we offer no view on whether the arrangement would affect the liability of the owner under the *respondeat superior* doctrine.

We note that a number of other jurisdictions have approved similar arrangements, subject to the limitation that the lawyer-owner(s) of the firm, rather than the employee management agency, maintain exclusive control over hiring, firing, and

[2] In particular, the special concerns about disqualification that may arise in respect of a temporary lawyer who works for more than one firm at a time, *see* ABA Formal Op. 88-356 (1988); D.C. Bar Ethics Op. 284 (1998), do not obtain here. Of course the normal conflicts requirements for lateral lawyers, *see* D.C. Bar Ethics Op. 279 (1988), and nonlawyers, *see id.* § 4; D.C. Bar Ethics Op. 227 (1992), will apply even where an individual moves between two law firms that use the same employee management company.

other aspects of the lawyer's employment. *E.g.*, Ill. Op. 90-23 (1991); Mich. Informal Op. RI-310 (1998); Mo. Informal Op. 990019 (disapproving employee management where lawyer would not have unilateral right to discipline or terminate leased nonlawyer employee); N.C. Op. RPC 104 (1991); N.J. Op. 631 (1989).

Finally, some PEOs adhere to published standards of a trade organization known as the Employer Services Assurance Corporation ("ESAC"). ESAC requires that a PEO share with the "client" (i.e., the law firm), and in some instances exercise exclusively, the power to hire and fire employees (who here would include lawyers and legal assistants as well as clerical and secretarial staff), that the PEO have at least a shared right to direct and control the work of the employees, and that ESAC have access to client (i.e., law firm) work sites and records. A lawyer owner who permitted the removal of these rights and responsibilities wholly or partly from the management of the law firm would violate the Rules of Professional Conduct. Hence the use of a PEO by law firms in this jurisdiction is prohibited if the arrangement gives the PEO actual (as opposed to merely legal) authority over the hiring or firing of lawyers or legal assistants, or authorizes the PEO to direct or control the provision of legal services by any employee of the law firm. The responsibilities in question include the duties to exercise independent judgment on behalf of clients, (*see* D.C. Rules 1.8(e)(2), 2.1), maintain client confidences and secrets (*see* Rules 1.6, 1.8(e)(1)), act zealously on behalf of the client's interests (*see* Rule.1.3(a)), avoid conflicts (*see* Rule 1.7), and supervise the conduct of the others working for the firm (*see* Rules 5.1, 5.3). By contrast, the ASO form, or the PEO form without such objectionable attributes, does not appear to raise any of these concerns.

Thus we answer the inquiry in the affirmative, subject to the limitations and concerns noted above. Use of an employee management company by a law firm is permissible only if it does not affect the firm's provision of legal services and does not limit or infringe any of the duties and responsibilities of lawyers set out in the D.C. Rules of Professional Conduct.

Inquiry No. 99-6-21
Adopted: February 20, 2001

*Opinion No. 305*

## Ethical Considerations Arising From Representation Of Trade Association

• Representation of a trade association does not, without more, create an attorney-client relationship with each member of the association; particular circumstances of a representation, however, may create an attorney-client relationship with one or more of the members.

When counsel for a trade association is asked to represent a client in a matter adverse to a member of that trade association, the lawyer must consider whether a *de facto* attorney-client relationship exists with the member, as well as whether the prospective representation would be impaired by the lawyer's existing representation of the trade association.

### Applicable Rules

• Rule 1.6 (Confidentiality of Information)
• Rule 1.7 (Conflict of Interest)
• Rule 1.13 (Organization as Client)
• Rule 1.16 (Declining or Terminating Representation)

*Inquiry*

The proliferation of trade associations, particularly in Washington, D.C., has led to inquiries regarding a lawyer's ethical responsibilities to the trade associations she represents and, also, to the association's members.[1] The primary concern is the circumstances under which a lawyer representing a trade association may undertake a representation adverse to a member of the trade association.

*Discussion*

Rule 1.13(a) states that "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The Comment to Rule 1.13 further states that "The duties defined in this Comment apply equally to unincorporated associations." Comment [13] to Rule 1.7 adds, "[T]he lawyer who represents a . . . trade association or other organization-type client is deemed to represent that specific entity, and not its . . . members or 'other constituents.'" A lawyer representing a trade association then, does not, simply by or through that representation, establish an attorney-client relationship with each member.[2]

This view has found considered acceptance elsewhere. *See* ABA Ethics Op. No. 92-365 (July 6, 1992) (interpreting the comparable provision of the Model Rules of Professional Conduct (1983, amended 1991); Oregon Bar Ethics Op. No. 1991-27 (a lawyer who represents a trade association may represent one member of the association against another member with respect to a matter unrelated to the work performed for the association without disclosure to or consent from the association).[3] This approach, however, does not conclude the analysis. There remains for consideration the penumbra where an attorney is asked to undertake a representation adverse to one or more members of the trade association that she represents.

*1. Representation Adverse to Member*

In general, the lawyer for a trade association is not prohibited from representing the association in a manner adverse to a member or members. Comment [13] to Rule 1.7; D.C. Bar Ethics Op. No. 216. In the situation where the trade association becomes adverse to the interests of one of the members, Comment [8] to Rule 1.13 provides guidance to the trade association's lawyer:

> There are times when the organization's interest may be or become adverse to

[1] A trade association is "an association of business organizations having similar problems and engaged in similar fields formed for mutual protection, interchange of ideas and statistics and for maintenance of standards within their industry." BLACK'S LAW DICTIONARY 1493 (6th ed. 1990). *See also Nat'l Muffler Dealers Assoc., Inc. v United States*, 440 U.S. 472, 483 n.15 (1979) (noting that the Department of Commerce has defined a trade association as "'a nonprofit, cooperative, voluntarily-joined, organization of business competitors designed to assist its members and its industry in dealing with mutual business problems.'") (citation omitted).

[2] While this Opinion concerns trade associations, the principles addressed here may apply to other types of organizations. *See* Rule 1.13.

[3] Information obtained from a member while the lawyer is acting for the trade association is protected by the attorney-client privilege and subject to the confidentiality requirements of Rule 1.6; however, it is the trade association that holds the privilege, not the member. Comment [3] to Rule 1.13; D.C. Bar Ethics Op. No. 269. As described below, however, a situation may arise where the member, through the lawyer's "act or omission," has a reasonable belief that it was being represented individually by the lawyer, in which case the confidentiality requirements of Rule 1.6 protect the member's communications as well as the trade association's. *See* D.C. Bar Ethics Op. No. 279 n.6.

> 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. . . .

*See also Shadow Isle, Inc. v. American Angus Assoc.*, No. 84-6126-CV-SJ-6, 1987 WL 17337, at *4 (W.D. Mo. Sept. 22, 1987) (law firm not barred from continuing to represent trade association in suit brought by member where the association was the only client recognized by the firm). In addition, since the member is not a client of the association's lawyer, the lawyer is usually free to represent an unrelated party with interests adverse to the member. Comment [13] to Rule 1.7.

Under certain circumstances, however, the lawyer may be deemed to represent an individual member, notwithstanding the absence of a formal attorney-client relationship. Comment [14] to Rule 1.7. *See also* Association of the Bar for the City of New York ("ABCNY") Ethics Op. No. 1999-01. "In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation." Comment [14] to Rule 1.7, *citing* ABA Ethics Op. No. 92-365. The threshold query, then, is whether the member should reasonably be regarded a *de facto* client of the lawyer.

*2. Attorney-Client Relationship with Member of Association*

"[D]etermining whether and to what extent the individual member has become a client requires careful examination of all of the circumstances of the firm's relationship to and representation of the trade association." ABA Ethics Op. No. 92-365. An attorney-client relationship may be formed in the absence of an express agreement, and is "not dependent on the payment of fees [or] . . . upon the execution of a formal contract.". *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311,1317 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). What is most important is whether the member of the trade association disclosed confidential information to the association's lawyer, and the surrounding circumstances and expectations. ABA Ethics Op. No. 92-365. *See also Westinghouse*, 580 F.2d at 1319-1320; *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d Cir. 1981).

In *Westinghouse*, the leading case on this issue, the law firm for a trade association also represented a party in litigation adverse to some of the association's members. The affected members moved to disqualify the firm. These members had previously submitted information to the firm in connection with legislative efforts on behalf of the association, with the understanding that all material would be kept confidential and in the belief that the firm was acting on the members' behalf. Although the court expressly declined to create a per se rule that a lawyer for a trade association represents every member of the association, it disqualified the law firm because the association members reasonably believed they were submitting confidential information to a firm acting in their individual behalf.

In its opinion regarding the representation of trade associations, the American Bar Association Committee on Ethics and Professional Responsibility drew upon *Westinghouse* as well as its previous conflict analysis with respect to the representation of corporations and partnerships. ABA Ethics Op. No. 92-365; *see also* ABCNY Ethics Op. 1999-01, *citing* ABA Ethics Op. 95-390. The factors considered by the ABA Committee included whether the lawyer involved had affirmatively assumed a duty of representation to the member of a trade association; whether the member had separate representation; whether the lawyer represented the member before commencing its representation of the association; and whether the member relied upon the lawyer's representation of its individual interests. In addition, the Committee commented that the size of the trade association may bear on the reasonableness of any member's expectation of representation; for example, it is more likely to be unreasonable for a member of a large association to expect that the association's attorney represents its individual interests.

If, under the analysis described above, a lawyer concludes that an individual association member should be treated as a client of the law firm, the lawyer must consider whether it faces a conflict of interest.[4] If the new representation would require the lawyer to advance two adverse positions in a single matter, then Rule 1.7(a) prohibits the representation. In other circumstances, the applicable rule is Rule 1.7(b), which provides that a lawyer shall not represent a client with respect to a matter if:

> (1) that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;
>
> (2) such representation will be or is likely to be adversely affected by representation of another client;
>
> (3) representation of another client will be or is likely to be adversely affected by such representation; or
>
> (4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

Rules 1.6 (confidentiality of information) and 1.10 (imputed disqualification) may also be implicated. *Cf. Westinghouse*, 580 F.2d at 1321 (referencing comparable rules under Code of Professional Responsibility). To overcome the conflict and continue the adverse representation, the lawyer must disclose the issue and obtain the consent of the member as well as of the prospective client, pursuant to Rule 1.7(c).[5]

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[4] If the firm's representation of the trade association has concluded when the hypothetical new matter is presented, such that the association is a former client, Rule 1.9 would control:

> 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 consents after consultation.

[5] Rule 1.7(c) permits representation to go forward despite a conflict "if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." Comment [19] to Rule 1.7 sets forth the requirements for disclosure:

> "Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation. . . . Full disclosure also requires that clients be made aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation."

The Terminology section of the Rules defines "consent" as "a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question."

*3. Impairment of Representation*

Even if no attorney-client relationship exists with the member, the lawyer must determine whether the representation would be materially impaired by her representation of the trade association. Pursuant to Comment [14] to Rule 1.7, representation (absent informed consent) would be improper if:

> (a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client. [sic]
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or
>
> (c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

*See also Glueck*, 653 F.2d at 750; ABCNY Ethics Op. No. 1999-01. In *Glueck*, the Second Circuit adopted the following test:

> Disqualification will ordinarily be required whenever the subject matter of a suit is sufficiently related to the scope of the matters on which a firm represents an association as to create a realistic risk either that the plaintiff will not be represented with vigor or that unfair advantage will be taken of the defendant.

*Glueck*, 653 F.2d at 750. This test involves a careful analysis of the attorney's relationship and dealings with the member and the member's relationship and dealings with the association. For example, a member's disclosure of confidential information relevant to the association's matter undertaken by the attorney may be a basis for disqualification. *Id.*[6] The *Glueck* court affirmed the disqualification of a law firm that represented a trade association in collective bargaining negotiations. The firm also represented a former executive of one of the association's members in a breach of employment contract dispute. Applying the "substantial relationship" test, the court concluded that, while preparing for collective bargaining, the law firm might well learn of the member's policies or practices bearing on the executive's termination, and thus the trial court did not abuse its discretion in disqualifying the law firm. *Glueck*, 653 F.2d at 750.[7] *Cf. Shadow Isle*, 1987 WL 17337, at *4 (law firm not barred from continuing to represent trade association in suit brought by member where no danger of divided loyalty to two clients existed since the association was the only client recognized by the firm).

Alternatively, the matter may not be undertaken if the result sought by the prospective client is likely to have a material adverse impact on the trade association's finances. *See* Comment 16 to Rule 1.7. Disqualification on the grounds of financial adversity was appropriate in *North Star Hotels Corp. v. Mid-City Hotel Assocs.*, 118 F.R.D. 109 (D. Minn. 1987), where a firm represented a hotel manager in a suit against the partnership that owned the hotel. The firm already represented two development partnerships whose general partner was also the general partner of the hotel partnership. Because any judgment against the hotel partnership would have a financial impact on the two development partnerships represented by the firm, the court disqualified the firm for a conflict arising from "financial adversity". 118 F.R.D. at 112-13; see also ABA Ethics Op. No. 92-365, discussing *North Star Hotels Corp.*.

If the analysis demonstrates that the lawyer's representation of the trade association will materially limit its representation of the prospective client, then the lawyer may only accept or continue the representation by obtaining the consent of the trade association and the prospective client, pursuant to Rule 1.7(c). See Comment 1 to Rule 1.16 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest, and to completion.").

*Conclusion*

A lawyer who represents a trade association does not, without more, represent the members of the association. When asked to represent a client in a matter where the lawyer would be adverse to an association member, however, the lawyer must consider the relevant facts and circumstances to determine if the member has a reasonable belief that an attorney-client relationship exists between the member and the lawyer. If so, the lawyer may accept the new representation only with the consent of both the prospective client and the member. If no attorney-client relationship exists with the member but the lawyer's representation would be impaired because of a substantial relationship between the subject of the new representation and its representation of the trade association, or if the new matter is likely to be financially adverse to the association, then the representation may proceed only with the consent of the client and the trade association.

Inquiry No. 00-6-15
Adopted: January 16, 2001

*Opinion No. 306*

**Practicing Law While Simultaneously Selling Insurance**

• A lawyer who also is a licensed insurance broker may sell insurance products to the general public, provided that the lawyer fully complies with the Rules of Professional Conduct applicable to lawyers acting in non-lawyer capacities. When a lawyer is selling insurance products to her clients, she must ensure: (1) her own professional judgment on behalf of the client will not be adversely affected by the transaction; (2) the terms of the transaction are fair and reasonable to the client; (3) the client is advised of the right to seek independent counsel; (4) the client has an opportunity to seek independent counsel; (5) the client is advised of the lawyer's possible conflict of interests and attendant possible adverse consequences; and (6) the client provides written consent to the transaction.

**Applicable Rules**

• Rule 1.6 (Confidentiality of Information)
• Rule 1.7 (Conflict of Interest: General Rule)
• Rule 1.8 (Conflict of Interest: Prohibited Transactions)
• Rule 8.4 (Misconduct)

*Inquiry*

The inquirer is a lawyer who also holds a license as an insurance broker.

[6] Glueck and other cases refer to the trade association member in such a situation as a "vicarious" or derivative" client. As the ABCNY Committee on Professional and Judicial Ethics observed, such names are not helpful to the analysis. ABCNY Ethics Op. 1999-01.

[7] For a discussion of the "substantially related" test in this jurisdiction, *see* Rule 1.9 and *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc).

Recently, the inquirer, a member of the District of Columbia Bar, left government service and announced her intention to engage in the private practice of law. The inquirer plans to practice law and sell insurance products to both clients and the general public. The inquirer requested our advice concerning whether the Rules of Professional Conduct allow a lawyer to practice law and sell insurance simultaneously from the same office. The inquirer also asked whether it was ethical for her to offer to sell insurance to clients who had retained her for legal services.

*Discussion*

This Committee previously has opined that "[t]he Rules of Professional Conduct erect no bar to a lawyer engaging in another business, separate from his or her law practice, so long as the lawyer's engagement in that business does not result in violations of applicable provisions of the Rules." D.C. Bar Op. No. 226 (1992) (citing *e.g.,* Rules 1.3 (duty of zealous representation); 1.7(b)(4)(professional judgment adversely affected by lawyer's responsibility to third party or lawyer's own financial interests); 1.8(a)(transactions with client)). We also have noted that a lawyer performing multiple professional roles (*i.e.*, lawyer and broker) with respect to a single transaction should comply with applicable provisions of the Rules of Professional Conduct regardless of which "hat" she is wearing in particular aspects of that transaction. *See* D.C. Bar Op. No. 226.

When the inquirer is selling insurance to non-clients, she is not functioning as a lawyer or dealing with individuals whom she has represented as a lawyer. Accordingly, the inquirer must ensure the client understands that she is acting exclusively as an insurance broker and not as a lawyer in the insurance transaction. As a member of the Bar, however, the inquirer must still comply with certain Rules of Professional Conduct even though she is selling insurance instead of practicing law. The relevant Rules of Professional Conduct would be those that apply to lawyers acting in non-lawyer capacities. *See, e.g.*, Rule 8.4 (lawyer may not "[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

Further, when selling insurance products to non-clients, the inquirer should ensure that an attorney-client relationship is not inadvertently created. The prospective purchaser of insurance products may know that the inquirer is a lawyer, in part, because insurance will be sold from a law office. The prospective purchaser also may have or may indicate an expectation that the inquirer will bring her legal judgment to bear in recommending insurance products. Under either circumstance, the inquirer should inform the prospective purchaser that she is not functioning as a lawyer and will not be exercising professional judgment as a lawyer on behalf of the purchaser.

If the inquirer sells insurance products to her client, she is entering into a business transaction with the client. Rule 1.8(a) provides:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
>
> (1)The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2)The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
>
> (3)The client consents in writing thereto.

Accordingly, in selling insurance products to her client, the inquirer must ensure that the terms of the transaction are fair and reasonable to the client and fully disclosed and transmitted to the client in writing. The inquirer also should advise the client of the client's right to seek independent counsel. Next, the inquirer must give the client an opportunity to seek the advice of an independent attorney concerning the terms of the insurance transaction. The matter in which the client is given an opportunity to seek the advice of independent counsel may vary depending on such factors as the sophistication of the client, the magnitude of the transaction, and the client's certitude with respect to the need to consult with independent counsel. *Cf.* Comments [19] & [20] to Rule 1.7. The inquirer then must get the client's written consent to the transaction.

In addition to complying with Rule 1.8(a), the inquirer also must comply with Rule 1.7(b)(4) when selling insurance products to her clients. Rule 1.7(b) provides that "a lawyer shall not represent a client with respect to a matter if: . . . (4) [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." However, Rule 1.7(c) allows a lawyer to represent a client despite a conflicting financial or business interest "if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."

In order to comply with Rule 1.7(b), the inquirer should not recommend or enter into a business transaction with a client unless she concludes that her professional judgment on behalf of the client will not be adversely affected by the transaction. *See* Comment [25] to Rule 1.7. The inquirer must be careful that her ability to make a profit on the sale of insurance does not cloud her professional judgment as to whether insurance is really needed by the client. *See* N.H. Bar Op. No. 1998-99/14 (2000). In this regard, the New York State Bar concluded that a lawyer engaged in estate planning may not recommend or sell life insurance products to the lawyer's estate planning clients if the lawyer has a financial interest in the sale of the particular products. The New York State Bar reasoned that under such circumstances the lawyer's financial interest would be reasonably likely to interfere with the lawyer's independent professional judgment in advising the client how best to satisfy his or her financial needs regarding trust and estate planning. *See* N.Y. State Bar Op. No. 619 (1991).

Even when the inquirer concludes that her professional judgment on behalf of the client will not be adversely affected by the transaction, the inquirer should not recommend or enter into the business agreement without full disclosure to the client of the inquirer's own interest in the transaction so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the inquirer's interest in the insurance product offered (including the fact that the lawyer will be earning commissions, discounts, or other benefits from the insurance underwriter or any other third party), alternative sources for insurance

services, possible adverse consequences of the inquirer's representation, and sufficient information so that the client understands that the provision of insurance services is not a legal service. *See* Comment [25] to Rule 1.7. This disclosure does not have to be in writing or take any particular form. *See* Comment [20] to Rule 1.7. However, "the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide fully informed consent." *Id.*

In the event that the inquirer's obligation to the insurance underwriter or another party precludes full disclosure to her client, the inquirer cannot proceed with the insurance transaction. *See* Comment [19] to Rule 1.7. The inquirer also must obtain the client's consent to proceed with the transaction notwithstanding the inquirer's conflicting interests.

In selling insurance to her client, the inquirer also must be mindful that she still is bound by all of her obligations to the client as a result of the existing attorney-client relationship in matters other than the insurance transaction. Thus, the inquirer has, among other obligations, a duty to preserve the client's secrets and confidences. *See* Rule 1.6. To the extent that the inquirer knows about the client's secrets or confidences that are inconsistent with the provision of insurance services, the inquirer cannot reveal that information without the client's consent unless otherwise authorized by law. However, the inquirer cannot "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." *See* Rule 8.4. There may well be situations in which the inquirer is obligated to disclose certain information to the insurance company that underwrites the policies she sells. In such circumstances, it may not be possible for the inquirer to sell insurance to the client.

The views we express in this Opinion are supported by recent ethics opinions in other jurisdictions. The New Hampshire Ethics Committee advised that a lawyer who also is a licensed insurance broker may offer insurance products to her estate planning clients, so long as the clients consent in writing after full disclosure and an opportunity to consult with an independent attorney, the transaction is fair, and the lawyer satisfies herself that her professional judgment will not be clouded by her interest in selling the insurance. *See* N.H. Bar Op. 1998-99/14. Similarly, the New York State Bar Association Committee on Professional Ethics allowed a lawyer licensed as an insurance broker to sell insurance products to clients, provided that the lawyer's professional judgment as a lawyer would not be impaired and the lawyer makes clear that, in selling insurance, the lawyer is not exercising professional judgment on the client's behalf. *See* N.Y. State Bar Op. No. 687 (1997). The lawyer also must obtain the client's consent, after full disclosure of the lawyer's conflicting interest, to proceed with the transaction. *Id. But see* N.Y. State Bar Op. No. 619 (estate planning lawyer could not sell insurance products to client because his financial interest interfered with independent professional judgment in advising client on trust and estate matters). The New York State Bar allowed the lawyer to sell insurance products to non-clients subject to the obligation to avoid deceitful conduct and subject to solicitation rules. New York State Bar Op. No. 687, *see also* S.C. Adv. Op. No. 98-29 (1998)(practicing attorney with insurance license not prohibited from selling life insurance in S.C.); Utah Eth. Op. No. 146A (1995)(lawyer may sell insurance products to existing legal clients after fulfilling the disclosure and consent requirements); Mich. Eth. Op. No. RI-135 (1992)(lawyer/insurance agent may sell insurance to law clients provided that ethics rules regarding business transactions with clients, confidentiality, and conflicts of interest are observed); Ill. Adv. Op. No. 90-32 (1991)(lawyer may sell insurance products to legal clients with disclosure and consent). Therefore, the weight of authority supports our conclusion that a lawyer may sell insurance products to the general public and her client, provided that the lawyer follows certain Rules of Professional Conduct.

Inquiry No. 00-8-33
Adopted: February 20, 2001

*Opinion No. 307*

## Participation in Government Program Requiring Payment of Percentage of Fee

- It is permissible for a lawyer to participate in a federal government referral service that negotiates contracts to provide legal services to federal agencies where that program requires the lawyer to submit one percent of the legal fees received through the service to the government office in order to fund the program.

**Applicable Rules**

- Rule 5.4 (Professional Independence of a Lawyer)
- Rule 7.1 (Communications Regarding a Lawyer's Services)

*Inquiry*

We have been asked to address the permissibility of a lawyer's participation in a General Services Administration (GSA) program designed to provide federal agencies with a schedule of pre-negotiated contracts for goods and services, including legal services for financial asset management. The program is funded by charging participating contractors a fee of one percent of the business they receive through the program, raising the question of whether, in the case of a lawyer's participation, this funding scheme would violate our rules prohibiting the sharing of legal fees with non-lawyers.

Our understanding of the background and working of the program is as follows: Federal law grants an office of GSA, the Federal Supply Service (FSS), authority to issue solicitations and award contracts for the provision of commercial products and services to federal agencies. The FSS carries out this task by negotiating contracts for space, goods and services with providers. It then places these contracts on a "schedule," from which customer agencies may select a contractor based on their determination of where they can obtain the best value. Agencies are not required to use the FSS-negotiated schedules; they may contract for services independently. The advantage of FSS schedules is that they often offer better deals to government agencies by offering lower prices gained through large volume contracts and sparing agencies the time and expense of independent procurement.

In 1994-95, Congress ceased funding FSS through the appropriations process and instead directed the agency to establish an "industrial funding" system through which customers would fund FSS's services. FSS accordingly established a system under which participating contractors are required to remit to FSS an "industrial funding fee" (IFF) of one percent of the contract amount. See 48 C.F.R. 552-238-77.[1]

In January 2000, in response to requests from customer agencies, FSS

[1] 48 C.F.R. 552-238-77(a) states that "The IFF reimburses the GSA Federal Supply Service for the costs of operating the Federal Supply Schedules Program and recoups its operating costs from ordering activities."

added a line item for legal services to an already existing schedule for financial asset services. This schedule provides services to help agencies manage and dispose of financial assets such as loans and real and personal property—to provide, for example, the kind of short-term, concentrated financial and legal services the Small Business Administration might need in order to conduct an asset sale to dispose of ten thousand loans at one time. This introduction of legal services on a FSS schedule did not require government agencies to use legal services contracted for through FSS. Agencies remain free to negotiate independently for legal services, but can gain significant efficiency advantages by taking advantage of FSS schedule contracts.

Under the FSS's standard procedures, a law firm that bids to participate on a schedule contract to provide legal services to a government agency in connection with financial asset management would be obligated to pay the one percent IFF for all legal work thereby obtained. A law firm has asked whether participation in a FSS service contract would violate D.C. Rule of Professional Conduct 5.4 (a), which prohibits lawyers from "sharing" legal fees with non-lawyers.

*Discussion*

The D.C. Rules of Professional Conduct allow lawyers to "participate in lawyer referral programs and pay the usual fees charged by such programs." Rule 7.1, Comment [6]. Rule 7.1(b)(5) further provides that a lawyer who uses an intermediary to obtain legal work must take reasonable steps "to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged." It is thus clear that a lawyer can participate in a government-run schedule program for legal services, and pay "the usual fee" charged by this program, provided that the lawyer takes reasonable steps to inform government clients obtained through such a program of the existence of the fee and the effect, if any, of that fee on the government clients' legal fees.

D.C. Rule of Professional Conduct 5.4, however, prohibits lawyers from "sharing" fees with non-lawyers. Comment [1] to Rule 5.4 explains that the purpose of this prohibition is "to protect the lawyer's professional independence of judgment." In Opinion No. 286, this Committee examined the interaction between D.C. Rules 7.1 and 5.4. As we there explained, "[a] non-contingent payment for the referral of legal business, i.e., one that is paid regardless of the success or outcome of the representation, is not a division of legal fees." "On the other hand," we decided, "the payment of a contingent referral fee, tied to the amount of the lawyer's fees or recovery on behalf of the client, . . . is more akin to a commission, which directly reduces the fee income of the lawyer making the payment." Thus, we reasoned, the lawyer is, "in practical effect, paying some of the proceeds of a specific legal representation to another person," thus constituting impermissible "sharing" of fees with a non-lawyer intermediary.

The question here, then, is whether the IFF, in being based on a percentage of "the fee income of the lawyer making the payment," constitutes impermissible fee sharing.[2] We conclude that IFF does not constitute impermissible fee sharing, for a number of reasons. First, FSS is an established, organizational referral service rather than an individual third-party intermediary. Comment [6] to D.C. Rule 7.1 distinguishes between a "recognized or established agency or organization" offering a "lawyer referral program," to which a lawyer may "pay the usual fees charged by such programs," on the one hand, and "payments to intermediaries to recommend the lawyer's services," with respect to which "special considerations arise," on the other. This comment suggests that the drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely on them for business referrals to influence those lawyers' "professional independence of judgment." D.C. Rule 5.4, Comment [1]. Indeed, we see the development of referral schemes that do not compromise lawyers' independence as a positive development, though we recognize that our Rules are less clear than they could be on this issue.

Lacking the benefit of complete clarity in our own rules, we turn for additional insight to the opinions of other jurisdictions. A great many opinions from other jurisdictions support the conclusion that lawyers' payment of a fee linked to the legal bills generated through their participation in a non-profit, government-approved referral service is permissible, provided that the fee arrangement appears to be a reasonable means of funding the costs of running the referral service. The ABA Committee on Professional Ethics and Grievances reached this conclusion as early as 1956, in response to a query from the ABA Standing Committee on Lawyer Referral Services as to whether a bar association could operate a lawyer referral service financed "either by a flat fee or a sliding scale charge based on the fees derived [by participating lawyers] from the cases referred to them." In an opinion authored by Henry Drinker, the Committee held that such an arrangement would not violate Canon 34, the then-existing fee splitting prohibition, concluding that "[r]egistrants may be required to contribute to the expense of operating [the referral plan] . . . by a reasonable percentage of fees collected by them." ABA Formal Op. 291 (1956).

The ABA Committee on Ethics and Professional Responsibility reiterated this conclusion in 1968, when it gave approval to several proposed schemes for financing a lawyer referral service including remittance of "a reasonable percentage of the fees earned" through use of the service and assessment of "a forwarding fee, ranging from 10% to 25%, of the fee collected by the attorney." See ABA Informal Op. 1076 (1968).

Following these ABA opinions, many state legal ethics committees reached similar conclusions. The Michigan State Bar Committee on Professional Ethics, for example, approved a lawyer's participation in a not-for-profit referral service registered with the state bar that charged a percentage of the fee collected by the lawyer, reasoning that, so long as participating lawyers in a bar association referral service are not subject to "undue influence, the professional judgment of the lawyer is not interfered with and the rule against fee-splitting with nonlawyers is not violated." Michigan State Bar Comm. on Prof. and Judicial Ethics, Op. RI-75 (1991).[3]

[2] We assume for purposes of this opinion that attorneys participating in the FSS program meet all other qualifications and conditions for providing legal services to the clients at issue and we consider the FSS program only with regard to the IFF funding mechanism, as described above, and not with regard to any other of its requirements.

[3] See also California State Bar Ethics Op. 1983-70 (1983) (attorney may pay approved lawyer referral service a fee based on percentage of fees collected but may not raise fee charged to client to cover referral charge); Chicago Bar Ass'n Prof. Resp. Comm., Op. 87-1 (1987) (lawyer may pay a percentage of the fee collected to bar association-

Another comprehensive opinion is Pennsylvania Bar Ass'n Ethics Op. 93-162 (1993), which collects many other ethics committee opinions approving bar associations' use of referral fees based on a percentage of lawyers' fees obtained through the service. The Pennsylvania opinion also examines statistics from the ABA Standing Committee on Lawyer Referral and Information Services, which indicate that, in 1989, twenty-two states and localities used "earned fee" financing to support bar association referral services. The Committee reasoned that such widespread implementation of earned fee financing shows that this funding mechanism falls within the "acceptable 'usual charges of a not-for-profit lawyer referral service' under Pennsylvania Rule of Professional Conduct 7.2(c)." It further reasoned that this specific quoted language took precedence over the more general fee splitting prohibition of Pa. Rule of Professional Conduct 5.4(a). A similar interpretation of the language of D.C. Rules 7.1 and 5.4 can be made here, as already noted above. See D.C. Rule 7.1, Comment [6].

Both the Michigan and Pennsylvania Committees found persuasive on public policy grounds *Emmons v. State Bar of California*, 6 Cal. App. 3d 565, 86 Cal. Rptr. 367 (Ct. App. 3d Dist., 1970), in which the court concluded that the evils created by lawyer fee splitting with nonlawyers are not present in the case of lawyer referral services. As the *Emmons* court explained:

> There are wide differences—in motivation, technique and social impact—between the lawyer reference service of the bar association and the discreditable fee-splitting features in the disciplinary decisions. Prohibited fee-splitting between lawyer and layman carries with it the danger of competitive solicitation; poses the possibility of control by the lay person, interested in his own profit rather than the client's fate; facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney.

6 Cal.App.3d at 573-74; 86 Cal. Rptr. at 372 (internal citations omitted). The court held that none of these dangers is present where a referral service

> seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public. When conducted within the framework conceived for such facilities, its reference service presents no risks of collision with the objectives on the canons of fee splitting and lay interposition.

6 Cal.App.3d at 574; 86 Cal. Rptr. at 372-73.

We are likewise persuaded by this reasoning. FSS is a nonprofit service aimed at achieving important public policy objectives, including holding down the cost to taxpayers of legal services provided to government agencies. It presents no risks of interfering with participating lawyers' independent professional judgment. To be sure, all the opinions we have cited deal with referral plans operated by bar associations, rather than by a government agency. Nevertheless, we find their underlying rationale equally compelling here.[4] The IFF, established under congressional direction, is a reasonable means of funding a non-profit service to assist government agencies in obtaining lower cost legal services, just as the bar associations' referral services provide less costly legal services to the general public. Given the nonprofit, public interest motivation underlying both arrangements, we see no more potential for the kinds of abuses at which D.C. Rule 5.4 is aimed in one context than in the other.

The reasonableness of the one percent IFF charge further supports our conclusion. This percentage appears small when compared to the percentages found reasonable in other legal ethics committee opinions we examined.[5] The fact that government agencies can choose whether or not to use the FSS schedule in contracting for legal services provides still further indication that the IFF is reasonable. If the agency can negotiate a lower fee for legal services by approaching a law firm that is not on the FSS schedule, the agency is free to do so. It thus seems safe to assume that to the extent that agencies opt to use FSS schedules to obtain legal services, FSS offers a reasonable, cost-effective means for government agencies to contract for legal services.[6]

Of course, as we noted at the outset, under Rule 7.1(b)(5) lawyers participating in a referral service, including the FSS scheme we are examining here, must comply with the requirement to take reasonable steps "to ensure that the client is informed of (a) the consideration, if any, paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged." Thus, under Rule 7.1(b)(5), lawyers must disclose to their government agency client their payment of the one percent IFF and the effect of doing so, if any, on their legal fee.

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sponsored lawyer referral service in order to cover the expense of operating the service, provided fee is limited to one that is reasonable); Arkansas Bar Association Op. 95-01 (1995) (bar association referral service may require participating attorney to pay a percentage of fees produced by clients where increase in revenue produced for bar association will help maintain this public service).

[4] *Contra* Ohio Sup. Ct. Bd. Of Comm'rs on Grievances and Discipl., Op. 95-6 (1995) (disapproving payment of fee based on a percentage of legal fee earned from client referred by a non-profit service that was *not* affiliated with a bar association). This opinion is distinguishable, however, because Ohio Rule Code of Professional Responsibility DR 2-103 differs from D.C. Rule 7.1 in specifically prohibiting lawyers from paying *any* type of fee to a referral service other than a bar association.

[5] See, e.g., Emmons v. State Bar of California, 6 Cal. App. 3d at 568, 86 Cal. Rptr. at 368 (referral fee of one third of fee received); Vermont Advisory Ethics Op. 87-12 (1987) (lawyer expected to pay 10% of any fee received); Calif. St. Bar Ethics Op. 1983-70 (1983) (10% of all fees collected over a $300 minimum); ABA Informal Op. 1076 (10% to 25% of the fee collected by the attorney).

[6] We thus need not reach the issue of whether lawyers may "pass through" a referral service fee to clients in the form of increased charges for legal services. Many bar associations have been adamant in disallowing this practice. *See, e.g.*, California Opinion 1983-70, *supra*; Michigan Op. RI-75, *supra*; Pa. Ethics Op. 93-162, *supra*. In light of the voluntary and competitive nature of the FSS contracting scheme, there appears to be little danger that the IFF fee results in higher legal bills to government clients. Indeed, the very purpose of FSS is to provide agencies with contract options through which they may be able to obtain *lower* prices for legal services. Lawyers must, of course, take into account their obligation to pay the IFF in negotiating a rate for legal services with FSS, but will have incentives not to pass through this cost in their billing rate in order to present a competitive proposal.

We also note, relatedly, that this case, in which lawyers are responsible for submitting referral service fees, differs from the situation presented in our recent Opinion 302, where we decided that Rule 5.4 was not implicated where a client *directly* pays a fee to use a legal services bidding system. Where it is the lawyer's responsibility to submit a referral service fee based on a percentage of the legal fees earned, D.C. Rules 5.4 and 7.1 apply. The lawyer cannot claim to be merely remitting the fee on behalf of the client.

*Opinion No. 308*

**Ethical Constraints on Lawyers Who Leave Private Employment for Government Service**

- Lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing their new clients with diligence and zeal. A government lawyer owes continuing obligations to her former clients to protect client confidences and secrets both from disclosure to others and from use by the lawyer to the disadvantage of the former clients. A government lawyer may not undertake work that is the same as or substantially related to work done for a former client without the consent of the former client. While disqualification of a government lawyer from a matter due to work done for a prior client is not imputed to other lawyers in the government agency or entity, screening measures should be considered in appropriate cases.

**Applicable Rules**

- Rule 1.6 (Confidentiality)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification)

*Discussion*

Rule 1.11 of the D.C. Rules of Professional Conduct, Successive Government and Private Employment, details specific ethical prohibitions applicable to lawyers who leave public service (e.g., legal counsel to a government agency, judicial officer, or law clerk) and enter private practice. Although there is no parallel rule addressing lawyer movement from private practice to government employment, the D.C. Rules of Professional Conduct address this subject more generally and provide guidance on the ethical constraints that apply when a lawyer leaves private practice to enter public service.[1] This opinion summarizes the ethical considerations that a lawyer entering government service should bear in mind in discharging her duties to both her former clients and her new government employer.[2]

*Duties to Former Clients*

A lawyer who leaves private practice to enter government service owes important and continuing ethical obligations to her former clients.[3]

*1. Confidentiality*

First and foremost among a lawyer's duties to former clients is the duty of confidentiality. Rule 1. 6 (a) prohibits a lawyer from revealing a confidence or secret of the lawyer's client or from using a confidence or secret of the lawyer's client to the disadvantage of the client. These two distinct duties continue after the client-lawyer relationship has terminated, see Rule 1.6, Comment [28], and are fully applicable to a lawyer who has moved from private to government employment.

First, Rule 1.6 mandates that a lawyer who has obtained confidences and secrets about a former client in the course of a former representation must be vigilant not to reveal any protected information obtained from the former client no matter how relevant to the work of his new client. Second, Rule 1.6 imposes an additional and perhaps more subtle prohibition relating to client confidences and secrets; namely that the lawyer not knowingly "use" protected information "to the disadvantage of the client." This prohibition requires that the government lawyer who is presented with an assignment in which she could use former client confidences (without necessarily revealing them to others) to achieve a better result for the government must not do so if there is any reasonably foreseeable disadvantage to the former client. Thus, for example, a lawyer who in private practice represented automobile manufacturers extensively in product liability litigation and learned information in the course of that representation about the client's future plans for design changes could not, as a government employee, use that information to shape an environmental regulation that could be viewed as unfavorable to the former client. While such a government assignment might not be prohibited as a conflict of interest under Rule 1.9 in that it would not involve the same or a substantially related matter, the use of client confidences or secrets even in an unrelated matter to the disadvantage of the former client is prohibited, absent client consent or one of the specific exceptions in Rule 1.6 (c) and (d).[4]

*2. Conflicts of Interest*

Rule 1.9 provides that 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 consents after consultation.

Rule 1.9 requires that a government lawyer contemplating representation in a matter directly adverse to the interests of a former client determine whether the matter is the same as or substantially related to representation that the lawyer previously provided to the former client.[5]

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[1] In addition to the D.C. Rule of Professional Conduct, there are criminal and civil statutory and regulatory prohibitions and obligations applicable to government employees, including lawyers. These statutes and regulations, which address subjects such as conflicts of interest, financial disclosure, restrictions on payments and post-employment activities, include (1) the criminal conflict of interest laws in chapter 11 of title 18, United States Code; (2) the restrictions on gifts in 5 U.S.C. §§ 7351 and 7353; (3) the financial disclosure requirements of 5 U.S.C. app. § 101, et seq.; (4) Executive Order 12731; and (5) the Standards of Ethical Conduct for Employees of the Executive Branch set forth in 5 C.F.R. part 2635. This opinion will not address these requirements, which also must be complied with by the government attorney.

[2] Similarly, this Opinion does not address the ethical issues that are presented when a private lawyer temporarily provides legal services to a government agency or entity. *See* D.C. Bar opinion 268 (1996) (Conflict of Interest Issues Where Private Lawyers Provide Volunteer Legal Assistance to the D.C. Corporation Counsel).

[3] A lawyer in private practice contemplating a move to government service also must be sensitive to ethical obligations that may arise during the transition process. To the extent that the lawyer's move to government service involves termination of ongoing client representations, the lawyer must do so in a manner that minimizes possible adverse impact on the client and that complies with the requirements of D.C. Rule 1.16. Even in the case of concluded client representations, there may be continuing client obligations, including the need to provide for the proper transfer or disposition of client files. these obligations have been addressed in other Committee Opinions and will not be revisited here. *See, e.g.*, D.C. Bar Opinion 283 (1998) (Disposition of Closed Client Files); D.C. Bar Opinion 294 (1999) (Sale of Law Practice by Retiring Lawyer). In addition, a lawyer in private practice contemplating a move to the government also must be sensitive to any potential conflicts of interest that may be presented during the course of seeking government employment. *See, e.g.*, D.C. Bar Opinion 210 (1990) (Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney).

[4] Because Rule 1.6 is limited to client confidences and secrets, its restriction does not extend, of course, to general information about an industry, area of practice, legal interpretations, economic sectors, and the like that a lawyer learns in the course of her professional career.

[5] To the extent that determination of what constitutes "the same or a substantially related matter" presents difficult questions of interpretation under

The existence and scope of a "matter" for purposes of Rule 1.9 depend on the facts of a particular representation and the nature and extent of the individual lawyer's involvement. When a lawyer has been directly involved in a lawsuit or transaction on behalf of a client, the Rule plainly prohibits subsequent representation of another client whose interests are materially adverse. "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." D.C. Rule 1.9, Comment [2]; *see Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 42 (D.C. 1984). If a matter is the same as or substantially related to the work done for the former client, the lawyer may not proceed without written consent of both clients, including the former client.[6] In the absence of such consent, the government lawyer may not undertake the representation.

For lawyers in private practice, disqualification due to former client conflicts of interest under Rule 1.9 is imputed to all other lawyers associated in a "firm" with the disqualified lawyer, thereby effectively barring the lawyer's firm from the new representation (in the absence of client consent). *See* D.C. Rule 1.10. Due to the draconian effects of imputed disqualification on the ability of the government to obtain legal services, however, the principles of imputed disqualification do not apply to disqualify government lawyers who practice in a government agency with a lawyer who is disqualified because of prior client representation. Rule 1.10, Comment [1] ("For purposes of the Rules of Professional Conduct, the term 'firm' . . . does not include a government agency or other government entity."). Thus, unlike the situation in private practice where all lawyers associated in a law firm with a lawyer disqualified under Rule 1.9 also are disqualified through imputation under Rule 1.10, in the government context, the lawyers in a government office, agency, or department who work with a personally disqualified lawyer are not barred from representation adverse to the lawyer's former client.

D.C. Rule 1.11, which deals with the lawyer who moves from government to private practice, similarly does not extend the imputed disqualification of a former government lawyer to other lawyers in the private firm, but does require the implementation of specified screening mechanisms in order to avoid imputed disqualification. *See* Rule 1.11(c)-(e). While our Rules do not expressly require such screening in the government context for a lawyer who is disqualified by a prior client relationship under Rule 1.9, consideration and implementation by the government agency of voluntary screening measures that effectively insulate the lawyer from ongoing contact with the matter from which she is disqualified should be considered.[7] Such measures provide important assurances to the lawyer's former clients that the lawyer's ethical obligations under Rules 1.6 and 1.9 are being met and signal an appropriate recognition by the government agency of the importance of these obligations.

*Duties to New Client*

In highlighting the duties owed to former clients, this Opinion does not intend to ignore the new government attorney's ethical obligations to her new government client. Like all attorneys subject to these rules, the attorney must represent her government client competently (D.C. Rule 1.1), "zealously and diligently within the bounds of the law" (D.C. Rule 1.3), and in a manner that avoids conflicts of interest or impairment of the lawyer's professional judgment (D.C. Rule 1.7). Like all government lawyers, a lawyer joining the government from private practice also must be sensitive to those provisions of the D.C. Rules of Professional Conduct that specifically address the ethical obligations of government lawyers. *See, e.g.*, D.C. Rule 3.8 (Special Obligations of a Prosecutor). Finally, government lawyers must be sensitive to the reality that the D.C. Rules of Professional Conduct are just one element of the larger body of authority governing the conduct of government attorneys;[8] discussion of the specific elements of those statutes and regulations, however, is beyond the scope of this opinion.

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*Opinion No. 309*

**Advance Waivers of Conflicts of Interest**

- Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another.

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 2.2 (Intermediary)

*Inquiry*

The Ethics Committee has been asked whether advance waivers of conflicts of interest[1] are permissible and, if so, whether there are requirements for such waivers additional to, or different from, those prescribed by Rules 1.7 and 1.9 for waivers generally.[2] For purposes of this opinion, the term "advance waiver"

the applicable ethical rules, the government attorney should utilize the significant resources represented by the U.S. Office of Government Ethics and the agency ethics officer designated for her particular agency.

[6] Rule 1.11, which governs lawyers who leave government service for private practice, contains no provisions for waiver of the lawyer's disqualification. This is not the case for the "reverse revolving door" i.e., private practice to government, which is governed by Rule 1.9. Comment [3] to Rule 1.9, while noting that Rule 1.11 governs the transition from government to private practice, expressly states that "disqualification from subsequent representation is for the protection of clients and can be waived by them."

[7] The screening measures identified in Opinion 279 (Availability of Screening as Cure for Imputed Disqualification) provide guidance on important factors that should be considered in establishing an ethical screen.

[8] *See, e.g.*, statutes and regulations cited in Note 1 *supra*.

[1] Waivers of conflicts of *interest*, which are the principal subject of this opinion, are different from waivers of *confidentiality*. *See infra* note 10.

[2] D.C. Rule 1.8 addresses conflicts of interest arising from certain types of transactions. This opinion does not address waivers of such conflicts.

means one that is granted before the conflict arises and generally before its precise parameters (e.g., specific adverse client, specific matter) are known.[3]

*Discussion*

The practice of law in this country has changed markedly in the century since the ABA Canons of Professional Ethics were promulgated. As was the case then, many lawyers practice in relatively small firms, or as solo practitioners, in a single geographic location. Increasingly, though, law firms have hundreds or even thousands of lawyers, with multiple offices across the country and around the globe. In such firms, individual partners or associates may not even know one another, let alone the identities of the clients their colleagues represent or the details of the matters their colleagues are pursuing for such clients.

Moreover, the manner in which clients—particularly commercial clients—use lawyers is quite different than in the past. The days when a large corporation would send most or all its legal business to a single firm are gone. Today,

> when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers.

ABA Formal Op. 93-372 (1993) ("ABA Opinion"), *in* American Bar Association, Formal and Informal Ethics Opinions, 1983-1998, at 167-68. This means, for example, that if the law firm hypothesized in the ABA Opinion is looking out for its own interests, it might decline the Miami representation. This in turn would deny the client's choice of a lawyer and would reduce its potential choice of lawyers generally.

One alternative is to let clients waive such conflicts if they view such waivers as being in their interest. This approach has been recognized as proper at least since the promulgation of the ABA Canons of Ethics in 1908. *See* American Bar Association, Opinions on Professional Ethics 22 (1967) (text of Canon 6); D.C. Code of Professional Responsibility, Disciplinary R. 5-101(A) (1991 ed.).[4] The District of Columbia Rules of Professional Conduct ("D.C. Rules") prescribe the conflicts of interest that prevent a lawyer from accepting and, in some instances, continuing, a representation. D.C. Rules 1.7, 1.9. Where the conflict involves two current clients, a lawyer[5] may not advance adverse positions on behalf of those clients in the same matter. D.C. Rule 1.7(a). That conflict is not waivable. *See id.*, comments [2]-[4], [6].

Rule 1.7(b) sets out four types of current-client conflicts that may be overcome by a waiver. These are conflicts in which—

(1) in a matter involving a specific party or parties, the position to be taken by the lawyer's client is adverse to the position taken by another client of the lawyer in that matter, even though the other client is represented by a *different* lawyer;

(2) the representation "will be or is likely to be adversely affected by [the lawyer's] representation of another client;"

(3) "representation of another client [of the lawyer] will be or is likely to be adversely affected by such representation"; or

(4) "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

Conflicts under subparagraphs (2), (3), and (4) of Rule 1.7(b) sometimes are referred to as "punch-pulling" conflicts because they address situations where a lawyer's commitment to the adverse client, or to some personal situation related to the representation, arguably might tempt her to "pull her punches" on behalf of her client.

"The difference between Rule 1.7(a) and Rule 1.7(b) is that in the former, the lawyer is representing multiple interests in the same matter, while in the latter the lawyer is representing a single interest, but a [current] client of the lawyer who is represented by *different* counsel has an interest adverse to that advanced by the lawyer." D.C. Rule 1.7, comment [1] (emphasis added).

Where a *former* client is involved, a conflict exists only if the adversity arises in a matter that is the same as, or substantially related to, the matter in which the lawyer formerly represented that client. D.C. Rule 1.9; *see Brown v. D.C. Bd. of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); *In re Sofaer*, 728 A.2d 625 (D.C. 1999) (decided under Rule 1.11).

As noted above, a conflict under Rule 1.7(a) may *not* be waived. *See* D.C. Rule 1.7, comments [2]-[4], [6]. A conflict under Rule 1.7(b) may be waived, however, "if each potentially affected client consents to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." D.C. Rule 1.7(c). "Consent is "a client's uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question." D.C. Rules, Terminology, ¶ [2]. In turn, "consultation" means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." *Id.* ¶ [3]. A waiver must be predicated upon disclosure sufficient to allow the client to make "a fully informed decision" and to make the client "aware of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation." D.C. Rule 1.7, comment [19]; *see In re James*, 452 A.2d 163, 167 (D.C. 1982) (requiring "a detailed explanation of the risks and disadvantages to the client").

A conflict of interest under Rule 1.9 (former client) also may be waived. D.C. Rule 1.9, comment [3]. Such a waiver is valid "only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client."

[3] We accordingly view a conflict waiver given as part of an agreement for representation by a single lawyer of multiple clients, see D.C. Rules 1.7(c), 2.2, as more in the nature of a *current* than an advance waiver.

[4] "Giving effect to a client's consent to a conflicting representation might rest either on the ground of contract freedom or on the related ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the the client's legal entitlements." Charles Wolfram, Modern Legal Ethics § 7.2.2, at 339 (1986).

[5] Because a conflict of interest under Rule 1.7 or 1.9 is imputed to a lawyer's entire firm, D.C. Rule 1.10(a); D.C. Ethics Op. 279 (1998), "lawyer" in this discussion comprehends not only the individual lawyer but her entire firm. Thus, if one lawyer in a law firm is disqualified by reason of Rule 1.7 or Rule 1.9, the entire firm is disqualified. D.C. Rule 1.10(a); *see* D.C. Rule 1.7, comment [23]; D.C. Rule 1.9, comment [3]; D.C. Ethics Op. 279 (1998).

*Id.*[6] That is, the Rules require that a client who is asked to waive an actual or potential conflict have an adequate appreciation of what protection she is giving up. This requirement is subjective, meaning that more explanation may be required to satisfy the Rules' consent and consultation criteria where a less sophisticated client is involved than where a more sophisticated client is being asked to waive its rights. *See* D.C. Rule 1.7, comment [20]; ABA Opinion at 170.

We know of no District of Columbia Court of Appeals decision that expressly permits or prohibits advance waivers of conflicts of interest.[7] The D.C. Rules are silent on whether a client may give an advance waiver as to itself, though a comment to Rule 1.7 permits an organization client to "give consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client . . . so long as the requirements of Rule 1.7(c) can be met." D.C. Rule 1.7, comment [17]. Similarly, this committee has not addressed the issue directly, though we have expressed doubt about the enforceability of advance waivers, "especially where the client is not a sophisticated consumer of legal services," D.C. Ethics Op. 265 (1996), and doubt whether advance waiver of a client's right to accept a confidential settlement could have been the product of informed consent, D.C. Ethics Op. 289 (1999). Nevertheless, we do not write on a clean slate: The American Bar Association's Committee on Ethics and Professional Responsibility, the Restatement of the Law Governing Lawyers, the ABA's Ethics 2000 Commission,[8] various courts, bar associations in other United States jurisdictions, and at least one respected academic figure have said that while advance waivers are not per se improper, they will be sustained only where the client can be said to have given informed consent.

The ABA Opinion, for example, observes that " '[u]nlike the client issuing a specific waiver, the client issuing a prospective waiver cannot know what confidences he will in the future disclose or in what adverse representations the attorney may engage.' " ABA Opinion at 171 (quoting Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 Mich. L. Rev. 1074, 1082 (1981)). Accordingly, that opinion states that a prospective waiver probably will not stand unless it identifies the opposing party or at least a class of potential opponents, as well as giving the client sufficient information to appreciate "the nature of the likely matter and its potential effect on the client." *Id.* at 171. The ABA Opinion also cautions that a waiver of *conflicts* does not constitute a waiver of *confidentiality, see infra* n. 10, and suggests strongly that any advance waiver be in writing, ABA Opinion at 172-73.

The ABA Opinion also requires that when a conflict arises, the lawyer revisit the judgment(s) she made originally about the propriety of the waiver. *Id.* at 171. This does not apply literally in the District of Columbia because the ABA Model Rules of Professional Conduct ("Model Rules") require that the lawyer "reasonably believe[] the representation will not adversely affect the relationship with the other client" *in addition to* requiring that the clients consent after consultation. Model Rule 1.7(a). The D.C. Rules, on the other hand, permit a lawyer to seek a waiver *even though* the representation reasonably may be expected to affect adversely the relationship with the other client. D.C. Rule 1.7(b)(2)-(3), 1.7(c). We nevertheless believe that a prudent lawyer in this jurisdiction should revisit the issue when a conflict actually arises, so as to ensure that adequate disclosure will be made to the new client from whom a contemporaneous waiver of conflicts is being sought, *see* ABA Formal Op. 99-415, and that the lawyer is satisfied that she will be able to represent both clients adequately.

The Restatement does not rule out advance conflict waivers but says that they are

> subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.
>
> On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement of the Law Governing Lawyers, § 122, comment *d* (2000).

The Restatement adds that if, between the time a prospective waiver is given and the time a conflict arises, "a material change occurs in the reasonable expectations that formed the basis of a client's informed consent, the new conditions must be brought to the attention of the client and new informed consent obtained." *Id.* Presumably, by "material change" the comment means something short of the change that itself creates the conflict, else there could be no advance waivers.

The changes in the Model Rules recommended by the ABA Ethics 2000 Commission include a comment on the subject of advance conflict waivers. Commission on Evaluation of the Rules of Professional Conduct, Report to House of Delegates (May 2001 rev.) ("Ethics 2000 Report"), prop. Model Rule 1.7, comment [22], available at www.abanet.org/cpr/e2k-report_home.html.[9] The general test of such a waiver is "the extent to which the client reasonably understands the material risks that the waiver entails." *Id.* This in turn depends on the completeness of the explanation of possible conflicts and the "actual and reasonably foreseeable adverse consequences" of such conflicts. *Id.* Therefore, consent to a type of conflict with which the client is familiar is more likely to be effective than a general or open-ended consent. *Id.* Thus,

[6] Where the former client is the government, issues of disqualification, imputation, and waiver are governed by Rule 1.11 rather than Rule 1.9. D.C. Rule 1.9, comment [3].

[7] A 1994 decision expressly declined to rule that an advance waiver by an individual member of a business partnership of a lawyer's representation of the partnership as well as the individual partners is binding as a matter of law. *Griva v. Davison*, 637 A.2d 830, 846 (1994). The statement was dictum, however, and in any event is consistent with this opinion.

[8] The Ethics 2000 Commission formally is known as the Commission on Evaluation of the Rules of Professional Conduct.

[9] The Commission's recommendations will not become part of the Model Rules until and unless they are adopted by the ABA House of Delegates. The House of Delegates began consideration of the proposals at its August 2001 meeting but did not complete the effort and is scheduled to resume consideration of the report at its February 2002 meeting. *ABA Stands Firm on Client Confidentiality, Rejects "Screening" for Conflicts of Interest*, 70 U.S.L.W. 2093, 2095 (Aug. 14, 2001). Comment [22] was considered expressly at the August 2001 meeting but a proposed amendment that would have altered or deleted it was not adopted. *Id.* at 2094.

> 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.

*Id.* The Commission's comment on "informed consent" echoes this theme:

> 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.*

*Id.*, Rule 1.0, comment [6] (emphasis added).

Most courts that have considered this issue have ruled along the lines set out by the ABA Opinion, the Restatement, and the proposal of the Ethics 2000 Commission. Advance conflict waivers have been sustained where the potential adverse party was known and identified, the client giving the waiver was sophisticated, and the waiver had been reviewed by the client's in-house counsel. *E.g., United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981); *Fisons Corp. v. Atochem North Amer., Inc.*, 1990 U.S. Dist. LEXIS 15284, 1990 WL 180551 (S.D.N.Y. 1990); *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). The *Fisons* court stated that where the waiving client is sophisticated, notification of the potential conflict itself is sufficient to satisfy the requirement. *Fisons Corp.*, 1990 WL 180551, at *5. Moreover, at least one court has held that an advance waiver may be implied where the objecting client, including its in-house counsel, had extensive knowledge of the law firm's longtime representation of the other client. *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio 1976), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977).

On the other hand, advance waivers have been struck down where they are unduly general and unsophisticated clients are involved. Correspondence with the objecting client's nonlawyer employees (claims adjusters), for example, was held insufficient to constitute "consultation" or "full disclosure." *Florida Ins. Guaranty Ass'n, Inc. v. Carey Canada, Inc.*, 749 F. Supp. 255 (S.D. Fla. 1990); *see Marketti v. Fitzsimmons*, 373 F. Supp. 637 (W.D. Wisc. 1974) (where client a labor union local, mere knowledge of second representation insufficient to constitute waiver). Similarly, an open-ended release of the lawyer from "all rights, burdens, obligations, and privileges which appertain to his [former] employment," coupled with consent for the lawyer to "engage his services pro and con, as he may see fit," was held (notwithstanding the relative sophistication of the client) grossly insufficient to justify the lawyer's subsequent activity—including disclosure of confidential information—adverse to the former client. *In re Boone*, 83 F. 944 (N.D. Calif. 1897). Instead, said the court, the release would be effective only if it were "positive, unequivocal, and inconsistent with any other interpretation." *Id.* at 956. A more recent decision held that a general advance consent covering all unrelated matters is insufficient to waive adversity in litigation unless it expressly refers to "litigation." *Worldspan, L.P. v. Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

> [F]uture directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.

*Id.* at 1360; *see Hasco, Inc. v. Roche*, 700 N.E.2d 768 (Ill. App. 1998) (narrow construction of advance waivers). *But see Zador Corp. N.V. v. Kwan*, 31 Cal. App. 4th 1285, 1300-01, 37 Cal. Rptr. 2d 754, 763 (Cal. App. 1995) (construing general waiver, given in joint representation context, to include litigation).

At least two major local bar associations have opined that advance waivers of conflicts are permissible, particularly where the waiving client is sophisticated. N.Y. County Lawyers' Ass'n Ethics Op. 724 (1998); Los Angeles County Bar Ass'n Formal Op. 471 (1994). The New York County opinion adopts the ABA Opinion's recommendations regarding disclosure of potential adverse clients (or types of clients) and types of adverse representations, adding that the lawyer also should disclose the steps to protect the client (e.g., erection of an ethical wall) that will be taken should a conflict arise. The ultimate issue, the opinion states, is whether "the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought." Taking cognizance of the subjective nature of informed consent, the New York County opinion observes that for

> a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person.
>
> * * *
>
> Indeed, a "blanket" waiver of future conflicts involving adverse parties may be informed and enforceable depending on the client's sophistication, its familiarity with the law firm's practice, and the reasonable expectations of the parties at the time consent is obtained. For example, a subsequent representation may be said to have been reasonably contemplated by a sophisticated client, advised by in-house counsel, who is familiar with a law firm's multi-disciplinary practice and wide variety of clients.

Finally, a prominent academic recently has suggested a "bright line" standard under which even a broad advance conflict waiver generally should be enforced "if it is unambiguous and the client is independently represented by another lawyer, including in-house counsel, at the time the waiver is given." Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. Legal Ethics 289, 312 (2000) ("Painter"); *accord* Brian J. Redding, *Suing a Current Client: A Response to Professor Morgan*, 10 Geo. J. L. Ethics 487, 497-99 (1997). Professor Painter suggests using solely the "independent representation" criterion rather than coupling it to the "sophisticated client" criterion suggested by the Restatement. Painter, at 327. His approach avoids the uncertainty inherent in making the validity of the waiver depend on a subjective

judgment of whether a client is "sophisticated." *Id.*

Professor Painter also suggests that the "substantially related" criterion that applies where a former client is involved, *see* D.C. Rule 1.9; *Brown*, 437 A.2d 37, should be part of the test of which conflicts can be waived in advance. Painter, at 321.

> Although loyalty and confidentiality concerns are heightened when a lawyer is concurrently representing clients with adverse interests, the sweeping prohibition of concurrent conflicts rules can sometimes be intolerable. Many lawyers respond by not taking on a new client who might in the future have interests adverse to current clients, knowing that once they begin representing a client, they will not be permitted to represent other clients in matters where the first client's interests are adverse.
>
> * * *
>
> Although the risk of adverse use of confidential information is increased by a waiver that imposes the substantial relationship test on concurrent conflicts, information learned in an unrelated representation is generally of limited value and the client is furthermore still protected by separate prohibitions on disclosure or adverse use of client information (*Model Rules* 1.6 and 1.8(b)).

*Id.*

*Conclusions*

Thus the modern view—held by the courts, the American Bar Association, local bar associations and the American Law Institute—is that advance waivers of conflicts of interest are permissible, within certain limits and subject to certain client protections. We conclude that the D.C. Rules are consistent with that view and that they permit advance waivers under Rules 1.7 and 1.9. *See United Sewerage Agency*, 646 F.2d at 1349-50. "Clients who are fully advised should be able to make choices of this kind if they wish to do so." *Id.* at 1350.

Such waivers, however, are permissible only if the prerequisites of the D.C. Rules—namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation"—are satisfied. *See* D.C. Rule 1.7(c). As noted above, the client must have "information reasonably sufficient to permit the client to appreciate the significance of the matter in question," D.C. Rules, Terminology, ¶ [3], and to allow the client to make "a fully informed decision" with awareness "of the possible extra expense, inconvenience, and other disadvantages that may arise if an actual conflict of position should later arise and the lawyer be required to terminate the representation." D.C. Rule 1.7, comment [19]; *see In re James*, 452 A.2d at 167 (requiring "detailed explanation of the risks and disadvantages to the client"). Ordinarily this will require that *either* (1) the consent is specific as to types of potentially adverse representations and types of adverse clients (e.g., a bank client for whom the lawyer performs corporate work waives the lawyer's representation of borrowers in mortgage loan transactions with that bank) *or* (2) the waiving client has available in-house or other current counsel independent of the lawyer soliciting the waiver.

Further, the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed. *See* D.C. Rule 1.7, comment [19]; *City of El Paso v. Salas-Porras*, 6 F. Supp. 2d 616, 625-26 (W.D. Tex. 1998). A corollary of this rule is that if the lawyer cannot disclose the adversity to one client because of her duty to maintain the confidentiality of another party's information, the lawyer cannot seek a waiver and hence may not accept the second representation. D.C. Rule 1.7, comment [19] ("If a lawyer's obligation to one or another client or to others or some other consideration precludes making . . . full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue").

A conflict arising from the lawyer's appearance on both sides of the same matter is, as noted above, nonwaivable. D.C. Rule 1.7(a) & comment [1]. Because of the greatly increased potential for misuse of client confidences—inadvertently or otherwise—advance waivers should exclude from their coverage not only the same matter but also any substantially related matter. *See* Painter, at 321. For this reason, advance waivers ordinarily will not come into play in former-client situations under Rule 1.9 because disqualification under that rule extends only to matters that are the same as, or substantially related to, the initial matter.

Further, although the D.C. Rules do not require that waivers be in writing, D.C. Rule 1.7, comment [20], we join the ABA Committee on Ethics and Professional Responsibility in recommending that—for the protection of lawyers as well as clients—advance waivers be written. *See* ABA Opinion at 173. We note in this connection that the ABA Ethics 2000 Commission has proposed that the Model Rules require all waivers to be written. Ethics 2000 Report, prop. Model Rule 1.7(b)(4) & prop. comment [20].

Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake.

In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied.[10]

*Appendix*

**Sample Advance Waiver of Conflicts of Interest**

Below is a sample of text for an advance waiver of conflicts of interest. The committee does not view this text as authoritative or exclusive:

"As we have discussed, the firm represents many other companies and individ-

[10] Waivers permitting the adverse use or disclosure of confidential information, *see* D.C. Rule 1.6(c)-(d), may not be implied from waivers of conflicts of interest. Because of their considerable potential for mischief, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver. *See Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 229 (7th Cir. 1978) (expressing doubt as to the efficacy of "a vague, general" advance waiver of confidentiality); *In re Boone*, 83 F. 944 (prohibiting waiver of confidentiality requirement). *But see* ABA Formal Op. 99-415 (1999) (suggesting that a more flexible standard may apply where the waiving client is sophisticated or has in-house counsel); Brian J. Redding, *The "Confidential Information" Conflict—Is it Time for the ABA to Rethink its Position on Waiver?*, Prof. Law., Winter 1999, at 10 (same). As with conflicts of interest, see *supra* note 3, we view the waivers of condidentiality that commonly are found in joint and "intermediary" representation situations, *see* D.C. Rules 1.7, 2.2, as constituting current, rather than advance, waivers.

uals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you."

Inquiry No. 00-4-13
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*Opinion No. 310*

**Propriety of Lawyer Charging Interest When the Client Fails to Pay Fees**

- Opinion No. 11 re-examined and broadened; when a client fails without justification to make payments to a lawyer that are called for by their fee agreement, and that agreement does not provide for payment of interest on such amounts, the lawyer may, assuming there is no overreaching on the lawyer's part, request the client to alter the fee arrangement prospectively to include charges for interest on the unpaid balance and condition further representation to the client on agreement to that condition.

**Applicable Rule**

- Rule 1.5 (Fees)

*Discussion*

Fee arrangements between lawyers and clients are of course a matter of constant interest to both. There has been recent interest in fee arrangements that include not simply the designation of a fee for service but also conditions that give the lawyer rights vis-a-vis the client to assist the lawyer in inducing the client to pay—most particularly in the question of whether a lawyer may charge interest on an unpaid client balance, although other issues also arise—as lawyers and clients attempt to craft agreements that provide both for fair fee amounts and assurances of payment. Generally speaking there is wide agreement that a lawyer can charge a client interest on unpaid bills, although jurisdictions differ on whether such a charge can be imposed by the lawyer if not agreed to by the client at the outset of the representation. In Opinion No. 11 (1975), we decided that the former Code of Professional Responsibility allowed a lawyer to charge interest on an unpaid legal fee, but "only if clearly agreed to by the client, in advance of the representation or in advance of a new stage of the representation."

Because of current interest in the issue and because we have not examined it pursuant to the current Rules of Professional Conduct, we reconsider the issue.

*1. Adversity in Fee Arrangements*

Finding the appropriate standpoint from which to assess fee arrangements can be difficult. There is some tendency to discuss the issue in terms of the adversity between the lawyer and the client when the lawyer includes provisions in a fee agreement intended to induce the client to pay. See, e.g., *Lustig v. Horn*, 732 N.E. 2d 613 (Ill. App. 2000)(provision in fee agreement allowing lawyer to seek attorney's fees for any lawsuit against the client to recover fees rejected as "potentially violative of the Rules of Professional Conduct barring an attorney from representing a client if such representation may be limited by the attorney's own interests"). Indeed, this Committee appears to have considered a similar problem from that point of view in Opinion No. 211, one of a series on the subject of the appropriateness of provisions in fee agreements requiring arbitration of fee disputes.[1]

But at least some adversity must exist between client and lawyer in the creation of virtually any fee arrangement. At the most basic level, the client's natural interest is to prefer the fee to be smaller and the lawyer's, larger. Moreover, in carrying out a representation, a lawyer is often faced with the need to resolve at least technically conflicting interests—if the fee basis is payment by the hour, the lawyer (who has a financial incentive to do more work) will face the question of whether to perform work that appears to be at the margin of utility; if the fee is fixed (and in Opinion No. 238 we have recognized that fixed fees can serve to make legal services available to those who might not otherwise be able to afford them), there is a built-in incentive for the lawyer to pass up performing work that would take time but which promises to have relatively little benefit for the client. Therefore, it is not only not possible to erase all instances of adversity between client and lawyer in the fee process, but it must be recognized that the lawyer and client inescapably have adverse interests to at least some degree throughout the relationship.

In Rule 1.8 (particularly Rule 1.8(a)), the Rules do provide a framework for regulation of business relations between client and lawyer. However, to treat the relationship between client and lawyer in arriving at a fee arrangement as a legally adverse business relationship under Rule 1.8 would lead to results that the Rules do not seem designed to bring about. Under that Rule a client could not be asked to negotiate a fee arrangement with a lawyer unless the client could consult a different lawyer (Rule 1.8(a)(2)). Not only would such a result be radically unusual and disruptive, but, as the Association of the Bar of the City of New York has observed (ABCNY Formal Opinion 2000-3) this would also mean, logically, that a client could never retain a lawyer, because to arrive at a fee arrangement with one lawyer the client would have to retain another lawyer, which the client could not do without retaining a third lawyer, and so on. For these reasons, analysis of particular aspects of a fee arrangement to determine whether or not they raise issues of conflict of interest does not seem to be a fruitful approach.

Nor does it seem possible to draw a bright-line distinction by saying that wherever a fee arrangement contemplates the possibility that the lawyer will find it necessary to institute adversary proceedings against the client to seek to compel payment that a sufficient level of adversity had been reached where a conflict must be deemed to exist. Our Opinion 218, for example, approves a fee arrangement between lawyer and client providing for mandatory arbitration of fee disputes under the rules of the Attorney Client Arbitration Board. While such a proceeding can be hoped to be less antagonistic than litigation, it is distinctly adversarial nonetheless. Thus we have approved fee arrangements that contemplate adversary proceedings between lawyers and clients. Indeed, fee arrangements are in general intended to create legally enforceable obligations to pay (see §§ 17-18, Restatement of the Law Governing Lawyers (2000)), and thus necessarily contemplate at least the possibility of a legal action to enforce them. It is difficult to see how there could be

[1] See Opinion Nos. 190, 211, and 218. It is not our purpose here to revisit or re-examine those issues in any degree.

effective lawyer-client relationships without this.

*2. Considerations Involved in Attorney-Client Fee Agreements*

It cannot be forgotten, however, that a fee arrangement between a lawyer and client is not like a standard business arrangement. Clients tend to require lawyers at times of difficulty, and the client must feel free to impose a high level of trust in the lawyer and to have confidence in the relationship. In dealing with the client the lawyer should not take advantage of either the lawyer's superior knowledge and experience or the lawyer's freedom from the concern and distress that disturb the client. Moreover, the fact that it is unusual for a client to obtain independent legal advice when concluding a fee arrangement with a lawyer means that lawyers owe a particular duty to avoid overreaching in the fee-setting process.

At the same time, there are benefits to provision of assurances of payment of fees or compensation for late payment. First of all, as just suggested, it is binding contracts that make the provision of legal services possible in the first place. Second, it is the client's duty to pay fees to the lawyer that the lawyer appropriately earns under their fee arrangement. Restatement of the Law Governing Lawyers, § 17(1) (2000). The payment of fees the lawyer has earned is not a voluntary act on the part of the client, and the lawyer is entitled to insist on being paid in accord with the terms of the fee arrangement and to pursue reasonable steps to enforce payment from a recalcitrant client. Not just individual lawyers but the profession as a whole and the availability of legal services would suffer if that were not the case.

Third, the availability of fee arrangements with incentives for timely payment may well have a positive impact on the formation of lawyer-client relationships. Since a lawyer must somehow account for the additional cost—in time as well as money—of clients who do not pay or who delay payment in violation of the fee agreement, if the lawyer can focus the lawyer's additional costs of dealing with clients who do not pay or pay timely on those clients themselves, that allows the lawyer to avoid attempting to spread those additional costs among all of the lawyer's clients. This may help to avoid upward fee pressure on clients who do pay their fees, caused by clients who do not pay on time. Such an assurance may even make a lawyer willing to take on representation of a particular client who presents an unusual risk of delayed payment or non-payment where the lawyer would be unwilling otherwise.

*3. Provisions of Rule 1.5*

The District of Columbia Rules of Professional Conduct deal with fees in a fashion that allows taking full account of these considerations in individual cases. Rule 1.5 deals with the fee relationship between lawyer and client by requiring a lawyer's fee to be "reasonable." While it provides a list of factors that may be considered in that determination (including the time and labor, difficulty and skill required, the likelihood that acceptance of the assignment will preclude the lawyer from accepting other work, customary fees for such work, the amount at issue and the result obtained, time limits, nature and length of the client relationship, experience and reputation of the lawyer, and fixed or contingent nature of the fee) that list is non-exclusive.[2] As the comments indicate, the Rule covers not just the amount of a fee but fee arrangements generally, including method of payment and the impact of the agreement on the provision of the lawyer's services. See Comment [4] (discusses advance payment of fees and the "special scrutiny" necessary when fees are paid in property rather than money) and Comment [5] (cautions that "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").[3]

The reasonableness requirement is an objective standard. Because the term "reasonable" is well understood to be a broad one, the lawyer must consider not just the non-exclusive list of factors provided in Rule 1.5 (a)(1)-(8), but every possible issue that may bear upon the fairness and reasonableness of a fee arrangement. This balance is more wide-ranging than application of something like a standard that simply looks for adverse interests.[4] The lawyer must be aware that when the reasonableness of a fee is reviewed, such factors as the lawyer's experience and superiority of legal knowledge over the client will be taken into account, as well as the client's sophistication or lack thereof, need for legal services, and mental state of distraction or worse caused by the situation that has caused the client to seek legal advice. The wise lawyer will explain all aspects of a proposed fee relationship in detail in advance of obtaining the client's agreement. As we stated in Opinion No. 267, it is the lawyer's responsibility to make sure that the client understands the fee arrangement. It is also the lawyer who, if challenged, will have the burden of establishing the reasonableness of the

[2] Subsection (b) requires the basis or rate of the fee to be in writing when the lawyer has not regularly represented the client; subsection (c) contains special requirements for contingent fees; subsection (d) bars the use of contingent fees in criminal cases; subsection (e) governs division of fees between lawyers in different firms; and subsection (f) provides that any fee prohibited "by law" or by subsection (d) is per se unreasonable.

[3] While there are provisions specifically regulating fee arrangements in other Rules, notably in Rules 1.8 and 1.15, these tend to be specific provisions dealing with particular and well-defined issues rather than the general requirements that are located only in Rule 1.5. A lawyer's treatment of fee advances is covered in Rule 1.15(d); whether a lawyer may take literary or media rights as part of a fee is covered by Rule 1.8(c); Rule 1.8(e) restricts the conditions under which a lawyer may accept fees from someone other than a client; and Rule 1.8(i) governs liens to secure payment of fees. We do not express an opinion on whether a fee arrangement as part of which the lawyer arguably "acquire[d] an ownership, possessory, security, or other pecuniary interest adverse to a client" within the meaning of Rule 1.8(a) would trigger that Rule's applicability as well. *See Renouf v. Multicultural Broadcasting*, 1994 WL 499060 (DDC 1994) (Oberdorfer, J.) at *2-3.

[4] This conclusion is consistent with Scope Comment [5] of the Rules, a rule of construction that cautions against importing additional general considerations into the operation of Rule provisions that deal with specific issues, as Rule 1.5 does with fee arrangements. Scope Comment [5] provides:

> [5] In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of Rule 1.3 are not intended to govern conflicts of interest, which are particularly discussed in Rules 1.7, 1.8, and 1.9. Thus, conduct that is proper under the specific conflicts rules is not improper under the more general rule of Rule 1.3. Except where the principle of priority state here is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a lawyer has analyzed the ethical considerations under a given rule, the lawyer must generally extend the analysis to ensure compliance with all other applicable rules.

fee agreement. In this connection, the importance of having a written arrangement cannot be overstressed. Of course Rule 1.5(b) requires that the lawyer provide to a client whom the lawyer has not regularly represented a written statement of the basis or rate of the fee at or shortly after the representation begins. A writing would also be highly advisable, if not compelled by Rule 1.5 (see the final sentence of Comment [1] to Rule 1.5), whenever an existing fee arrangement with a client is altered during a representation.

The decision in *Lustig v. Horn*, supra, well illustrates the difference between application of a reasonableness standard versus a standard that simply looks for elements of adversity. The court there held that a fee arrangement was improper that provided that in a lawsuit to collect the attorney's legal fees the lawyer could obtain attorney's fees and costs attributable to the collection action from the client. It found that the retainer agreement "anticipates suit against and recovery of additional fees from a client should that client fail to pay the bill within the time required" and that this gave rise "to substantial fees for vigorous prosecution of the attorney's own client", raising the concern on the client's part of "his attorney's retaliation for nonpayment of even unreasonable fees." The court concluded that the fee provision was "potentially violative of the Rules of Professional Conduct barring an attorney from representing a client if such representation may be limited by the attorney's own interests." Concluding that a lawyer "should not place himself in a position where he may be required to choose between conflicting duties or where he must reconcile conflicting interests rather than protect fully the rights of his client," the court held that the award of attorney's fees for the collection action under the agreement should be set aside.

While the court is correct that the fee arrangement there contemplated adverse action by the lawyer against the client to collect fees, it omitted to note that, as discussed above, any fee arrangement, given that it is a binding contract, contemplates such an action in the event of nonpayment. The proper question, we think, is whether these provisions were reasonable in the circumstances. It appears that they were, despite the adversity. First, a collection action by a lawyer against a client is a relatively remote contingency. In such an action the lawyer's entitlement to collect attorney's fees for the collection action itself would become an issue only if the lawyer had already prevailed on the merits against the client—i.e., if the lawyer first established that the client had violated the obligation to pay the lawyer. The lawyer could not prevail on that point without establishing that the fees had been reasonable. Since the client had known from the beginning that in the event the client was held liable to the lawyer for unpaid fees the cost of collection would be a part of the damages, it would not appear that there is anything per se unreasonable about such a condition in a fee agreement.

*4. Assessing Provisions Aimed at Compensating the Attorney for the Client's Lateness in Paying or Failure to Pay*

The most commonly discussed question in this general topic is the charging of interest on a client's unpaid bills. The result in our Opinion No. 11—that under the Code of Professional Responsibility a lawyer could charge interest on a client's unpaid bills as long as that possibility had been agreed to by the client "in advance of representation or in advance of a new stage of representation"—is consistent with the rule in many jurisdictions. See, e.g., ABA Formal Opinion 338 (1974); New York Opinion No 399 (1975); Connecticut Opinion No. 99-26; Missouri No. 960017; Wolfram, *Modern Legal Ethics* § 9.2.2 at 506 (1986).

A logical question is whether it may be reasonable to go further and hold, as a number of jurisdictions do,[5] that the lawyer can in appropriate cases ethically seek interest on amounts owed even if there is no such provision in the fee agreement. This issue may be examined in the context of a hypothetical case in which a lawyer and a client agree upon a fee arrangement requiring the client to make payments to the lawyer as the lawyer's work progresses; assume that the arrangement does not mention any requirement that interest is due where the client fails to make payments otherwise required. Then the client simply fails to pay the lawyer in a timely fashion. If we assume that the lawyer is performing appropriately, this puts the client in breach of the agreement. Why, if the client has breached the agreement, should it be ethically inappropriate for the lawyer to charge for the time value of the money that the client has wrongfully failed to pay on time? When the question is put that starkly it is difficult to come up with a satisfactory answer.

However, we conclude that going from that abstraction to a practical standard that sufficiently protects the client is very difficult. There are too many possible compelling reasons that might drive a client to decline to pay fees for us to attempt to set out a guideline—and it would have been a relatively simple matter for the lawyer to have brought up the issue of interest for untimely payment before the representation has begun. The latter point is reinforced by the policy underlying the requirement for a written explanation of fees in Rule 1.5(b).[6] While that rule does not require the lawyer to anticipate every contingency that may arise, it does clearly express a preference for having the client be presented in writing, before incurring the obligation to pay a fee, a description of what will occur with respect to fees as far as reasonably possible.

Therefore, we conclude that we adhere to the view expressed in Opinion No. 11 that a client's unexcused failure to meet a fee obligation does not allow a lawyer to seek to collect interest on the unpaid portion of the debt unless that is specifically provided for in the existing fee arrangement. However, we also conclude that a client's unexcused failure to meet fee obligations to the lawyer can be a basis for the lawyer to re-examine the fee arrangement and, as a condition of performing further work, request the client to agree to an interest charge, prospectively only, for unpaid amounts that may be owing for work done by the lawyer in the future, after this change in the fee arrangement becomes effective (that is to say, we do not approve imposing interest charges on unpaid amounts for work done before the interest charge was agreed to). The lawyer can do this only if the severe standard for changing the fee arrangement during the representation can be met. A change in a fee arrangement in an ongoing representation is subject to strict scrutiny for overreaching by the lawyer, who, as we recognized in Opinion No. 11, may have "acquired [since the beginning of the representation] an unfair advantage in negotia-

[5] Such a view is consistent with that taken by the New York City Bar Association (Formal Opinion No. 2000-2), Georgia Opinion 45 (1985), Massachusetts Opinion 83-1 (1983), Rhode Island Opinion 98-06 (1998), and North Carolina 98-3 (1998). In Massachusetts and Georgia, while interest can be imposed even though that is not provided for in the original fee arrangement, the client must first be given an opportunity to pay without interest.

[6] Rule 1.5(b) requires a lawyer who has not regularly represented a client to provide the client, in writing, a statement of the basis or rate of the fee.

tions—as where the client's cause would be significantly impaired by the lawyer's withdrawal." See *Chase v. Gilbert*, 499 A. 2d 1203, 1209 (D.C. 1985) ("District of Columbia courts will scrutinize closely an attorney-client contract which is beneficial to the attorney and executed long after the attorney-client relationship has commenced"). What may constitute overreaching in particular circumstances is of course dependent on such factors as the resources and sophistication of the client, the presence or absence of such external factors as a favorable litigation schedule that would be lost if the client had to change counsel, and so on. But where the occasion for the change is the client's failure to comply with an obligation that the fee agreement reasonably placed on the client, the lawyer's request for a change in the fee arrangement is limited to imposition of an interest charge to be applicable prospectively should that situation occur in the future, and there are no other factors suggesting overreaching by the lawyer or advantage being taken of the client, we see no reason why the lawyer should not be able to seek such a change in the fee arrangement during the representation.[7]

We find this course superior to the lawyer's simply seeking to impose an interest charge where none had been provided for because it provides the client unequivocal notice and an opportunity to fully ventilate whatever concerns the client may have had about the representation. An additional advantage is that at a point where the fee arrangement itself is being changed, such important matters as the rate of interest and when it becomes applicable may, and indeed must, be fixed with specificity. This result is consistent with, and arguably does not even work a change in, the rationale of Opinion No. 11, in which we noted:

> An agreement for the imposition of interest or a finance charge that is entered into during the course of representation, where there was no such agreement at the outset, would be improper *if, by reason of his representation the lawyer had acquired an unfair advantage in negotiations*—as where the client's cause would be significantly impaired by the lawyer's withdrawal.

(emphasis added) As we interpret the Rules of Professional Conduct, the taking advantage of the client that Opinion No. 11 cautions the lawyer against would in our view bar a lawyer from seeking to change the fee arrangement even if the client had failed to pay under the existing arrangement.[8]

*Opinion No. 311*

**Choice-of-Law Rules for Professional Conduct in Non-Judicial Proceedings**

- When a District of Columbia attorney acts in a non-judicial proceeding outside of the District of Columbia, the rules of professional conduct governing the attorney's actions are determined by reference to D.C. Rule 8.5(b)(2). If the attorney is licensed only in the District of Columbia, the rules of professional conduct of this jurisdiction will apply. If the attorney is licensed both in the District of Columbia and in another jurisdiction, the rules of the jurisdiction where the attorney has his principal place of practice will apply unless factors relevant to the conduct in question clearly establish that the attorney's conduct has a predominant effect in the other jurisdiction—in which case the rules of that jurisdiction will apply. When a District of Columbia attorney serves as co-counsel on a matter with an attorney licensed in another jurisdiction, the District of Columbia attorney need only conform his conduct to the rules applicable under the choice-of-law provisions of Rule 8.5(b)(2) and the restrictions of Rule 8.4(a).

**Applicable Rules**

- Rule 8.5(b) (Choice-of-law)
- Rule 8.4(a) (Misconduct)

*Inquiry*

The Committee has been asked which rules of professional conduct apply to a member of the District of Columbia Bar participating in a non-judicial proceeding outside the District of Columbia. Consider, for example, an attorney who represents a party to a mediation occurring in State X where the State X version of ABA Model Rule 4.2—the rule relating to contacts with a represented party—varies substantially from the District of Columbia version of Rule 4.2. In such a situation—where the mediation is not in connection with a proceeding pending before a court in State X—will the attorney be subject to discipline in the District of Columbia for failing to comply with the requirements of State X's rules if they are more limiting than the District of Columbia's rules? Conversely, will the attorney be subject to discipline for actions that comply with the more lenient requirements of a State X rule but violate a more restrictive District of Columbia rule? Finally, what are the obligations of a District of Columbia attorney who acts as co-counsel in a non-judicial proceeding with an attorney licensed only in State X if a situation arises in which the two attorneys are subject to differing professional conduct requirements?

*Discussion*

District of Columbia Rule of Professional Conduct 8.5(b) [hereinafter "D.C. Rule"] addresses choice-of-law questions involving the application of the rules of professional conduct to the actions of an attorney both when the conduct relates to a matter that is pending before a court and "for any other conduct."

As a general matter, D.C. Rule 8.5(b)(1) provides that for conduct in connection with a proceeding before a court in which the attorney has been admitted to practice, the District of Columbia will apply the rules of professional conduct of that apply in that court (typically, those of the jurisdiction where the court sits), unless those rules provide otherwise. Thus, whenever an attorney's conduct relates to a proceeding before the courts of a jurisdiction outside the District of Columbia (a jurisdiction which, for convenience, we will call State X), the District will apply the rules of professional conduct adopted by State X to District of Columbia lawyers who appear in connection with the proceeding. *E.g. In re: Gonzalez*, 773 A.2d 1026 (D.C. 2001) (subjecting District of Columbia attorney to discipline and applying Virginia rules to his conduct with respect to matter before Virginia court); *cf.* Md. State Bar Ass'n, Comm. on Ethics Op. 86-28 (1986) (Maryland lawyer appearing in litigation in District of Columbia may follow District's less restrictive rule in responding to client fraud on the court). This choice-of-law provision is applicable whether an attorney is admitted to practice in State X's jurisdiction generally or has been specially admitted for the purpose of appearing in a single proceeding. When an attorney appears before a

[7] West Virginia (Opinion No. 93-02) refuses to allow a lawyer to charge interest on an unpaid balance where there was no provision for such a charge in the original fee agreement, finding that such a charge might "confuse" the client and "carry with it the threat that the attorney might withdraw." We think that the client is unlikely to be confused where the occasion for the lawyer's request to change the fee arrangement is the client's failure to pay.

[8] Cf. Rule 1.16(b)(3), which authorizes a lawyer to withdraw from a representation upon the failure of the client "substantially to fulfill an obligation to the lawyer [if the client] has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled...."

federal court the applicable rules of professional conduct will be those governing the bar of that court.

When the conduct in question does not involve a judicial proceeding in State X—as in, for example, an arbitration, a mediation, an administrative proceeding, a governmental investigation, or a commercial negotiation[1]—the choice-of-law rules of the District of Columbia Rules of Professional Conduct provide:

> (i) If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and
>
> (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

D.C. Rule 8.5(b)(2)[2]

*Rule 8.5(b)(2)(i)—Choice-of-Law for Lawyers Licensed Only in the District of Columbia*

D.C. Rule 8.5(b)(2)(i) provides that, in the context of non-judicial proceedings, if an attorney is licensed to practice only in the District of Columbia, the District of Columbia rules of professional conduct, not the rules of the jurisdiction where the non-judicial proceeding occurred will govern that attorney's conduct. This choice-of-law provision stems from the recognition that the authority to discipline a lawyer arises from his admission to practice in a territorial jurisdiction —either generally, or for a particular matter. *E.g., In re: Wade*, 526 A.2d 936 (D.C. 1987) (lawyer subject to discipline in District of Columbia for conduct outside of the jurisdiction because he maintains active membership in District of Columbia bar); Rule 6 Commentary, Model Rules for Lawyer Disciplinary Enforcement (ABA 1996) ("Admission to practice triggers the jurisdiction of the disciplinary authority."). Hence, an attorney licensed only in the District of Columbia will not be subject to discipline here for conduct relating to non-judicial proceedings elsewhere, so long as his conduct conforms to the District's rules of professional conduct.[3]

*Rule 8.5(b)(2)(ii)—Choice-of-Law for Lawyers Licensed Both in the District of Columbia and Elsewhere*

A more analytically difficult question arises under D.C. Rule 8.5(b)(2)(ii) when the attorney is authorized to practice both in the District of Columbia and in State X where the non-judicial proceeding is occurring (or, indeed, in yet a third jurisdiction, State A). In such a situation the District of Columbia choice-of-law provisions first require that the disciplinary authority determine the jurisdiction where the attorney is licensed and principally practices. The rules adopted by the jurisdiction of that "principal place of practice" will generally govern an attorney's conduct. Our choice-of-law provisions recognize, however, one exception to this general rule—the "predominant effects" exception. This exception is invoked when an attorney's conduct "clearly has its predominant effect" in State X (if State X is also a jurisdiction where the attorney is licensed to practice), even if State X is not the jurisdiction in which the attorney principally practices. When such a "predominant effect" is clearly established, the professional conduct rules of State X will apply.

Resolving individual fact scenarios in which these choice-of-law questions arise requires balancing two competing principles. On one hand, regulation of the bar historically has been, and remains, a function of the judiciary of each state. *See Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432-35 (1982). Each jurisdiction's regulation of the conduct of attorneys licensed by the state involves, therefore, a matter of significant governmental concern. *See* ABA Formal Op. 91-360 (July 11, 1991), *reprinted in* ABA Formal and Informal Ethics Opinions, 1983-1998, at 72, 75 (2000). Because each state has an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses," *Middlesex County*, 457 U.S. at 424, resolution of choice-of-law questions must be undertaken with due regard for the differing values expressed in conflicting rules of professional conduct adopted by two (or more) separate judicial bodies.

On the other hand, we must be mindful of the intent of those who drafted Rule 8.5(b).[4] The choice-of-law provisions were drafted to "minimiz[e] conflicts between rules, as well as uncertainty about which rules are applicable." D.C. Rule 8.5, comment [3]; *see also* A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998, at 345 (ABA 1999) (Rule 8.5(b) was added to "bring some measure of certainty and clarity" to choice-of-law issues). Rule 8.5(b) is, therefore, intended to ensure that "any particular conduct of an attorney [is] subject to only one set of rules of professional conduct," and that the "determination of which set of rules applies to particular conduct *is as straightforward as possible*." D.C. Rule 8.5, comment [3] (emphasis supplied).

This need for clarity and certainty is particularly acute "in the District of Columbia, whose Bar members frequent-

[1] When an arbitration or mediation occurs in connection with ongoing litigation or at the order of a court, then the choice-of-law rules applicable to "conduct in connection with a proceeding in court" under D.C. Rule 8.5(b)(1) may control. The choice-of-law rules addressed in this opinion are limited, therefore, those to be applied to non-judicial proceedings that do not occur in connection with a proceeding in a court.

[2] The choice-of-law questions addressed in this opinion also apply to government attorneys who are members of the District of Columbia Bar, yet frequently appear on behalf of the United States in non-judicial proceedings outside of the District. The choice-of-law principles enunciated in this opinion apply equally to government attorneys. Those who are members only of the District of Columbia Bar will, in reference to their conduct in non-judicial matters outside of the District, be subject only to the District's rules of professional conduct. Those who are members of both this Bar and another will have their conduct evaluated based upon the rules of the jurisdiction that is their principal place of practice (which may often be the District of Columbia) unless the conduct in question has a predominant effect in another jurisdiction where they are also licensed to practice law.

[3] The attorney should, nonetheless, exercise caution when acting in, or in respect of, another jurisdiction where differing rules exist, even though not licensed to practice there. Some activity in State X may be deemed by State X to be the unauthorized practice of law. In addition, the Committee offers no opinion as to the possibility that another jurisdiction may seek to apply its own rules to the attorney's conduct based upon its own choice-of-law and disciplinary authority rules. Some states assert disciplinary authority over lawyers acting within the state even though neither licensed in that jurisdiction nor appearing before courts of that jurisdiction. *E.g.* Md. R. Prof. Conduct Rule 8.5(b); *see also* D.C. Ethics Op. 167 (1986) (cautioning that extra-territorial representation may subject attorney to jurisdiction of foreign locale). Many states have choice-of-law provisions different from those of the District of Columbia, and application of those rules may produce results inconsistent with those arising from the District's choice-of-law rules.

[4] D.C. Rule 8.5, adopted in November 1996, is identical to ABA Model Rule 8.5, which was adopted by the ABA in August 1993.

ly practice in other jurisdictions and are admitted in more than one jurisdiction." Report to the Board of Governors of the District of Columbia Bar: Proposed Amendments to the District of Columbia Rules of Professional Conduct, at 65 (F. Whitten Peters, Chair) (1993) [hereinafter "Peters Committee Report"]. In short, "for any choice of law system to be effective in guiding members of the Bar, it is essential that [it] be as uniform as possible." *Id.*; *see also* ABA, Report of the Committee on Ethics and Professional Responsibility (1993) ("The basic thesis of the proposal [to revise Rule 8.5] is that what it achieves in certainty and simplicity is worth much more than whatever regulatory interest it sacrifices."), *reprinted in* Peters Committee Report at 69.[5]

Given the intent of D.C. Rule 8.5(b) to foster both clarity and regularity in the choice of conflicting rules, the proper interpretation of that Rule should rely, to the maximum extent practical, on bright line determinations that will bring certainty to the interpretation of Rule 8.5(b)(2)(ii) and provide guidance to the members of the Bar. *Cf. Ross v. Creighton Univ.*, 740 F. Supp. 1319, 1330 (N.D. Ill. 1990) ("Rules serve little purpose if they are not reasonably predictable and if they do not apply across the board, for one cannot conform behavior to the unknowable."); Restatement (Third) of the Law Governing Lawyers § 5, comment *h* (2000) (characterizing Model Rule 8.5(b) as intended to "provide [for] more rigid, per se rules" relating to choice-of-law issues and distinguishing it from the more contextual "significant effects" test adopted by the Restatement). Put another way, "[r]ule 8.5(b) attempts to set out choice-of-law rules conforming in some respects to those in [the Restatement], but as per se and unexcepted rules rather than presumptions." Restatement (Third) § 5, Reporter's Note to Comment *h* (citing Roach, "The Virtues of Clarity: The ABA's New Choice-of-Law Rule for Legal Ethics," 36 So. Tex. L. Rev. 907 (1995)).

To be sure, bright line rules cannot identify the appropriate resolution of choice-of-law questions for each and every situation, which must, in the end, be resolved on a case-by-case basis. Nonetheless, the following factors should, to the maximum extent possible, be used to determine the ultimate resolution of the choice-of-law question.

*Principal Place of Practice*—Under D.C. Rule 8.5(b)(2)(ii) the initial inquiry is the identification of the principal place of practice of a lawyer. We are aware of no commentary or case law that addresses the question of how this identification may be accomplished. We believe that the rule envisions a common-sense understanding of the phrase "principal place of practice" that encompasses the following components:

First, the phrase "principal place of practice" refers to the place of practice of the individual attorney whose conduct is at issue, not to the principal place of practice of his or her law firm. Typically, it is the individual lawyer's conduct that is at issue; any sanctions to be considered by the disciplinary authority generally will run against an individual attorney, not the firm. Moreover, it would be administratively unworkable (and in some cases virtually impossible, given the multi-jurisdictional nature of many major firms and the difficulty in some instances of identifying a firm's "principal" office[6]) to oblige individual attorneys to conform their conduct to the ethical rules of the jurisdiction where the principal office of the firm exists. This is especially true given that lawyers affiliated with a firm often will not be licensed to practice law in the jurisdiction of the firm's principal office. Hence, we do not believe that Rule 8.5(b)(2)(ii) requires attorneys to look to the rules of professional conduct of a jurisdiction where they do not practice simply because they have affiliated with the branch office of a law firm whose principal office is outside the District of Columbia.

Rather, an individual attorney's principal place of practice is presumptively to be determined by identifying the physical location of the office from or at which the attorney conducts the largest portion of his practice. *Cf.* Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Op. 96-147 (1997) (South Carolina Rules of Professional Conduct govern conduct, in South Carolina, of Pennsylvania lawyer also admitted in South Carolina, "where he currently resides and practices").[7] In those rare instances where the initial inquiry yields ambiguous results—as where an attorney splits his time almost equally between an office in the District of Columbia and an office in State X—then the disciplinary authority should look, secondarily, to the jurisdiction where the attorney resides (if the attorney resides in a jurisdiction where he is licensed) to determine his principal place of practice.[8]

Once the principal place of practice of an attorney is determined, the rules of that jurisdiction should be applied to evaluate the attorney's conduct in non-judicial settings, unless the "predominant effect" exception requires application of the rules of a different jurisdiction.[9]

*The Predominant Effect Exception*—On rare occasions the "predominant effect" exception may lead the disciplinary authority to apply the rules of professional conduct of State X, where the conduct occurred and where the attorney is also licensed, even though the attorney whose conduct is under examination has a principal place of practice in the District of Columbia (or another jurisdiction, State A). We anticipate, however, that this exception will be invoked only in those infrequent situations where the

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[5] Consequently, though different jurisdictions may retain independent disciplinary authority over the conduct of an individual attorney licensed in more than one jurisdiction, the District of Columbia rules seek to "take all appropriate steps to [ensure] that [differing jurisdictions] apply the same rule to the same conduct, and in all events [to] avoid proceeding against a lawyer on the basis of two inconsistent rules." D.C. Rule 8.5, comment [5].

[6] For example, is a firm founded in Texas, and practicing as a Texas limited liability corporation, yet with its single largest office in the District of Columbia, a Texas or a District of Columbia firm?

[7] In this era of multi-jurisdictional practice, multiple offices, and attorneys who telecommute to their offices from distant locations or their homes, even the relatively straightforward question of where an attorney's office is located may, in some instances, be difficult to determine. We anticipate, however, that the disciplinary authority will look to extrinsic indicia of an attorney's principal physical location: Where is his mail received? What address is listed on his letterhead, professional listing, and business cards? Which office is registered with the relevant federal, state, and local regulatory (e.g. license and taxation) authorities as his business location? While assuredly the resolution of these factual questions will not always be free from doubt, the Committee anticipates that uncertain cases will be exceedingly infrequent.

[8] It is theoretically possible that an attorney splits his time exactly equally between two principal offices in different jurisdictions and that he resides in neither jurisdiction. There may, therefore, be rare instances in which it may be impossible to unambiguously determine a "principal place of practice." In that event the predominant effects test will guide the choice of the applicable rules of professional conduct.

[9] As should be evident, this analysis also applies if the attorney's principal place of practice is in State A, a state that is neither the District of Columbia (where the attorney is licensed), nor State X (where the conduct occurred), and the attorney is a member of the Bar of State A. If the attorney whose conduct in State X is in question has a principal place of practice in a third jurisdiction, State A, where he is also licensed, the District of Columbia will apply the rules of professional conduct of State A unless the predominant effects exception requires otherwise.

interests of the other jurisdiction are manifestly greater than those of the District of Columbia or State A where the principal place of practice is located. *Cf.* Restatement (Third) of the Law Governing Lawyers § 5, comment *h* (2000) (predominant effects test is a "rigid" and "per se" test); *id.* § 5, Reporter's Note to comment *h* (predominant effects test involves "per se" rules more restrictive than "presumptions").[10]

Thus, the Commentary to Rule 8.5 advises that the predominant effect exception to Rule 8.5(b)(2)(ii) is "a narrow one." D.C. Rule 8.5, comment [4]. And the Rule's requirement that a lawyer's conduct "clearly" have a predominant effect in another jurisdiction strongly suggests that the facts establishing such a predominant effect must be more than speculative or uncertain; rather they must be concrete and clearly established.

It is beyond the ability of the Committee to offer a comprehensive list of factors that will or will not suffice to invoke the "predominant effects" exception. Indeed, as the exception is intended to provide for the treatment of unusual and unique cases that ought not to be resolved by the application of the "principal place of practice" test, it is inconsistent with the purpose of the exception to suggest a rigid definition of what constitutes a "predominant effect." Rather, invocation of the exception will be guided by the Rule's intent to apply the exception narrowly, yet render it useful in those rare circumstances where it is appropriate. Thus, for example, the exception

> would be appropriately applied . . . to a situation in which a lawyer admitted in and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

D.C. Rule 8.5, comment [4].[11] In short, the predominant effect exception properly will be invoked in the narrow set of cases where the factors relevant to the particular conduct in question clearly establish that State X manifestly has a substantially greater interest in the resolution of the question to that of the principal place of practice.[12]

*Action by Attorneys Involved in Joint Representation*—One additional issue needs to be addressed—the situation in which an attorney who is a member of the District of Columbia bar and whose conduct would, under the foregoing analysis, be subject to District of Columbia rules, is jointly representing a client with another attorney who is subject to a different jurisdiction's authority. A District of Columbia attorney acting in State X will often act in coordination with an attorney licensed to practice only in State X—either a lawyer who is local co-counsel from a different law firm or a lawyer who is associated in a single firm with the District of Columbia lawyer but has a principal place of practice in State X.[13]

What, if any, are the obligations and responsibility of the District of Columbia lawyer faced with this "dual jurisdiction/dual professional obligation" situation? Put another way, we assume that for at least one of the attorneys certain conduct may comply with the rules of professional conduct that govern his actions, while for the other the same conduct does not. May the restricted attorney engage in a representation of a client with an unrestricted attorney who may act in a situation where the restricted attorney's own actions would be impermissible?[14]

In our judgment D.C. Rule 8.5 is best interpreted to require that the District of Columbia attorney faced with a dual jurisdiction/dual professional obligation situation act so that his own personal conduct is consistent with the rules of professional conduct applicable to him under the choice-of-law principles outlined above. In other words, a District of Columbia attorney does not violate the rules of professional conduct if his co-counsel engages in conduct that is permissible for that co-counsel under the rules of professional conduct applicable to that co-counsel, even if the District of Columbia attorney could not undertake the conduct in question. And, conversely, if the District of Columbia attorney acts in a manner permitted him under our choice-of-law principles, that act is not rendered impermissible simply because his co-counsel would not be permitted to engage in the conduct by virtue of the rules of professional conduct applicable to the co-counsel.[15]

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[10] The analysis reflected in this section will also apply in the converse situation, involving an attorney subject to discipline in the District of Columbia by virtue of his license from this jurisdiction whose principal place of practice is in State X. The ethical rules of State X will apply to the attorney's conduct in non-judicial proceedings unless the District of Columbia disciplinary authority determines that the predominant effect of the attorney's conduct lies in another jurisdiction where the attorney is also licensed (whether the District of Columbia or State A).

[11] D.C. Ethics Op. 264 identified a number of variables that might factor into a choice-of-law decision. Opinion 264 was issued, however, prior to the District's adoption of the current version of Rule 8.5.

[12] Without addressing any concerns that these situations may raise relating to the unauthorized practice of law, for completeness sake, we note three unlikely scenarios: 1) In the unusual case that an attorney's principal place of practice is in a state, State A, that is not a jurisdiction where the attorney is licensed, the District of Columbia disciplinary authority will apply the professional conduct rules of the jurisdiction, State X, where the conduct in question occurred, if the attorney is licensed in State X; 2) In the even more unlikely circumstance that the attorney has a principal place of practice in State A (where he is not licensed), engages in conduct in State X (where he is also not licensed), and the disciplinary authority must choose between the rules of either the District of Columbia or the attorney's second state of licensure, State M, the disciplinary authority should apply the rules of the jurisdiction of licensure that has the predominant contact with the conduct in question (by virtue, for example, of the residence of one of the clients); and 3) If neither jurisdiction of licensure has any contact with the conduct in question and if both the conduct and the principal place of practice lie in jurisdictions where the attorney is not licensed—the disciplinary authority should presumptively apply the more limiting of the competing rules of the two states of licensure (the District of Columbia and State M), as the case may be.

[13] The analysis in this section is equally applicable if co-counsel is licensed to practice in a third jurisdiction, State A.

[14] D.C. Rules 5.1(c) (1) and 8.4(a) do not cover this situation, as they address only the issue of an attorney's responsibility for the unethical acts of another attorney. Here the underlying action by the unrestricted attorney is, for that attorney, conduct in compliance with his jurisdiction's rules. The question here is the more nuanced one of when (if ever) the attorney with greater restrictions on his professional conduct may continue to participate in a matter when the unrestricted attorney has acted in a manner permissible for him, yet in a manner that the restricted attorney could not have.

[15] We recognize that this interpretation raises the specter that a District of Columbia attorney may be chosen to perform acts in State X in order to evade the ethical restrictions that might apply to his State X colleague who is subject to that jurisdiction's rules. Conversely, the State X attorney may be called upon to perform acts that would be prohibited to the District of Columbia attorney under the choice-of-law analysis set forth above. We doubt that such deliberate evasion of professional conduct limitations is commonplace and note that the District attorney is expressly prohibited from such willful action. *See* D.C. Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so,

The structure and language of the rules of professional conduct support this interpretation of Rule 8.5(b). A contrary interpretation (one, for example, holding that an attorney licensed only in the District of Columbia could not act in a manner that was permissible for him because the action was impermissible for his co-counsel) would, in many circumstances, create a result directly contrary to the mandatory language of D.C. Rule 8.5(b)(2)(i): "If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied *shall* be the rules of this jurisdiction." *Id.* (emphasis supplied). An interpretation that imputed to a District of Columbia attorney, licensed only in this jurisdiction, the rules of professional conduct of another jurisdiction applicable to his co-counsel would contravene the express directive of Rule 8.5 that the District of Columbia attorney be governed only by the rules of this jurisdiction.

This construction of Rule 8.5 is also more generally consistent with the structure of the rules of professional conduct. Where the drafters wished to require an individual attorney to act on the basis of or in respect of the professional obligations of another attorney they made that requirement express. Thus, for example, the rules provide that a disqualifying conflict of interest for one attorney is imputed to all members of his law firm. *See* D.C. Rule 1.10(a). And they provide special rules governing conflicts arising from prior government service of an attorney and their effect on members of his law firm. *See* D.C. Rule 1.11. By contrast, there is no general mandate requiring every attorney to comport his conduct with the professional conduct rules applicable to all of his colleagues within a law firm, much less with the rules applicable to unaffiliated co-counsel in a particular matter. It would be unwarranted to read such an obligation into the rules based on the choice-of-law provisions of D.C. Rule 8.5(b).

Finally, our understanding of Rule 8.5(b) is consistent with the assumptions that, at least implicitly, underlie the resolution of other professional conduct issues. For example, the ABA Standing Committee on Ethics and Professional Responsibility recently considered whether American lawyers may form partnerships with foreign lawyers. *See* ABA Formal Op. 01-423 (Sept. 22, 2001); *see also* D.C. Ethics Op. 278 (1998) (approving partnerships with foreign lawyers). In approving such partnerships the ABA Committee noted that the "law and ethical standards applicable to the legal profession in foreign countries will differ from some of the law and ethical standards that apply to U.S. lawyers." Formal Op. 01-423 at 8; *see also* D.C. Ethics. Op. 278 (same). Rather than concluding that the U.S. lawyers might be bound by the variant professional conduct standards applicable to their foreign partners, the ABA Committee counseled that the resolution to the problem posed by the differing standards lies in an explanation of the differing standards to any client potentially affected by them so that the client can make an informed decision on the matter. *See* Formal Op. 01-423 at 8; *cf.* D.C. Ethics Op. 278 (D.C. attorney "must ensure that the proposed association [with foreign attorney] does not in any way impair or frustrate his ability to meet his ethical obligations"). Thus, the ABA Committee recognized, without deciding (*see* Formal Op. 01-423 at 9 n.21), that the choice-of-law provisions of the rules do not necessarily require U.S. lawyers to adhere to the professional conduct standards of their foreign colleagues.

In light of these considerations, we believe that under D.C. Rule 8.5(b) the rules of professional conduct applicable to a District of Columbia attorney are not imputed to his co-counsel who may be subject to differing rules. The converse also holds—subject to the strictures of D.C. Rule 8.4(a), a District of Columbia attorney is not by virtue of the relationship made subject to the rules of professional conduct applying to his State X co-counsel and need follow only the rules of professional conduct dictated by the principal place of practice and predominant effects choice-of-law considerations outlined above.

Inquiry No. 01-09-20
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*or do so through the acts of another.*") (emphasis supplied).

The Committee is also cognizant of the possibility that a client may attempt to secure advantage and evade the applicable ethical restrictions by retaining counsel unencumbered by certain locally applicable ethical rules. In the absence of empirical evidence that large numbers of clients are making such strategic choices we discount that possibility, believing that far more salient factors (such as quality of representation, price, experience, and reputation) will much more significantly influence the choice of counsel. In our view the choice-of-law questions posed in this opinion are far more likely to be disclosed by the course of events well after the choice of counsel has been made than to be the motivating force for that choice.

*Opinion No. 312*

## Information That May Be Appropriately Provided to Check Conflicts When a Lawyer Seeks to Join a New Firm

- When a lawyer contemplates moving to a new firm, it is necessary to determine whether prior work done by the lawyer on client matters may create a conflict of interest for the new firm. To check whether such conflicts exist, only information that does not constitute "confidences" or "secrets" may be revealed without client consent. However in most cases sufficient information can be disclosed to permit a conflicts check.

### Applicable Rules

- Rule 1.6 (Confidentiality of Information)
- Rule 1.10 (Imputed Disqualification)

*Background*

In Opinion No. 273, we discussed a number of issues raised by the movement of lawyers from one firm to another. One such issue was the need to check for possible conflicts of interest between current and former clients of the lawyer's existing firm and those of the new firm. This opinion expands on Opinion No. 273 by seeking to address possible confusion or uncertainty among lawyers who are proposing to move to a new firm about the extent to which they can reveal information to their prospective new firms for the purpose of undertaking such conflict checks.[1]

*Discussion*

To understand what information a lawyer may appropriately reveal in checking conflicts with a new firm, a brief review of the standards that apply in those circumstances should be helpful. D.C. Rule 1.10(b) provides specific guidance on what creates a conflict of interest with respect to client relationships on which the moving lawyer is no longer participating when the lawyer joins the new firm.[2] That Rule provides that

[1] Where a lawyer joining a firm is concerned about conflicts that may have been caused by work done before becoming a lawyer, as a law clerk, summer associate, paralegal assistant, or other non-lawyer assistant, Rule 1.10(b) does not require disqualification of the firm which the lawyer is joining in any event, but other considerations apply. *See* Opinion No. 227.

[2] Rule 1.10(b), extending to situations where a

where a lawyer joins a firm, that firm may not represent a client in any matter that is the same as or substantially related to a matter on which the lawyer formerly worked for a client adverse to the present firm's client, but only where the moving lawyer "has in fact acquired information protected by Rule 1.6 that is material to the matter."

In several ways, this is a narrower test than the former-client substantial relationship test as imposed by the combination of Rule 1.9 and Rule 1.10(a) in the case of a lawyer who is not changing firms. First, under Rule 1.9, the receipt of confidential information in the earlier representation is presumed if the later matter for a different client is "substantially related." Where such a presumption is made, a lawyer will generally not be heard to assert that the lawyer did not actually receive such information.[3] By contrast, Rule 1.10(b) turns on whether a lawyer actually received confidential information in the earlier representation that is material to the current matter.

Second, under Rule 1.10(b) a moving lawyer's former clients for conflict-checking purposes do not include every client in the former firm but only those clients on whose matters the lawyer actually worked. Comment [19] states in part: "Thus, not all of the clients of the [lawyer's] former firm . . . are necessarily deemed former clients of [the moving lawyer]. Only those clients with whom the [moving lawyer] in fact personally had a lawyer-client relationship are former clients within the terms of [Rule 1.10(b)]."[4] Therefore, when a lawyer is in firm A the provisions of Rule 1.10(a) impute to that lawyer any disqualification of any lawyer in the firm under the conflict of interest rules (specifically 1.7, 1.8(b), 1.9, or 2.2), whether or not the lawyer is involved with the conflict-causing representation. But when that lawyer moves to firm B the only conflicts that the lawyer carries along from firm A are those caused by client representations in which the lawyer actually participated. Conflicts that applied to the lawyer while in firm A only because of the imputation required by Rule 1.10(a) do not apply when the lawyer is moving to another firm.

Third, as noted in Opinion 273, in order to trigger disqualification of the new firm under Rule 1.10(b), it is not sufficient for the moving lawyer simply to have participated in the representation of the client at the former firm. Rather, disqualification is appropriate only where that lawyer has "acquired information protected by Rule 1.6 that is material to the matter." Therefore, as Opinion No. 273 says, this provision "leaves open the possibility that a lawyer, such as an associate who had only a peripheral involvement in a matter (as by preparing a research memorandum on a point of law), would not subject his new firm to disqualification under Rule 1.10(b) because that lawyer did not learn any client confidences in the course of the representation."[5]

This narrower scope of Rule 1.10(b) reflects the policy favoring attorney mobility; the concern was that the broader test of Rules 1.9 and 1.10(a), if applied in the context of lawyers changing firms, would result in a "radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel." Comment [10] to Rule 1.10.

Typically, when a lawyer contemplates joining a new firm, the lawyer provides information to that firm indicating the clients, adversaries, and an indication of the subject matter on which the lawyer has worked at the lawyer's existing firm so that the potential new firm may check to see whether the lawyer's joining it would create a conflict of interest with any of that firm's clients.[6] What can a lawyer contemplating such a move firm reveal to that firm in providing that information? Rule 1.6 governs the answer to this question. Subsections (a) and (f) require lawyers not to reveal "confidences" and "secrets" of a client or former client. (Of course under Rule 1.6(d)(1) a client may consent to disclosure of a confidence or secret, but we will assume here that no such consent has been obtained.) Rule 1.6(b) defines "confidence" as "information protected by the attorney-client privilege under applicable law"—a reminder that the scope of the privilege is a matter of substantive law and not an appropriate subject for an opinion of this Committee. We will assume that the privilege covers communications made in confidence by the client to the lawyer for the purpose of obtaining legal advice and communications from the lawyer to the client that might reflect the substance of those client-lawyer confidential communications. See *Evans v. Atwood*, 177 F.R.D. 1 (D.D.C. 1997).

Rule 1.6(b) then defines "secret" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing, or would likely be detrimental, to the client." A "secret" may be information gained from another source than the client and may be shared by others without losing its status as a secret. Comment [6] to Rule 1.6; *see* our Opinions No. 83 and 246. As Comment [6] to Rule 1.6 states, the requirement to protect secrets "reflects not only the principles underlying the attorney-client privilege, but the lawyer's duty of loyalty to the client."

Thus the critical point in identifying secrets is not whether the information came from the client or who else knows it, but whether it was "gained from the professional relationship" and (1) the client has asked that it be held inviolate or (2) revelation of it would be embarrassing or likely detrimental to the client.[7] An illustration of the limitation

lawyer "had previously represented a client," covers both instances where the client matter has ended at the lawyer's former firm (or other employment) and where the matter may be continuing but the moving lawyer is no longer working on that matter.

[3] See *T.C. Theatre Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). T.C. Theatre is cited in comment [2] to Rule 1.9. Cf. *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (DC 1984)(en banc) (applying the "substantially related" test under the former Code of Professional Responsibility in the context of determining disqualification of a former government employee).

[4] The phrase "personally had a lawyer-client relationship" covers any situation in which the lawyer actually worked on a client matter, regardless of whether the lawyer had a "personal" relationship with the client.

[5] Actually, this portion of Opinion No. 273 may be subject to misinterpretation if it is read to suggest that the only information protected under Rule 1.6 is client "confidences"—information protected by the attorney-client privilege. Rule 1.6 also requires the lawyer to keep "secrets" confidential, secrets being defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing, or would likely be detrimental, to the client." It is, of course, extremely important for lawyers to be scrupulous in determining whether they may have such information.

[6] It is not possible to generalize about how this process does or should occur. Typically, by comparison to the moving lawyer, the firm has more clients and a system, often computerized, for checking conflicts (*cf.* the final sentence of Comment [11], Rule 1.7) so it makes sense for the moving lawyer to supply this information to the firm, to be checked against the firm's system. But there may often be circumstances (for example, where the moving lawyer or the firm have specialized practices) where the moving lawyer should make particular inquiry as to whether the firm represents particular clients, is adverse to particular entities, or is involved in specific issues or controversies.

[7] Subsections (a) and (b) of Rule 1.6 are substantially identical to DR 4-101(B) and (A) of the former Code of Professional Responsibility. The D.C. Bar recommended that that language be retained in Rule 1.6 over the then-new ABA Model

on the scope of "secrets" is contained in Comment [8] to the D.C. version of Rule 1.6, which observes that with respect to a former representation at least, "secrets" do not include information that has become "generally known." We believe that in the context of a lawyer who has moved, or is contemplating a move, to another firm and is determining what information may be revealed for checking conflicts with that firm, the bar on revealing "secrets," in addition to not applying to information that is harmless or unexceptionable, would also not prevent the lawyer from discussing information that would otherwise be a secret but has become generally known.[8]

We stress that we are here referring to information that is truly generally known so that the lawyer in question is certain that the information is not new to the person whom the lawyer is discussing it with. For example, if the press has widely reported that a particular corporation was one of several that had been sued by a federal agency, then it could hardly be argued that a moving lawyer had revealed a "secret" by mentioning that he or she had worked on that litigation at the existing firm. The lawyer must make the judgment of whether particular information is a secret or not (see our Opinion No. 128). We caution that because such decisions are made in the almost entirely private context of a lawyer seeking employment in another firm, the lawyer must err on the side of protecting information where any doubt exists.

Without the former client's consent, therefore, a lawyer may, in checking conflicts at a new firm, reveal information about representations that is not privileged and is not a secret because it has not been requested by that client to be held inviolate and the revelation of which would not be harmful or embarrassing to that client or has become generally known. In the great majority of cases, we believe, this leaves lawyers free to reveal sufficient information to carry out a reliable conflict check. Information about many representations would not harm or embarrass the client where the basic facts of the representation are unexceptionable or already known to opponents or others who are not the client, including, for example, regulatory agencies or other government bodies.

Moreover, it is typically necessary to reveal only the most general information about a representation in order to determine, positively or negatively, whether a representation may cause a conflict. This is clear from the holding in *T.C. Theatre Corp. v. Warner Brothers Pictures* mentioned above. *See also, Brown*, supra, 486 A. 2d at 49-50. In *T.C. Theatre*, a lawyer's former client was the opponent in litigation of the lawyer's current client, and the former client moved to disqualify that lawyer and the lawyer's firm, claiming that in the former representation the lawyer learned confidential information from the then-client that would presently be useful in opposing that former client. The lawyer denied that he had received such information in the former representation. Judge Weinfeld ruled that to inquire into the truth of the assertions about what information had been confided in the earlier representation would require the revelation of the very confidential information sought to be protected. To avoid that, he held, the appropriate inquiry would be whether the current representation was "substantially related" to the former. If it was, then it would be presumed that confidences were given in the former representation that would be of use against the former client in the latter. To effectuate this test, the subject matter of former representation is described in general terms and compared to the current representation. As noted above, this standard is codified in Rule 1.9 of the D.C. Rules as the primary determinant of whether a lawyer may oppose the interests of a former client on particular issues. As we have described, to avoid discouraging lawyer mobility Rule 1.10(b) imports a narrower version of the substantially related test (under which the subject matter is compared but there must be actual possession by the lawyer of protected information rather than simply presuming possession); but the basic process of comparing representations to determine whether they involve similar subject matter is the same under Rule 1.10(b) as it is under Rule 1.9. It could hardly have been intended that Rule 1.10(b) impose a standard for checking conflicts that cannot be applied without revealing secrets protected by Rule 1.6.

There are, of course, many instances in which the facts surrounding a representation (such as that client X is contemplating a takeover of another business or has consulted a divorce lawyer or a criminal defense lawyer) may be extremely sensitive and so fraught with the possibility of injury or embarrassment to that client that absent a waiver that information is not subject to disclosure even for the purpose of checking conflicts.[9] *See* D.C. Rule 1.7, comment [19]. There is no specific exemption to the confidentiality rules in Rule 1.6 or elsewhere that permits a lawyer to reveal confidential information for the purpose of checking or seeking waiver of a conflict. This does not, mean, however, that there are no techniques that may in many cases allow conflicts to be adequately checked while at the same time assuring confidentiality to the full measure required by the Rules. A helpful discussion of possible approaches is provided in New York State Bar Opinion No. 720 (1999). Some rough guidelines or suggestions follow. However, the appropriateness and usefulness of such shortcut techniques as these suggested here can really only be judged on a case by case basis.

- As noted above, as a general rule it is merely necessary to compare the client name and the general subject matter of the representation. This information is often, though not always, neither privileged nor a secret.
- In some cases, identifying a particular issue or subject matter without identifying the client name may be sufficient to determine the lack of any conflict (see Opinion No. 265 on positional conflicts).
- If the subject matter but not the client name is sensitive, it will often be possible to avoid the sensitive areas if the moving lawyer mentions only the

Rule of Professional Conduct because the ABA model Rule 1.6 language was "broader than warranted." Report of the D.C. Bar Model Rules of Professional Conduct Committee (the so-called Jordan Committee) and the Board of Governors, November 19, 1986, at 52. The Jordan Committee noted that the ABA version of the rule barred lawyers from revealing any information "relating to the representation." As an example of the overbreadth of this formulation, the Committee noted that information would be protected by it if that information came to the lawyer via a newspaper after the representation had ended. *Id.* While the Jordan Committee did not mention this, the ABA version would also bar the lawyer from mentioning any such information even if it could not possibly cause injury, or even were favorable, to the client. We think it plain that this is another example of overbreadth of the ABA version when compared to the DC Rule, which protects as "secrets" only information that the client has requested be held inviolate or the revelation of which would embarrass or be deleterious to the client.

[8] We doubt that the word "reveal" (Rule 1.6(a)(1)) even properly applies to the act of stating a fact to a hearer who already knows that fact. Further, it is questionable whether the act of disclosing a fact to a person can embarrass or be detrimental to someone within the meaning of the definition of "secret" in Rule 1.6(b) if the person to whom it was disclosed already knows it.

[9] This is a familiar difficulty in the context of seeking a waiver of a conflict. Even where a lawyer believes that a waiver would be given, it cannot be sought if in order to inform the would-be waiving client sufficiently it is necessary to reveal confidential information about the other client the revelation of which would not be consented to.

client name and asks the firm if that causes a problem. If it does not there may not be any need to determine whether the subject matter of that representation presents any problem.[10]

- If the identity of the client creates a problem (for example because the moving lawyer's practice specialty—for example, criminal law—would in combination with the client name reveal too much), it may be possible for the moving lawyer to name, instead of the client, those persons or entities to whom or which that client is adverse. If the firm does not represent them, there may well be no problem.
- At least as a first stage in an inquiry, it may be possible to avoid revealing confidences and secrets by providing a list of names to the firm without revealing which are clients and which adverse parties, perhaps also presenting the names in alphabetical or other order so as not to suggest associations. Depending on the substance of the firm's reaction or lack thereof to the names on the list, it may well be possible to discern that there is no problem without revealing additional information.

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*Opinion No. 313*

## Whether a Lawyer May Continue to Represent a Client When That Lawyer Represented the Same Client in the Same Matter While Serving as a Public Officer or Employee

- A former defense lawyer with the Navy Judge Advocate General's Corps may continue, in private practice, to represent in post-conviction proceedings the same criminal defendant whom he had represented as appointed counsel during the court martial. Even though his subsequent representation of the client is for the same matter in which he had participated personally and substantially while a public employee, he has not accepted "other employment" within the meaning of Rule 1.11 when he continues to represent the same client in the same matter after leaving military service.

[10] This is likely to be a successful technique much of the time. It cannot be presented as effective as a rule, however, because the issue may be one that affects persons not actually designated as adverse. Again, *see* Opinion No. 265 (positional conflicts).

**Applicable Rule**

- Rule 1.11 (Successive Government and Private Employment)

*Inquiry*

For over a year, a partner in the inquiring law firm had served as co-counsel in representing a lance corporal in the United States Marine Corps throughout the pre-trial and trial phases of his court-martial proceeding. The defendant was also represented by a criminal defense attorney appointed from the Navy Judge Advocate General's Corps ("JAG"). After the defendant was convicted and sentenced, his JAG criminal defense attorney was released from active duty and became an associate with the law firm that presents this inquiry. The partner who had served as co-counsel during the court martial has left the firm, and the defendant expressed an interest in having his former JAG lawyer, now a civilian, continue to represent him during various post-trial proceedings, which could include an appeal, a petition to the Board for Correction of Naval Records, and a petition for clemency. The former JAG lawyer, who is a member of the Bar of the District of Columbia, requested an opinion from the Navy concerning whether his continued representation of the defendant was prohibited by 18 U.S.C. § 207, and the Navy concluded that it was. According to the opinion, because he had participated "personally and substantially" as an officer throughout a "particular matter" in which the United States was a party, he could not communicate with or appear before the military authorities on behalf of the same specific party in connection with the same matter.

The law firm requested an opinion from this Committee regarding whether Rule 1.11 of the District of Columbia Rules of Professional Conduct prohibited the firm (as well as the JAG lawyer himself) from representing the defendant. While this request was pending, the United States Court of Appeals for the Armed Forces reversed the position originally articulated by the Navy with respect to the applicability of section 207. Relying on long-standing precedent from the United States Court of Military Appeals interpreting the scope of section 207 in this context, the court concluded that the defendant's civilian counsel could continue to represent him during further review of the court-martial proceeding.

*Discussion*

The Ethics in Government Act, 18 U.S.C. § 207, and Rule 1.11 apply in similar ways to restrict post-Government employment.[1] Under Rule 1.11, a lawyer may not "accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." The Ethics in Government Act uses similar terms in prohibiting any person, after leaving federal employment, from making any communication to or appearance before any officer or employee of any department, agency, etc. on behalf of any other person in connection with "*a particular matter*" (1) in which the United States is a party or has a direct and substantial interest, (2) in which the person "*participated personally and substantially* as such officer or employee" and (3) "which involved a specific party or specific parties at the time of such participation." 18 U.S.C. § 207(a)(1)(A)-(C) (emphasis added).[2]

There are, of course, differences between the two requirements: Section 207 is a criminal statute that applies to any former officer or employee of the executive branch of the United States or of the District of Columbia. Rule 1.11, by contrast, is a rule of professional con-

[1] Comment [2] to Rule 1.11 expressly recognizes that "[i]n the District of Columbia, where there are so many lawyers for the federal and D.C. governments and their agencies, a number of whom are constantly leaving government and accepting other employment, particular heed must be paid to the federal conflict-of-interest statutes. *See, e.g.*, 18 U.S.C. Chapter 11 [§§ 201-225] and regulations and opinions thereunder." *See also* D.C. Bar Op. No. 297 (discussing "as a threshold matter" the applicability of section 207 before considering the applicability of Rule 1.11).

[2] In 1986, this Committee acknowledged that it had proposed certain modifications to Rule 1.11—modifications that the Court of Appeals accepted—"with the purpose of conforming the language of the disciplinary rule to that used in 18 U.S.C. 207(a), the Ethics in Government Act. The Committee did not intend the change in language to have a significant, practical effect. Thus, what the Committee stated in interpreting 'substantial responsibility' still is relevant in determining whether the inquirer here 'participated personally and substantially' in the cases described by her inquiry." D.C. Bar Op. No. 177, at 294 (1986). Since then, both the Court of Appeals and this Committee have sought guidance on the meaning of Rule 1.11 by reference to regulations and opinions construing section 207. *See, e.g., In re Sofaer*, 728 A.2d 625, 643 (D.C. 1999) (interpreting the meaning of the condition under Rule 1.11(a) that the former government lawyer had participated "personally and substantially" in the government matter by seeking guidance from federal regulations interpreting the same phrase in 18 U.S.C. § 207); D.C. Bar Op. No. 297, at 177 n.3 (recognizing that "personal and substantial participation" has been defined by the Office of Government Ethics when interpreting section 207 in 5 C.F.R. § 2637.201(d)(1)).

duct that applies only to members of the D.C. Bar. Moreover, section 207 prohibits covered persons only from knowingly making "any communication to or appearance before" any department or agency of the federal or D.C. governments.[3] Rule 1.11's prohibition extends beyond communicating or making an appearance: it forbids anyone covered by the rule to "accept other employment" in connection with the same or substantially related matter. As Comment [5] explains, Rule 1.11(a) incorporates an "absolute disqualification of a lawyer from matters in which the lawyer participated personally and substantially."[4]

This is not a typical Rule 1.11 case. Even though the former JAG lawyer was a "public officer or employee" while serving as a lawyer in the military, his "client" in the "matter" was never the United States government. As an appointed defense counsel, his client was, throughout all relevant periods, the defendant. Rule 1.6(j) provides that, "[t]he client of the government lawyer is the agency that employs the lawyer *unless expressly provided to the contrary by appropriate law, regulation, or order*." "The Rules of Professional Conduct governing attorneys in the Navy expressly provide that "[a] covered [United States Government] attorney who has been duly assigned to represent an individual who is subject to disciplinary action or administrative proceedings, or to provide legal assistance to an individual, has, for those purposes, an attorney-client relationship with that individual." 32 C.F.R. § 776.32(a)(6). Moreover, "[n]otwithstanding a judge advocate's status as a commissioned officer subject, generally, to the authority of superiors, a judge advocate detailed or assigned to represent an individual member or employee of the [Department of the Navy] is expected to exercise unfettered loyalty and professional independence during the representation consistent with these Rules and remains ultimately responsible for acting in the best interest of the individual client." *Id.* § 776.56(a)(1).

The United States Court of Appeals for the Fifth Circuit has described the analogous relationship between a Navy JAG lawyer and the individual "clients" to whom he provides legal advice through the Navy's formal legal-assistance program:

> A legal assistance officer's function . . . is significantly different from that of other government lawyers. Rather than being charged with public matters in which the government is the client, a legal assistance attorney owes a preeminent duty to the private individual who, in effect, retains him. Under section 1906(c) of the Navy Judge Advocate General's Manual, for example, [the JAG lawyer] was required "to exercise his independent professional judgment on behalf of his client within the standards promulgated in the Code of Professional Responsibility . . . ." 32 C.F.R. § 726.6(c) (1975).[5]

The District of Columbia Rules of Professional Conduct recognize the unusual situation where a government lawyer's client is not the government itself but an individual person. Comment [38] to Rule 1.6 recognizes that this relationship presents a special set of confidentiality issues:

> Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to that individual and that subparagraph (d)(2)(A), not (d)(2)(B), applies.[6] . . . . Examples of such representation include representation by a public defender, a government lawyer representing a defendant sued for damages arising out of the performance of the defendant's government employment, *and a military lawyer representing a court-martial defendant.*

D.C. Rule 1.6, Comment [38] (emphasis added). The Navy's regulations recognize, for example, that "a judge advocate is a military officer required by law to obey the lawful orders of superior officers," 32 C.F.R. § 776.56(b)(1), and that "[n]ot all direction given to a subordinate covered attorney is an attempt to influence improperly the covered attorney's professional judgment," *id.* § 776.56(b)(2). Yet, when a JAG lawyer "is assigned to represent an individual client, neither the attorney's personal interests, the interests of other clients, nor the interests of third persons should affect loyalty to the individual client," *id.* § 776.56(b)(1).

In the case that triggered this inquiry, the United States Court of Appeals for the Armed Forces concluded that the former JAG lawyer could continue to represent the defendant during further review of the court-martial, citing *United States v. Andrews*, 21 C.M.A. 165 (1972). In *Andrews*, the United States Court of Military Appeals considered a factual situation nearly identical to that presented by the inquirer. Mr. Andrews, who had been represented by a JAG lawyer during a general court-martial proceeding, sought to retain the same lawyer after he had been released from active duty. The Chief of the Military Affairs Division in the Judge Advocate General's office had concluded that the former JAG lawyer was barred from further representation by section 207, and Mr. Andrews appealed this decision on the grounds that he had been denied the civilian counsel of his choice, as guaranteed by the Uniform Code of Military Justice. The Court of Military Appeals agreed, concluding that "a Judge Advocate General Corps officer released from active duty may continue to act for an accused as a civilian immediately after his release." 21 C.M.A. at 168. The court reasoned that this "opinion conforms with our view of the applicable law" and that the former JAG lawyer's "continued participation harbored no conflict of interest, since the parties to that relationship remained the same." *Id.*[7]

Of course, the rule governing successive government and private employment is not limited to instances where the former government employee "switches sides."[8] The American Law Institute has described three justifications for the pro-

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[3] *See* 5 C.F.R. § 2637.201(b)(3) ("An appearance occurs when an individual is physically present before the United States in either a formal or informal setting or conveys material to the United States in connection with a formal proceeding or application. A communication is broader than an appearance and includes for example, correspondence, or telephone calls."); *In re Sofaer*, 728 A.2d at 641 (recognizing that the Office of Government Ethics "concluded that because Respondent had not yet contacted any government officials with the intent to influence them in connection with his Libyan representation, he had not violated [18 U.S.C. § 207]").

[4] In contrast to the ABA's Model Rule 1.11, D.C. Rule 1.11 has no provision for waiver.

[5] *Woods v. Covington Cty. Bank*, 537 F.2d 804, 815 (5th Cir. 1976).

[6] Subparagraph (d)(2) provides that, "A lawyer may use or reveal client confidences or secrets . . . (A) when permitted by these rules or required by law or court order; and (B) [i]f a government lawyer, when permitted or authorized by law." D.C. Rule 1.6(d)(2).

[7] For the most recent expression of the court's position on this issue, see *United States v. Nguyen*, 56 M.J. 252, 252 (C.A.A.F. 2001).

[8] *See, e.g., General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974) (in suit by city against bus manufacturer alleging nationwide conspiracy, city's private lawyer who had substantial responsibility for investigating same conspiracy while at the Justice Department was disqualified); *Allied Realty, Inc. v. Exchange Nat'l Bank*, 283 F. Supp. 464 (D. Minn. 1968), *aff'd*, 408 F.2d 1099

hibition contained in Rule 1.11, even where there has been no side switching:

> First, prohibiting representation in a matter, even where consistent with the government's interests, diminishes the risk of subsequent misuse of information obtained by the government. If a former government lawyer could make use of confidential reports to an agency, for example, even in a cause that was consistent with the government position, it would go beyond the original purpose for making the reports and make it more difficult for the government to obtain voluntary disclosures from members of the public. Second, the rule removes an incentive to gain later advantages through methods of gathering information that are available only to the government, such as a grand-jury investigation. Third, the rule removes an incentive to begin proceedings as a government agent with a view to obtaining a subsequent advantage in private practice, such as by filing a complementary action for a subsequent private client.

*Restatement of the Law Governing Lawyers* § 132 cmt. d (2000). Each of these justifications for the prohibition contained in Rule 1.11 assumes that the former government lawyer was acting as a lawyer whose client was the government itself. *See id.* (describing the prohibition as applying even though "the subsequent representation is not adverse to the interests of the *former government client*").

It is not immediately obvious, however, that it should make any difference whom the former government lawyer had as a client. The fact that the former JAG lawyer's client was an individual defendant and not the government does not change the fact that the former JAG lawyer was, at the time he represented the defendant, a "public employee or officer." This Committee recognized over twenty years ago, when interpreting DR 9-101(B)—the predecessor to Rule 1.11 under the D.C. Code of Professional Responsibility—that the prohibition on successive government and private employment does not turn on whether the former government employee was acting as a lawyer at the time of his or her government employment:

> The fact pattern presented [is] unusual in one sense: the inquiring attorney was not a lawyer and was not serving as a lawyer when he was employed by the government. [The inquiring attorney was an economist while working for the government; after graduating from law school, he resigned from government service and joined a law firm.] Nevertheless, DR 9-101(B) covers situations of this type, if its other tests are met, since it refers to service as a "public employee" rather than a "public lawyer." We regard the choice of terms as a deliberate and proper one, since a more typical case may involve a lawyer who serves in an administrative capacity in the government and then leaves to resume the practice of law. We have little doubt that the Code bars a lawyer from undertaking a representation in a matter in which he exercised substantial responsibility while a public official, even if that responsibility was not that of a lawyer.

D.C. Bar Op. No. 84, at 150 (1980). If it does not matter that the former government employee was acting as a lawyer at all, why might it matter that he was acting as a lawyer for an individual defendant rather than for the government?

The answer, we believe, is found in the term "other employment" under Rule 1.11(a). To trigger the prohibition under Rule 1.11, it is not enough that a former government employee work on a matter which is the same as or substantially related to a matter in which he or she participated personally and substantially as a public officer or employee; the former government employee must first have accepted "other employment in connection with" the same or substantially related matter.[9] In our view, under circumstances in which the former government lawyer continues to represent in private practice the same client with whom the lawyer had established an attorney-client relationship while serving as a public officer or employee and in the same or substantially related matter, the former government lawyer has not accepted "*other* employment" within the meaning of Rule 1.11(a).

The comment to Rule 1.11 makes clear that the identity of the client is a critical question when determining when the former government lawyer has accepted "other employment":

> "Other employment," as used in paragraph (a) of this Rule, includes the representation of a governmental body other than the agency of the government by which the lawyer was employed as a public officer or employee, but in the case of a move from one government agency to another the prohibition provided in paragraph (a) may be waived by the government agency with which the lawyer was previously employed. As used in paragraph (a), it would not be "other employment" for a lawyer who has left the employment of a particular government agency and taken employment with another government agency (e.g., the Department of Justice) or with a private law firm to continue to accept representation of the same government agency with which the lawyer was previously employed.

D.C. Rule 1.11 Comment [10]. If it would not be "other employment" for the former government lawyer to continue to represent in private practice the same government agency with which he or she had been previously employed, it would not constitute "other employment" for the former government lawyer to continue to represent in private practice the same individual client whom he or she represented while employed by the government.

This Committee concluded over twenty-five years ago that there are two primary purposes underlying the prohibition reflected in DR 9-101(B):

> One is to prevent the appearance that a lawyer in public employment may have been influenced in his actions as a lawyer by the hope of later personal gain in private employment rather than by the best interests of his public client. The second purpose is to prevent the appearance that a lawyer may be utilizing for the benefit of a private client confidential information obtained in a prior attorney-client relationship with a public agency having interests in conflict with those of his private client.

(8th Cir. 1969) (former special assistant U.S. Attorney in criminal cases involving mortgage transactions was disqualified from representing plaintiff in civil suit to set aside the transactions).

[9] We note that Rule 1.11 of the ABA's Model Rules of Professional Conduct does not use the same formulation. Under the Model Rule, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee . . . ." This is just one of several significant ways in which D.C. Rule 1.11 differs from the ABA's Model Rule. *See generally* Grant Dawson, *Conflict of Interest: Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 Geo. J. Legal Ethics 329, 338-39 (1998) (detailing the many differences between the D.C. Rule and the Model Rule); *id.* at 338 ("The District of Columbia's version of Model Rule 1.11 is important because it differs significantly from its ABA counterpart and because it probably governs more lawyers than any other non-federal rule").

D.C. Bar Op. No. 16, at 82 (1976).[10] We conclude that none of the purposes underlying Rule 1.11 would be served by interpreting the term "other employment" to prohibit the former JAG lawyer in this inquiry from continuing to represent his client in subsequent court-martial and other related proceedings. We see no danger that the former JAG lawyer's conduct as a JAG defense lawyer would appear to be improperly influenced by the prospect that he might one day continue to represent the same defendant in the same matter once he were to become a civilian. The best interests of the former JAG lawyer's employer—the Department of the Navy's JAG Corps—are served by his having provided "competent, diligent, and prompt representation to [his] client" (32 C.F.R. § 776.20(a)). And it is just such service that would make it likely that his client would seek to retain him after he leaves military service. Furthermore, we perceive no risk that the former JAG lawyer would use confidential information obtained through his public employment for the benefit of a private client. With respect to the same matter in which he represented the individual defendant, he did not have an attorney-client relationship with the United States government. Therefore, any information that he obtained with respect to this matter was information that he would have used for the benefit of his client, regardless of whether he was employed by the Navy or by a private law firm.

Moreover, both this Committee and its ABA counterpart have recognized that there are substantial countervailing considerations that counsel against a broader prohibition under Rule 1.11 than necessary:

> "Some of [these] underlying considerations . . . are the following: the ability of government to recruit young professionals and competent lawyers should not be interfered with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service . . . ; and *the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their choosing, particularly in specialized areas requiring special, technical training and expertise.*"

D.C. Bar Op. No. 111, at 191 (emphasis added) (quoting ABA Formal Opinion No. 342 (1975)). We believe that these considerations are particularly significant where, as here, applying the rule would disrupt an ongoing attorney-client relationship.

In sum, we conclude that, where a government lawyer has, as part of his or her government employment, lawfully established an attorney-client relationship with an individual client, it does not constitute "other employment" for that lawyer to continue to represent the individual client in the same or in a substantially related matter once that lawyer is no longer a government employee.[11] Under these unusual circumstances, Rule 1.11 would not prohibit the former government employee from representing the client in the same matter in which that employee participated personally and substantially while working for the government.

Inquiry No. 01-10-22
Adopted: June 2002
Published: June 2002

*Opinion No. 314*

**Whether a Nonlawyer Union Employee May Supervise a Union Attorney**

• A nonlawyer union employee may supervise an attorney who is representing the union itself. In these circumstances the union is the client and, as an organization, acts through its duly authorized agents. However, the union employee may not supervise a union attorney who is representing a member of the union. The attorney would violate Rule 5.4(c) if she allowed the union employee to direct or regulate her professional judgment in rendering legal services to another.

**Applicable Rules**

• Rule 1.2 (Scope of Representation)
• Rule 1.7 (Conflict of Interest: General Rule)
• Rule 1.8 (Conflict of Interest: Prohibited Transactions)
• Rule 1.13 (Organization as Client)
• Rule 4.3 (Dealing with Unrepresented Person)
• Rule 5.4 (Professional Independence of a Lawyer)

*Inquiry*

Rule 5.4(c) of the District of Columbia Rules of Professional Conduct provides that "[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." A labor union inquires whether the rule is violated "if a nonlawyer union employee supervises a union attorney who (1) represents the union in any matter or (2) represents one of the union's members in a matter that is within the collective bargaining process." The union also inquires whether the result would be different if a union attorney represents a member in a statutory proceeding rather than a proceeding arising out of the collective bargaining process. Although this particular inquiry is submitted by a labor union, similar issues may arise for lawyers employed by a corporation, a trade association, or another type of organization.[1]

*Discussion*

A nonlawyer union employee *may* supervise a union attorney who is representing the union itself. Rule 5.4(c) does not preclude such an arrangement because it deals with the situation where a person (including an entity) "recommends, employs, or pays the lawyer to render legal services *for another* . . . ." Here the employing organization *is* the client. "Plainly, a nonlawyer may direct the activities of lawyers when the nonlawyer is a client or an agent of a client in the matter . . . , such as a nonlawyer officer of a corporation who directs the activities of a lawyer in the office of inside legal counsel of the organization . . . ." Restatement Third, The Law Governing Lawyers § 10, comment c (2000).[2]

[10] The ABA's Standing Committee on Ethics and Professional Responsibility described these same two purposes as follows: "Rule 1.11 is thus concerned 1) to limit the possibility that a lawyer might be tempted to use the power of public office to secure for herself lucrative private employment after leaving government service, and be distracted from her current public duties by the prospect of eventually going to work for the other side; and 2) to ensure against the possibility that 'substantial unfair advantage could accrue to the private client by reason of access to information about the client's adversary obtainable only through the use of public resources available during the lawyer's government service.'" ABA Formal Opinion No. 409 (1997) (citations omitted; quoting from Model Rule 1.11, Legal Background at 76 (Proposed Final Draft, May 30, 1981)).

[11] This conclusion applies not only to former JAG lawyers, but also to former public defenders and to former federal officers and employees who were authorized, while working for the government, to represent particular individuals or groups of individuals, *see* 18 U.S.C. § 205.

[1] We do not address in this opinion potential issues relating to the unauthorized practice of law.

[2] As we previously have recognized, "there plainly is no prohibition on an in-house lawyer performing legal work for the corporation that

Indeed, most lawyers represent, and take direction from, clients who are lay persons. The only difference here is that the client is an organization. Rule 1.13(a) of our Rules of Professional Conduct provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Those "constituents" may well be lay persons, and a corporation or a labor union may decide as a matter of its own governance that it will assign someone who is not a lawyer to supervise its legal staff. "Persons authorized to act for the organization. . . . determine the scope of the representation [and] direct the activities of the lawyer during the course of the representation. . . [T]he lawyer must follow instructions and implement decisions of those persons, as the lawyer would follow instructions and decisions of an individual client." Restatement Third, § 96, comment d.

Of course this does not mean that a lawyer must, or even may, surrender his professional judgment when representing a client that happens to be an entity. Rule 1.2 generally defines the scope of representation, and comment [1] makes it clear that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Indeed, a lawyer is obliged to withdraw from a representation if she concludes that carrying out the client's wishes will violate the Rules of Professional Conduct. Rule 1.16(a)(1). Lawyer employees of unions or corporations have the same professional duties, but adhering to them may cause more onerous personal consequences because the employer is the only client. "The power a client employer possesses over a lawyer-employee is substantial, compared to that of a client over an independent lawyer." Restatement Third, § 32, comment b.

The inquirer also asks how Rule 5.4(c) applies when the union lawyer represents one of the union's members and not simply the union itself. The answer depends on the context in which the representation occurs, and on whether there is an attorney-client relationship between the union lawyer and the union member.[3]

As we recently discussed in Opinion No. 316, the existence of an attorney-client relationship is determined by the substantive law of the relevant jurisdiction, not by applying the Rules of Professional Conduct. *See generally In re Lieber*, 442 A.2d 153, 156 (D.C. 1982)(discussing factors which determine whether an attorney-client relationship has been formed). Moreover, "[t]he existence of an attorney-client relationship is an issue to be resolved by the trier of fact and is predicated on the circumstances of each case." *Id.*

Substantive labor law also affects the analysis when the union is representing one of its members in connection with a grievance under the collective bargaining agreement. It is generally recognized that the grievance belongs to the union, not its member, but that the union owes a duty of fair representation to its member. *See generally Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 51, 76 (1991)(describing doctrine of fair representation); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)(same). Accordingly, many cases have held that the lawyer represents the union and not its individual member. *See, e.g., Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986). The United States District Court for our jurisdiction has deemed it "well established, as a matter of law, that an attorney handling a labor grievance on behalf of a union does not enter into an 'attorney-client' relationship with the union member asserting the grievance." *Gwin v. National Marine Engineers Beneficial Ass'n*, 966 F. Supp. 4, 7 (D.D.C. 1997)(citing *Peterson*), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998) (Table). If it is true that the union is the only client, then the union lawyer is not rendering legal services "for another," and Rule 5.4(c) does not come into play.

This topic has generated a great deal of debate. *See, e.g.*, Russell G. Pearce, *The Union Lawyer's Obligations to Bargaining Unit Members: A Case Study of the Interdependence of Legal Ethics and Substantive Law*, 37 S. Tex. L. Rev. 1095 (1996); James G. Pope, *Two Faces, Two Ethics: Labor Union Lawyers and the Emerging Doctrine of Entity Ethics*, 68 Or. L. Rev. 1 (1989). In many ways the situation is similar to the "eternal triangle" formed by a lawyer, an insurance company that has retained the lawyer, and the insured. Does the lawyer represent only the insurer, only the insured, or both? *See generally* ABA Formal Op. 01-421 (2001)(noting disagreement among various jurisdictions, but taking "no position as to whom the lawyer represents absent an express agreement as to the identity of the client").

This Committee, of course, does not opine on questions of substantive law. However, the obligations of the union attorney under the Rules of Professional Conduct will vary depending on whether an attorney-client relationship exists. If the lawyer does not have an attorney-client relationship with the union member, then he likely will have an obligation to clarify the nature of their relationship. This is true even if there is no apparent conflict between the interests of the union and those of its member. "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not . . . [s]tate or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested." Rule 4.3(b). Moreover, "[w]hen 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." *Id.*

The need for clarification increases as the risk of conflict grows. A lawyer shall not "[g]ive advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." Rule 4.3(a). Furthermore, "[i]n dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer [representing the organization] shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing." Rule 1.13(b). *See* D.C. Bar Legal Ethics Opinion No. 269 (1997)(discussing obligation of counsel for a corporation (whether in-house or outside counsel) to clarify role in internal corporate investigation). Such clarification will often be necessary when grievances are being presented under a collective bargaining agreement. As one court has explained, "[t]he interests of individual employees sometimes may be compromised for the sake of the larger bargaining collective." *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171, 1176 (7th Cir. 1995).

If the lawyer represents both the union and its member, then conflicts of interest

employs him." D.C. Bar Legal Ethics Opinion No. 135 (1984)(addressing, among other issues, the practice of law with a corporation whose directors or officers are non-lawyers). This opinion construed DR 5-107(B) of the Code of Professional Responsibility, but the language of Rule 5.4(c) is functionally identical. Our conclusion is equally valid when the employing organization is a labor union.

[3] For purposes of this opinion, we do not distinguish between a union member and a member of the bargaining unit who does not belong to the union.

may arise. *See generally* Rule 1.7(b). Sometimes these conflicts will require the lawyer to withdraw from both representations. In other circumstances, the conflict may be waived by the consent of the union and the union member after full disclosure. Rule 1.7(c).

If the lawyer represents the union member (as part of a dual representation[4]), Rule 5.4(c) would come into play and would forbid the lawyer to allow a union official (whether an attorney or not) "to direct or regulate the lawyer's professional judgment in rendering such legal services."[5] Thus, the application of Rule 5.4(c) will depend upon whether there is an attorney-client relationship between the union lawyer and the union member. That question will be answered through the application of substantive law.[6]

The third part of the inquiry focuses on the situation where a union attorney represents a member in a matter that does not arise out of the collective bargaining process. This might occur, for example, through a legal services program where an attorney paid by the union drafts a will, handles a divorce, or litigates a personal injury suit. These situations would not be impacted by federal labor law, and one would generally expect that an attorney-client relationship will be established between the union lawyer and the union member. In any event, the union would be employing or paying the union lawyer to render legal services to another. Under Rule 5.4(c) the lawyer may not permit a union official "to direct or regulate the lawyer's professional judgment in rendering such legal services." *See* ABA Formal Op. 87-355 (1987)(for-profit prepaid legal services plan must allow lawyer to exercise independent professional judgment on behalf of the client); Alaska Bar Ass'n Ethics Committee Opinion No. 99-3 (1999)(in-house staff counsel for an insurance company may represent an insured, but must be allowed to exercise independent professional judgment).

*Conclusion*

A nonlawyer union employee may supervise a union attorney who is representing the union itself because the employee is acting as an agent of the client. However, the union employee may not direct or regulate the lawyer's professional judgment in rendering legal services to a member of the union.

Inquiry No. 01-4-8
Adopted: June 2002
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*Opinion No. 315*

## Whether a Lawyer May Represent a Client in Private Practice in the Same Matter on Which That Lawyer Worked While a Government Employee and Whether This Committee Can Resolve Factual Questions Regarding a Lawyer's Prior Participation

- (1) A former lawyer with the Environmental Protection Agency ("EPA") may represent a private client in challenging the EPA's final rules, notwithstanding the fact that he was involved in substantially related litigation by drafting status reports and participating in discussions regarding the timing of the ongoing rulemaking proceedings. Because his participation in the prior matter did not involve him in the merits of the litigation and consisted of no more than official responsibility or participation on administrative and peripheral issues, he did not participate "substantially" in the prior litigation within the meaning of Rule 1.11.
(2) Because this Committee cannot determine whether a former Justice Department official in the Civil Rights Division participated "personally and substantially" in litigation concerning a school board when he worked twenty years earlier in the Division's front office, the prudent course to follow would be for the former Justice Department official not to represent the same school board in the same matter today. This Committee does not have the institutional capacity to resolve the factual question presented by inconsistent recollections from witnesses regarding the degree of the inquirer's personal participation in the same matter while a government employee.

**Applicable Rule**

- Rule 1.11 (Successive Government and Private Employment)

The Committee has received two separate inquiries relating to the same issue under Rule 1.11 of the District of Columbia Rules of Professional Conduct—whether, under specific factual circumstances, a lawyer "participated personally and substantially" while a government employee in the same matter on which the lawyer would now like to participate in private practice. Rule 1.11 provides that a lawyer may not "accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." Because the two inquiries present unique facts, we shall discuss each inquiry separately.

### I. Former Attorney with the Environmental Protection Agency

*Inquiry*

The first inquiry comes from a former attorney in the Environmental Protection Agency's ("EPA") Office of General

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[4] In D.C. Bar Legal Ethics Opinion No. 94 (1980), we considered the propriety of in-house counsel for a trade association performing legal services for a related organization. We concluded that "[b]ecause the attorneys here are employees of the Association, in every instance in which they would render services to the [related organization], they would be, for analytical purposes, engaging in a multiple representation—even if no services relating to the matter in question are actually provided to the Association and even if the Association's interests are not involved in the representation."

[5] In Opinion No. 135, we addressed the question of whether a lawyer employed by a corporation whose directors and officers are non-lawyers may perform legal work for the corporation's clients. Construing the predecessor to Rule 5.4(c), we cautioned that "the non-lawyers involved in the corporation must not exercise any control or influence over the exercise of the [in-house counsel's] professional judgment in performing legal services for the corporation's clients." More recently, in D.C. Bar Legal Ethics Opinion No. 289 (1999), we recognized that the prohibitions of Rule 5.4(c) apply to lawyers as well as lay persons: "We have no doubt that the barriers applicable to lay persons in this setting are equally applicable to lawyers. Indeed, the proposition that lawyers acting on behalf of lay individuals [in our case, a union] may seek to exercise such control over litigation brought by parties to whom they do not owe the lawyer's obligations of undivided loyalty raises even more significant questions than having lay individuals exercise such control or influence."

[6] If there is an attorney-client relationship with the union member, the lawyer will also have to comply with Rule 1.8(e). That rule provides that:

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) The client consents after consultation;
> (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) Information relating to representation of a client is protected as required by Rule 1.6.

Here, too, it is crucial to determine as a matter of substantive law whether the union lawyer has an attorney-client relationship with the union member. *See* Opinion 269 (discussing application of Rule 1.8(e) to lawyer retained by a corporation to represent one of its constituents); D.C. Bar Legal Ethics Opinion No. 225 (1992)(discussing application of Rule 1.8(e) in context of prepaid legal services program).

Counsel. While he was at the EPA (between October 1997 and April 2001), the inquirer was involved in drafting a set of regulations to implement the Clean Air Act Amendments of 1977. The first set of regulations to implement this Act were promulgated in 1980, and they were challenged in the United States Court of Appeals for the District of Columbia Circuit. After the case had been fully briefed, the parties reached a partial settlement agreement according to which the EPA agreed to make certain specific changes to a particular rule. Although the case was effectively remanded to the EPA for further rulemaking, it remained in abeyance on the court's docket. Meanwhile, as the remand proceedings were pending, the EPA issued a related set of regulations in 1992, and the challenge to those regulations was ultimately consolidated with the original challenge to the 1980 regulations. Beginning in January 1995, the D.C. Circuit ordered the consolidated cases held in abeyance pending the EPA's further rulemaking proceedings.[1] In 1996, the EPA issued a Notice of Proposed Rulemaking ("NPRM") regarding a wide range of regulations and including the specific issue that had been remanded through the partial settlement of the 1980 litigation. The EPA indicated in its NPRM that it intended to issue final rules consistent with the settlement terms. Those final rules have not yet been issued.

As mentioned above, during his time at the EPA, the inquirer worked on various aspects of the final rulemaking that had been proposed in 1996. In addition to his work on the new regulations, however, the inquirer was also responsible for helping the Department of Justice attorneys (who represented the EPA on appeal) draft status reports for the court on the progress of the further rulemaking. These reports were filed regularly with the D.C. Circuit every three to four months between 1995 and 1999. Although he was never counsel of record in the cases, the inquirer also participated as one of several EPA attorneys in discussions with opposing counsel regarding the timing of the EPA's final rulemaking. These negotiations never addressed the underlying merits of the litigation.

The inquirer has now left the EPA and begun working as counsel to one of the entities that had challenged the 1992 regulations. The inquirer has asked this Committee whether he may represent his current client in any future litigation challenging the final rules that the EPA will eventually issue in response to the 1996 NPRM. Specifically, the inquirer has asked whether, while employed by the EPA, he "personally and substantially" participated in the prior, consolidated litigations within the meaning of Rule 1.11 such that he may not now participate in a "substantially related" matter on behalf of a private client.

*Discussion*

Rule 1.11 does not generally apply to prohibit a former government lawyer from representing a private client in a matter when the lawyer's only relationship to that matter as a government employee was to work on administrative rulemakings of general applicability. *See* D.C. Rule 1.11(g) (limiting the definition of "matter" as "involving a specific party or parties"); *Id.*, Comment [3] ("[t]he making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11"). This Committee recently reaffirmed its longstanding view that the making of rules of general applicability does not constitute a "matter" within the meaning of Rule 1.11.[2] Therefore, as the inquirer himself has recognized, the fact that he worked on drafting and developing the final regulations would not preclude him from representing a private party in any subsequent litigation challenging those regulations.[3]

But the inquirer was involved in more than the drafting of the final regulations; he also participated in the prior, consolidated litigation by helping to draft status reports for the D.C. Circuit and by participating as one among several EPA employees in discussions relating to the timing of the EPA's final regulations. Put simply, the question is whether a government lawyer has "participated personally and substantially" in a matter when he or she helped to prepare reports on the status of subsequent agency rulemaking for filing in court and participated in discussions with opposing counsel over the timing of that rulemaking?[4]

Although this is a very close question, we conclude that the answer is "No." This question requires an inquiry into what the inquirer *actually* did or knew rather than into the scope of his prior legal representation. As we explained over twenty years ago, the question whether a former government employee's participation was "substantial" turns not on formal questions of the "authority to make major decisions" but rather on a

[1] Ultimately, the court "administratively terminated" the cases in December 1999.

[2] *See* D.C. Bar Op. No. 297 (2000) (a former government attorney is not prohibited under Rule 1.11 from representing a private client in a "negotiated rulemaking" in which he participated while employed by the government); *see also* D.C. Bar Op. 187 (1987) (former government employee was not prohibited under DR 9-101(B) from representing a private client in challenging an agency's regulations for which he had been responsible while employed by the government); D.C. Bar Op. 106, at 184 (1981) ("'work as a government employee in drafting, enforcing, or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same 'matter' is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation or specific parties'" (quoting ABA Formal Op. No. 342 (1975)). This view is consistent with the position of the American Law Institute, *see* Restatement (Third) of the Law Governing Lawyers § 133 cmt. e (2000) (defining "matter" as a "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. Drafting of a statute or regulation of general applicability is not included under that definition . . . .").

[3] We note, as we have recognized in prior opinions on this issue, that the fact that Rule 1.11 does not prohibit the subsequent private representation does not mean that the former government lawyer is free from any obligations with respect to his former government service. Under Rules 1.6(f), for example, he continues to have the obligation to preserve any government confidences or secrets that he obtained; under Rule 1.7(b)(4), the former government lawyer has an obligation to ensure that his professional judgment on behalf of his new, private client is not adversely affected by his prior involvement in the government rulemaking proceedings. *See* D.C. Bar Op. No. 297, at 178-79 (noting the concerns identified in Opinion No. 106).

[4] Based on our review of the rulemaking history, we believe that any challenge to the final rules that the EPA ultimately adopts would be "substantially related" to the consolidated litigations on which the inquirer worked while employed at the EPA. The critical question in determining whether two matters are the same or substantially related to one another is whether "the factual contexts of the two . . . transactions overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation." *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 49-50 (D.C. 1984) (en banc). The inquirer worked at the EPA between October 1997 and April 2001, during which time he was the staff attorney assigned to the consolidated litigation over the *1980* and *1992 Regulations*. Under the facts presented by the inquirer, it is reasonable to infer that, as the staff attorney assigned to this appeal, the inquirer had access to information in the prior litigation that would be "legally relevant to, or otherwise useful in, the subsequent representation" in challenging the EPA's final rules relating to the same issue.

factual inquiry into whether the "involvement was direct, extensive, and substantive, not peripheral, clerical, or formal." D.C. Bar Op. No. 84, at 150 (1980).[5]

In Opinion No. 111, we concluded that an Assistant United States Attorney did not have "substantial responsibility" (DR 9-101(B)) over a matter when all he did was to read the complaint and maintain a file of all publicly filed documents in the case. He did not render any advice, take any action, or consult with anyone else with respect to the litigation. *See* D.C. Bar Op. No. 111, at 191 (1982). Here, by contrast, the inquirer had to consult to some extent with the lawyers at the Department of Justice who filed the status reports that he drafted, but the substance of those consultations was confined to the progress of the ongoing rulemaking proceedings, not to the course of the litigation. Moreover, like the Assistant United States Attorney in Opinion No. 111, the inquirer was never counsel of record, so "public appearances should not be offended because as a government attorney he did not participate in the matter in a public way." *Id.* at 192.

As we noted in Opinion No. 177, the critical question is whether the inquirer's "activities involved [him] in the merits of the case," thereby making "substantial" his personal participation in the matter. *See* D.C. Bar Op. No. 177, at 295 (1986). Although the inquirer participated in discussions with opposing counsel, his role in these negotiations was as a junior member of the team, and the discussions focused not on resolving the merits of the litigation but on the timing of the final rules following the agency's NPRM.[6]

Moreover, the inquirer's role in the prior litigation was clearly not substantive. Throughout his period of employment with the EPA, the 1980 and 1992 consolidated litigations were inactive; the parties were simply waiting (indeed, they are still waiting) for the EPA to issue its final rules. If the scope of the inquirer's participation in the prior litigation were sufficient to constitute "personal and substantial" involvement, it is difficult to imagine how *any* involvement in a case would fail to satisfy such a standard. Simply participating as a lawyer on behalf of the EPA cannot be sufficient without some evidence that the participation was "more than official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue." 5 C.F.R. § 2637.201(d)(1). Accepting (as we must) the inquirer's own description of his involvement in the prior litigation as limited to drafting status reports on the ongoing administrative rulemaking and participating in discussions concerning the timing of that same rulemaking, we conclude that his involvement amounted to no more than "official responsibility . . . or involvement on an administrative or peripheral issue."

Finally, we concluded twenty years ago that an Assistant United States Attorney had not been substantially involved in a matter where he had "been privy to no government confidences relating to the matter" and where there could be "no suggestion that the degree of his involvement in the matter while in government service could reasonably be expected to or did encourage his subsequent private employment or the prospective assignment in private practice to the same litigation." D.C. Bar Op. No. 111, at 192. While it is certainly possible that the inquirer's current employer may have hired him (at least in part) because of his past involvement in the EPA's general rulemaking proceedings in this area, we find no reason to believe that the inquirer's limited and peripheral involvement in the litigations over the 1980 and 1992 rulemakings encouraged his subsequent private employment. And encouraging subsequent private employment is, after all, one of the goals that Rule 1.11 is designed to protect, for it could undermine the ability of government to recruit young professionals and competent lawyers to impose harsher restraints than necessary upon future practice. *See* D.C. Bar Op. No. 111, at 191; ABA Formal Opinion No. 342.

In sum, we conclude on this record that the inquirer did not "participate[ ] personally and substantially as a public officer or employee" in the prior consolidated litigation. Rule 1.11 would not, therefore, prohibit his participation in any subsequent litigation arising out of a challenge to the EPA's final rules.[7]

## II. Former Official in the United States Department of Justice

*Inquiry*

The second inquiry comes from a former Department of Justice lawyer, who asked whether he could represent a school board in the latest phase of a desegregation case that had been in active litigation in the early 1980s, when the inquirer had been a senior official in the Civil Rights Division.[8] The inquirer had taken the position with his former employer that he had not "participated personally and substantially" in the case while a public official. His own recollection was that he attended a single meeting relating to the case—a meeting that involved a number of other lawyers, including the Assistant Attorney General and the Government's expert witness in the case—and that he had no official responsibility for the matter. In response to his request for guidance, the Deputy Designated Agency Ethics Official in the Civil Rights Division recommended that he not appear before a federal agency or court on behalf of the school board in the current phase of the case "in order to avoid a possible violation of 18 U.S.C. [§] 207(a)."[9]

[5] *See also* D.C. Bar Op. No. 16, at 83 (1976) (concluding that, in order to determine whether a former government lawyer's responsibility with regard to a government contract was "substantial" within the meaning of DR 9-101(B), we must have "before us the full facts as to a particular contract and the role which the inquiring attorney played in the drafting, negotiation, execution or administration of that contract")

[6] We do not mean to suggest that participation in negotiations over the timing of administrative rulemaking could never be sufficiently substantial to trigger Rule 1.11. On the contrary, we would expect that participating in discussions over the timing of agency action in the context of litigation challenging such action would typically constitute substantial participation in the litigation itself. But under the specific circumstances at issue here, we believe that the inquirer's discussions with opposing counsel over the timing of the rulemaking were too far removed from the underlying merits of the challenge to the rules to constitute substantial participation *in the litigation*. To be sure, the inquirer participated personally and substantially in the substantive work on the final regulations. But, as we have already noted, participation in this general rulemaking does not constitute participation in a "matter" under Rule 1.11(a). Because the inquirer's participation in the relevant "matter" was limited to reporting on the progress and discussing timing of the general rulemaking proceeding, we are convinced, under the circumstances presented here, that his participation in the prior litigation was more "peripheral, clerical, or formal" than "direct, extensive, and substantive." D.C. Bar Op. No. 84 at 150.

[7] The fact that Rule 1.11 does not apply under the particular facts presented here does not mean that the inquirer is free from any obligations imposed by other Rules of Professional Conduct, *see supra* note 3, or by other legal requirements, *see* 18 U.S.C. § 207. Our opinion here does not purport to address the applicability of any of these other obligations.

[8] According to the inquirer, his firm now represents the school board. However, he has been screened off from all participation or involvement in the matter.

[9] Letter from Linda F. Thome, Deputy Designated Agency Ethics Official, U.S. Dep't of Justice, Civil Rights Division, at 3 (Sept. 11, 2001) ("Civil Rights Division Letter").

Having interviewed seven current and former Civil Rights Division attorneys, all of whom had varying recollections of the inquirer's involvement in this litigation, the official responded to the inquirer as follows: "In my view, the line attorneys and the reviewer responsible for the case in the Section, who were most intensively involved in the case to the exclusion of other matters, are most likely to have the best memories about it. Among this group, all but one recall that you were personally and substantially involved. Even your own recollection indicates that you attended at least one meeting at which the case was substantively discussed." Civil Rights Division Letter at 2. The inquirer has asked this Committee whether his involvement in this litigation in the early 1980s constituted personal and substantial participation in that matter under Rule 1.11(a).

*Discussion*

The government ethics official in the Department of Justice has concluded that the available evidence supports the conclusion that the inquirer participated in the earlier matter "personally and substantially" as a public officer or employee within the meaning of section 207(a)(1). That conclusion was based on interviews with other attorneys involved in the matter and on the judgment of the reviewing official that the recollections of those who were most closely involved in the case should be considered most reliable. Because, "[a]mong this group, all but one recall that the [inquirer was] personally and substantially involved," the official recommended that the inquirer not represent the school board before a federal court or agency to ensure that he not violate section 207.

One fact distinguishes this inquiry from others that the Committee has considered under Rule 1.11: there is a serious (if not surprising) disagreement over what role the inquirer actually played with respect to the school desegregation case approximately eighteen years ago. In all previous inquiries involving the meaning of the phrases "substantial responsibility" and "participated personally and substantially," the actions, duties, and responsibilities of the former government lawyer while in the government were undisputed and accepted as fact. Here, by contrast, there is no consensus. On one hand, the inquirer himself recalls attending a single meeting about the case in early 1983, when he was a Special Assistant to the Assistant Attorney General for the Civil Rights Division. He recalls attending this meeting with the Assistant Attorney General and with the government's expert witness in the litigation and characterizes his own participation as "peripheral." Other than this one meeting, he does not recall having had any other involvement with the case. The former Assistant Attorney General recalls that the inquirer was busy with another matter at this time and that he was not involved with this particular litigation. The former Chief of the Educational Section also recalls that the inquirer was not involved, although the former Chief had only limited involvement with the case himself.

On the other hand, a number of attorneys recall that the inquirer was far more involved. In particular, the lawyer who was primarily responsible for handling the matter for the Civil Rights Division remembers that the inquirer was present at more than one meeting about the case and that he had participated in discussions on various questions of strategy. The former Deputy Chief of the General Litigation Section recalls that the inquirer not only participated in more than one meeting about the case but that he participated in a substantial way, particularly on policy issues that arose during the course of the litigation. And the attorneys who handled the case in early 1983 recall that the inquirer participated in "conceptual discussions" about the case and that, at the particular meeting with the government's expert witness, the inquirer asked a series of specific questions about school-desegregation policy.[10]

We are not, of course, a fact-finding body, so we are in no position to resolve this factual question. If it turned out that the inquirer attended several meetings on the case, that he participated in "conceptual discussions" regarding policy issues that arose during the litigation, or that he raised specific questions about school-desegregation policy during a specific meeting relating to the case, we would probably conclude that the inquirer participated "personally and substantially" in the matter. As we noted in Opinion No. 177, where a former government attorney consulted with others in her office and reviewed their recommended decisions, "these activities involved her in the merits of the case," thereby making substantial her personal participation. *See* D.C. Bar Op. No. 177, at 295. To the extent that the inquirer's participation "involved [him] in the merits of the [school-desegregation] case," we believe that it would be reasonable to conclude that he participated "personally and substantially" in the matter.

It is a harder question whether the inquirer's participation would qualify as "personal" and "substantial" if the extent of his involvement were limited to what he now recalls. If all he did was attend a single meeting in the company of a number of more senior attorneys in the Civil Rights Division, and if he did not actively participate in the meeting by asking questions about the case but rather listened generally to the conversation of others, we would most likely conclude that he did not participate "personally and substantially" in the matter. To paraphrase our Opinion No. 84, his involvement in the matter would have been peripheral and formal, not direct, extensive, or substantive.

Because our conclusion with respect to the applicability of Rule 1.11 depends entirely on a factual determination, we cannot now provide the definitive answer that the inquirer is seeking. We simply have no basis to second-guess the conclusion reached by the government ethics official in the Civil Rights Division that the attorneys who were most intensively involved in the matter are most likely to have the best memories about it and that, among this group, all but one characterized the inquirer as having been personally and substantially involved in the matter. Because the passage of time has probably made it impossible conclusively to determine the relevant facts—at least in the absence of a formal hearing convened for that purpose—we believe that the only prudent course for the inquirer to follow would be to decline other employment in connection with this matter, lest he risk violating Rule 1.11.[11]

Inquiry Nos. 01-10-23, 01-12-26
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*Opinion No. 316*

**Lawyers' Participation in Chat Room Communications With Internet Users Seeking Legal Information**

[10] These descriptions of the attorneys' recollections are taken from the Civil Rights Division Letter recommending that he not represent the school board before a federal court or agency, "in order to avoid a possible violation of 18 U.S.C. [§] 207(a)."

[11] It is possible, of course, that the particular phase of the litigation pending in the early 1980s would not properly be considered "the same as, or substantially related to," the matter on which the inquirer would now like to work. If this were so, Rule 1.11 would not apply. That question, however, was not presented to the Committee, and we have no basis to consider it.

• It is permissible for lawyers to take part in on-line chat rooms and similar arrangements through which attorneys engage in back-and-forth communications, in "real time" or nearly real time, with Internet users seeking legal information, provided they comply with all applicable rules of professional conduct. To avoid formation of attorney-client relationships through such chat room conversations, lawyers should avoid giving specific legal advice. If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships.

**Applicable Rules**

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality)
- Rules 1.7, 1.9 (Rules on Conflict of Interest)
- Rule 7.1 (Communications Concerning a Lawyer's Services)

*Inquiry*

We have recently addressed a number of issues related to attorneys' participation in the cyberspace communications revolution.[1] We write here to consider an issue left unaddressed by these earlier opinions—namely, the permissibility of lawyers' participation in on-line "chat rooms," "list servs," and similar arrangements through which lawyers engage in interactive communications, in "real time" or nearly real time, with Internet users seeking legal information.[2]

Prior to drafting this opinion, one committee member undertook an informal survey of web sites offering chat rooms on law-related topics. A sampling of such sites revealed a wide array of services offering "one-on-one" communications with "licensed attorneys," many with catchy names such as "Free Advice" and "Dads' Divorce." These communications were sometimes free, but some services charged users a fee.[3] Many provided a multitude of law-related services, including not only live attorney chat rooms, but also attorney directories, treatises and legal reports, and links to other law-related information sources. Our analysis here solely concerns lawyers' participation in the features of these sites that offer visitors interactive communications with licensed attorneys on legal topics.[4]

Every chat room we visited displayed prominent disclaimers, often as a "click through" page to which visitors must indicate consent before proceeding, along the following lines:

> Please note . . . this chat room is for informational purposes only and is not intended to be used as specific legal advice in any way, shape or form. Participating in this chat room does not establish an attorney client relationship—for personal legal advice consult your attorney.

Such notices also typically disclaimed all warranties as to the quality and accuracy of the legal information provided and purported to disavow the service provider's liability for all harm arising from use of the service. Most chat room services we visited further disclaimed any duty to keep information provided by participants confidential, though one, devoted to immigration law, promised to make its best efforts to protect from third parties information transmitted by participants. All the sites we visited emphasized that their purpose was to provide "legal information," but not "legal advice."

Whether and how participating attorneys are permitted to follow up with Internet users with whom they engage in such communications appeared to vary. One site stated that the lawyer "does NOT receive any portion of your fee, and will NOT serve as your legal counsel, during LiveChat or thereafter, so you can get a completely candid evaluation." At other sites, however, the attorneys answering questions in chat rooms prominently provided their full contact information at the opening of the chat session and invited chat room participants to contact them directly after the chat session ended.[5]

We did not systematically monitor the communications that were taking place in chat rooms we located, nor did we "test" any site by submitting an inquiry from an individual. Nevertheless, we did read various conversations taking place in chat rooms that were open to the public without charge. Here is one randomly selected exchange that took place in one public chat room:

> Q: I am in the US on a visa waiver from UK [that] expires on 8th Sept. I have been told by an abusive husband not to return. I am therefore homeless—he has told immigration officials about me—they told him that I won't be allowed to re enter the States. This is the only place I have a home!!!!!! Please help? . . .
>
> A. Based upon the statements you made, it appears that you are in-status and your visa expires on September 8, 2001. It is difficult to change status from the visa waiver. Additionally you might want to apply for a nonimmigrant visa, such as a student ("F") visa. You will probably be required to leave the United States to obtain it. If you have no interest in education you might want to apply for a nonimmigrant work visa. Without

[1] In Opinion 281, we concluded that lawyers may send confidential client information through unencrypted electronic mail, except where special circumstances warrant a higher level of care about preserving a communication's confidentiality. In Opinion 302, we decided that lawyers may use web sites to advertise for plaintiffs for class action lawsuits, provided that they comply with all of our ethical requirements as to truthfulness and other matters, and offered some tentative "best practices" guidance as to how lawyers might want to structure e-mail communications with potential clients. *Id.* We also concluded in Opinion 302 that lawyers may use web sites that offer opportunities to bid competitively on legal projects posted by prospective clients, again provided the lawyers comply with all applicable rules of professional conduct. *Id.*

[2] In chat rooms, individuals' typed communications appear in "real time"—*i.e.*, as they are being typed—on the computer screens of other participants. On list servs, individuals' communications are sent to a central e-mail address, which then redistributes the communications to all subscribers' e-mail addresses.

[3] One multi-purpose site, for example, offered "real time, one-on-one chats with" a member of its "staff of licensed attorneys," for either $15 for a "single chat of up to 30 minutes," or an annual subscription rate of $30. Another charged $10 for a one-week subscription "that enables you to ask the lawyer a question, one-on-one, and to receive back an immediate response."

[4] One site, for example, displayed a "chat calendar" listing the dates and times of scheduled chat sessions with particular attorneys, who were further identified through links to their law firm web pages which contained further biographical information.

[5] We could find information about the financial terms governing attorneys' participation in such chat rooms at only a few of the web sites we visited. One devoted to immigration law issues explained that attorneys may purchase, for $200 per year, a "Basic Membership," consisting of a listing in an Internet attorney yellow pages, a direct web link from this directory to the attorney's web site, and "eligibil[ity] to join our team of attorneys who conduct live chats"; or, alternatively, for $1,200 per year, a "Premium Membership," providing all the benefits of basic membership plus access to certain case tracking software. Another stated that the lawyers responding to questions in its chat rooms were employees on its staff.

knowing more about your background, I do not know if you are eligible for any work visas. . . . If you know of a specific visa for which you want to apply. Or if you would like to discuss this with me. I offer a 10 minute free telephone consultation. XXX-XXX-XXXX is my direct line.

*Analysis*

I.

Legal ethics committees in several jurisdictions have turned their attention to lawyers' participation in chat rooms providing legal information, especially as such participation may involve attorney solicitation of clients.[6] As we recently observed in Opinion 302, however, the D.C. rules on client solicitation differ from those of many other jurisdictions in that D.C. Rule 7.1 does not contain a blanket prohibition against in-person solicitation. Instead, we noted, the "touchstone of Rule 7.1 is whether lawyers' communications about themselves or their services are 'false or misleading.' 7.1(a)" Opinion 302 (2000). Essentially the same prescriptions as those we outlined in Opinion 302 apply to attorney communications in chat rooms or similar services, including that the communications must be accurate, lawyers may not imply that they are disinterested in particular matters when they are not, lawyers must disclose any fees they pay in order to participate, and such fees may not be linked to or contingent on the amount of legal fees the lawyer may obtain from clients obtained through online services. *See* Opinion 302.

Because our rules do not draw a sharp distinction between in-person and written solicitations,[7] we need not decide a question that has been central to many legal ethics committees' opinions—namely, whether chat room communications should be analogized to the types of "in person" solicitation prohibited in their states.[8] Instead, under our Rules we think it best to regard chat room communications as having some qualities that are similar to in-person communications and some that are different. The potentially greater immediacy of "real time" communications in chat rooms, as opposed to other forms of written communications, may give rise to concerns similar to those about "in person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions," D.C. Rule 7.1, comment [5]. Lawyers communicating about their services in chat rooms therefore must take care not to run afoul of D.C. Rule 7.1(b) (2), which prohibits solicitations that involve the "use of undue influence," and D.C. Rule 7.1(b) (3), which prohibits lawyers from seeking employment by a potential client whose "physical or mental condition" makes rational judgment "about the selection of an attorney unlikely."[9] On the other hand, attorney communications with potential clients in chat rooms are probably less potentially coercive than face-to-face communications. As one state bar ethics committee observed, a potential client solicited through a cyberspace communication, even in real time, has the option of simply "not responding."[10]

We reiterate, furthermore, as we emphasized in Opinion 302, that one of the most distinctive characteristics of cyberspace communications—their reach far beyond the bounds of any particular jurisdiction—raises significant issues for practitioners about the applicability of the laws of multiple jurisdictions. Consistent with our mandate, we here consider the applicability of the D.C. Rules of Professional Conduct only, but we caution readers that other jurisdictions' rules may apply as well.

II.

To our minds, the most difficult questions presented by lawyers' participation in on-line chat rooms in which they answer visitors' legal questions involve the possibility of inadvertent formation of attorney-client relationships and the consequences thereof. We previously provided tentative "best practices" guidance on attorney communications over the Internet to avoid such problems, including the use of prominent "click through" disclaimers. *See* D.C. Ethics Op. 302. We caution, however, that even the use of a disclaimer may not prevent the formation of attorney-client relationships if the parties' subsequent conduct is inconsistent with the disclaimer.[11] Indeed, a lengthy scholarly examination of various jurisdictions' law on the topic reached the same conclusion.[12] Professor Catherine Lanctot argues that the broad "click through" disclaimers typically used by web sites offering live attorney chat rooms, though helpful in avoiding inadvertent formation of attorney-client relationships, may not prevent the formation of such relationships in cases in which subsequent on-line communications involve a consumer asking for and an attorney providing specific legal advice tailored to the facts of the consumer's particular situation.[13] It thus seems appropriate to expand on our earlier best practices discussion for attorney communications over the Internet to address lawyers' participation in chat rooms.

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[6] *See, e.g.*, Florida Bar Standing Comm. on Advertising Op. A-00-1 (2000); Mich. State Bar Comm. on Prof. and Judicial Ethics, Op. RI-276 (1996); Utah State Bar Ass'n Ethics Op. 97-10 (1997); West Virginia Ethics Op. 98-03 (1998).

[7] D.C. Rule 7.1 covers all communications concerning a lawyer's services; the D.C. Rules do not include provisions patterned after ABA Model Rules 7.2 and 7.3, which regulate advertising and solicitation, respectively.

[8] *See, e.g.*, Florida Bar Standing Comm. on Advertising Op. A-00-1 (Florida lawyers may not solicit prospective clients through real-time conversations in Internet chat rooms under state's restrictions on in-person solicitation); Mich. State Bar Comm. on Prof. and Judicial Ethics, Op. RI-276 (solicitation of clients through "'real time communications'" in Internet chat rooms violates state's restrictions on in-person and telephone solicitation)

[9] *See, e.g.*, Utah Ethics Op. 97-10 (analogizing chat room communication to in-person communication due to its "direct and confrontational nature"); Michigan State Bar Standing Comm. on Prof. and Judicial Ethics Op. RI-276 (noting "immediacy" of interactive electronic communication).

[10] Arizona State Bar Ass'n Ethics Op. 97-04 (1997) (communications with potential clients in chat rooms should not be deemed a prohibited in-person contact because there is not the same degree of "confrontation and immediacy").

[11] *See, e.g.*, New York City Ethics Op. 1998-2 (1998) (use of a "disclaimer may not necessarily serve to shield Law Firm from a claim that an attorney-client relationship was in fact established by reason of specific on-line communications"); Utah State Bar Ethics Op. 96-12 (1997) ("if legal advice is sought from an attorney, if the advice sought is pertinent to the attorney's profession, and if the attorney gives the advice for which fees will be charged, an attorney-client relationship is created that cannot be disclaimed by the attorney giving the advice.") (footnote and citations omitted). Indeed, a chat room visitor who is misled by a disclaimer purporting to disavow liability for legal advice might even have an argument that the disclaimer was "false and misleading" within the meaning of D.C. Rule 7.1 (a).

[12] *See* Catherine J. Lanctot, "Attorney-Client Relationships in Cyberspace: The Peril and the Promise," 49 Duke L. J. 147, 149-97 (1999); *see also* Joan C. Rogers, "Cyberlawyers Must Chart Uncertain Course in World of Online Advice," 16 ABA/BNA Lawyers' Manual on Professional Conduct Special Report 96 (2000) (quoting other legal commentators' similar conclusions that broad disclaimers may not prevent the formation of attorney-client relationships through cyberspace communications).

[13] Lanctot, *supra* note 12, at 248. In support of this conclusion, Lanctot cites opinions considering lawyers' use of disclaimers in a variety of contexts, including Kansas Bar Ass'n Comm. on Ethics/Advisory Servs., Op. 93-8 (1993) ("A law-

Lawyers' participation in chat rooms may implicate competing ethical values. On the one hand, lawyers' duties to inform the public about the law are well recognized. ABA Model Code EC 2-2 provided that the "legal profession should assist lay persons to recognize legal problems" and that lawyers should therefore "encourage and participate in educational and public relation programs concerning our legal system," and states whose ethics rules are based on the Model Code continue to have such provisions in their ethics codes. *See, e.g.*, N.Y. Code of Prof. Resp. EC 2-2. Although the D.C. Rules of Professional Conduct do not contain a provision equivalent to EC 2-2, there is every reason to believe, consistent with the traditions of the profession, that these ethical duties to contribute to making legal information available to the public continue to hold strong here. Cf. D.C. Rule 6.1 comments [1] & [2] (noting that D.C. Rule 6.1 was intended to carry forward long-standing ethical principles in the Code, especially Canon 2).

On the other hand, the ethical impetus that motivates lawyers to help the public become aware of legal problems cannot insulate lawyers from the consequences arising from formation of an attorney-client relationship as the result of providing legal advice. The question of precisely what conduct gives rise to an attorney-client relationship is one of substantive law in the relevant jurisdiction(s). Because the issue under discussion turns on that question, a review of the basic principles concerning the formation of attorney-client relationships is in order here. Most courts agree, for example, that neither a retainer nor a formal agreement is required to establish an attorney-client relationship. *See, e.g.*, *Kurtenbach v. TeKippe*, 260 N.W.2d 53, 56 (Iowa 1977); *see also In re Lieber*, 442 A.2d 153 (D.C. 1982) (attorney-client relationship formed where attorney failed to indicate lack of consent to accept court-appointed client after receiving notification of appointment by mail). In *Kurtenbach*, the court looked to (1) whether the putative client had sought advice from the lawyer, (2) whether the advice sought was within the lawyer's field of competence, and (3) whether the lawyer, either directly or implicitly, agreed to give the requested advice. *Kurtenbach*, 260 N.W.2d at 56. Many courts look to the reasonable expectations and reliance of the putative client. *See, e.g.*, *In re Lieber*, 442 A.2d at 156. Under this approach, even casually rendered advice may be found to give rise to an attorney-client relationship where the putative client relies on it. *See, e.g.*, *Togstad v. Vesely, Otto, Miller & Keffe*, 291 N.W. 2d 686 (Minn. 1980) (attorney-client relationship created where attorney stated that he did not think a prospective client had a cause of action but would discuss it with his partner, did not call client back, and client relied on attorney's assessment and did not continue to seek legal representation).

In light of these general principles, lawyers seeking to avoid formation of attorney-client relationships through chat room conversations would be well advised to avoid providing legal advice in such communications.[14] The relevant distinction is that between legal *advice* and legal *information*. Providing legal information involves discussion of legal principles, trends, and considerations—the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person's circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual's specific situation. Legal ethics committees in jurisdictions where EC 2-2 is still in effect have advised precisely this approach. In New York City Ethics Op. 1998-2 (1998), for example, the committee suggested that:

> A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writing by lawyers for non-lawyers should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

Likewise, in Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipl., Op. 94-13 (1994), the committee concluded that in giving legal seminars, "it would be prudent for the lawyer to advise the attendees that the lawyer's discussion in regard to questions will be general and not intended as individual advice for specific problems," and that "it may be helpful for the attorney to remind the attendees not to divulge confidential information." The committee further warned that, in taking part in radio talk shows, "particular caution is warranted," because the format often invites listeners to ask questions. The lawyer "must be extremely careful not to impart individual advice." (Citations omitted). The fact that lawyers may now be providing the public with legal information through Internet communications rather than more traditional fora such as public lectures or talk shows does not alter this fundamental analysis.

Consistent with that analysis, lawyers wishing to avoid formation of attorney-client relationships through chat room or similar Internet communications should limit themselves to providing legal information, and should not seek to elicit or respond to the specifics of particular individuals' situations. Lawyers could, for example, explain general principles or trends in the law, or lay out the majority and minority viewpoints and/or the range of variation on particular legal issues across jurisdictions, or even describe a particular jurisdiction's law. But lawyers should advise information seekers to obtain legal counsel to determine what law would be applicable to their unique circumstances. Likewise, lawyers participating in chat room exchanges could explain the approaches to certain legal problems lawyers typically consider, but should not purport to advise inquirers as to what to do in their specific situations. Where a communication is lengthy or otherwise might leave room for misunderstanding, lawyers should remind inquirers that the chat room communication is not a substitute for specific legal advice, and that the lawyer is providing general legal information only.

To illustrate, we will use the example we gave above of one chat room conversation we encountered. The lawyer in that case might have been better advised to

yer operating a '900' pay-for-information telephone number by which callers are given legal information . . . enters into a lawyer-client relationship with the caller and may not avoid it by disclaimer."); N.J. Sup. Ct. Comm. on Unauthorized Prac., Op. 17 (1994) (attorney cannot avoid malpractice liability in rendering legal advice to client or prospective client through "900-number" service by disclaiming attorney-client relationship). *See* Lanctot, *supra* note 12, at 192-93 n. 146.

[14] This is especially true for Internet communications, where giving legal advice might create an attorney-client relationship and thus subject an attorney to malpractice liability in a far distant jurisdiction. *See* New York City Ethics Op. 1998-2 (1998) (emphasizing need for caution given Internet's multi-jurisdictional reach).

respond to the inquirer's query along the following lines:

> Generally, persons who are in the U.S. on non-expired visa waivers are in status. Such persons, however, may often find it difficult to change status from a visa waiver. They might try to apply for a non-immigrant visa, such as a student visa, but they would probably be required to leave the United States to obtain such a visa. Another possibility some persons in this situation explore is to apply for a non-immigrant work visa. I cannot give you legal advice on your particular situation, but if you would like to discuss your specific case with me, you may call me for a consultation . . .

Such wording makes it more clear that the lawyer is not purporting to give legal advice than did the repeated "you should . . ." statements contained in the attorney's response quoted earlier in this opinion.

III.

The last question we address concerns the consequences under the D.C. Rules of Professional Conduct of formation of an attorney-client relationship through an attorney's participation in a chat room or similar Internet legal information service. In our view, if an attorney-client relationship *is* formed through cyberspace communications in which an inquirer seeks, and a lawyer provides, specific legal advice, that relationship brings to bear all of the responsibilities and benefits defined under the D.C. Rules governing attorney-client relationships, even though the lawyer has not "met" the client in the conventional sense and may not even know the client's identity.[15] Although D.C. Rule 1.2(c) permits a lawyer to limit "the objectives of the representation if the client consents after consultation," this rule further provides that any such agreement concerning the scope of representation "must accord with the Rules of Professional Conduct and other law." D.C. Rule 1.2 (c) & comment [5]. Comment [5] continues, "the client may not be asked to agree to representations so limited in scope as to violate Rule 1.1." In other words, while it is permissible for an attorney and client to agree to a representation that is limited in scope (such as in being of short duration or for the purpose of giving legal advice on one discrete legal problem), it is not permissible to further limit the scope of such a representation to avoid the application of rules requiring competence and the like. Nor may the lawyer restrict his or her obligations with respect to such matters as conflicts or confidentiality.[16]

Thus, before undertaking the kind of communication that would give rise to an attorney-client relationship as determined by applicable substantive law, the attorney must, in our view, ensure that the formation of that relationship does not give rise to impermissible conflicts under D.C. Rules 1.7, 1.8, 1.9, and 1.11. The attorney must also safeguard the secrets and confidences of that client under Rule 1.6.[17] This may be true even if an attorney-client relationship has not formed but the lawyer is in a situation in which he or she properly should regard an advice seeker as a prospective client, as might be especially likely to arise in settings in which lawyers are permitted to solicit or follow up with chat room visitors. *See* D.C. Rule 1.10(a) comments [7]-[12]; *see generally* Restatement (Third) of the Law Governing Lawyers § 15(1)(a) (2000) (lawyer owes duties to prospective clients to protect confidential information). Accordingly, even if a communication begins as a public communication in a chat room or similar exchange service, the attorney may be required at some point to reserve his or her communications for the eyes of a particular advice seeker only. And the attorney must always take care in cyberspace, as in face-to-face communications, that information he or she receives through on-line communications does not end up creating conflict of interest problems with respect to existing clients.[18] Likewise, the attorney must ensure that such requirements as that of competence under D.C. Rule 1.1, diligence and zeal under Rule 1.3, and adequate communication under Rule 1.4 are met.

Advocates of the provision of low-cost legal advice through on-line chat rooms and similar innovative services make the important point that these services offer great potential for providing low-cost legal services to low and moderate income persons. *See generally* "Conference on the Delivery of Legal Services to Low-Income Persons: Professional and Ethical Issues," 67 Fordham L. Rev. 1751 (1999); "Symposium: Lawyering for the Middle Class," 70 Fordham L. Rev. 623 (2001) (discussing need for innovation in legal services delivery mechanisms for both low and middle income clients). We do not dispute this observation or the spirit of concern and experimentation with which it is made. Indeed, many believe that devising better, lower cost ways of providing quality legal services to low and moderate income populations is one of the legal profession's most pressing problems. A number of proposals are being considered along these lines, including the possibility of allowing limited-purpose attorney-client relationships that might "unbundle" or disaggregate some of the responsibilities and duties traditionally required of lawyers. In its proposed Model Rule of Professional Conduct 1.2, for example, the ABA Ethics 2000 Commission stated that "a lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances,"[19] a change

[15] This conclusion is consistent with that of another state bar ethics committee that has considered the issue. *See* Ill. State Bar Ass'n Comm. on Prof. Conduct 96-10 (1997) ("lawyers participating in chat groups or other on-line services that could involve offering personalized legal advice to anyone who happens to be connected to the service should be mindful that the recipients of such advi[c]e are the lawyer's clients, with the benefits and burdens of that relationship."); *see also* Ohio Sup. Ct. Bd. of Comm'r on Grievances and Discipl., Op. 99-9 (1999) (attorneys who answer legal questions for a fee posed by visitors to firm's web site subject to same constraints that govern other methods of delivering legal services, including requirements of conflicts checks, competence, and confidentiality).

[16] *See* Ill. State Bar Ass'n Comm. on Prof. Conduct 96-10 (following its prior opinion cautioning that attorneys who gave legal advice through a telephone service could easily run afoul of the conflict of interest provisions of Rules 1.7 and 1.9, to conclude that "lawyers participating in similar activity over the Internet would be subject to the same concerns"); *see also* Arizona State Bar Ethics Ass'n Op. 97-04 (concluding that lawyers should not answer specific questions or give fact-specific advice in chat rooms because they would be unable to screen for potential conflicts and would risk confidentiality problems).

[17] A client may waive confidentiality under D.C. Rule 1.6, but only after "full disclosure" and "consent." D.C. Rule 1.6(d)(1). "[C]onsent" requires uncoerced assent following "consultation with the lawyer regarding the matter in question," and "consultation" requires "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question" (D.C. Rules "Terminology" [2] & [3])—requirements that may not be met in the context of assent through a "click through" disclaimer. As we noted in Opinion 309, waivers of confidentiality may be especially problematic and thus "require particular scrutiny and may be invalid even when granted by sophisticated clients" with independent counsel. Op. 309 n. 10.

[18] The best way of avoiding conflict problems, of course, would be to refrain from creation of an attorney-client relationship in the first place. Lawyers might also ask that chat room participants abstain from providing confidential information, as already discussed. These steps would not necessarily eliminate all conflicts problems, however, which again points to the need to eschew the formation of attorney-client relationships.

[19] Proposed comment [7] explains that "reasonable under the circumstances" means that "[i]f,

the Commission's reporter explains is intended in part "to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal service to low or moderate-income persons who otherwise would be unable to obtain counsel."

Reforms that would alter the traditional duties and obligations lawyers owe clients, however, are not encompassed within the D.C. Rules of Professional Conduct currently in effect. Such reforms will have to await the attention of the D.C. Court of Appeals. As our rules currently stand, the full panoply of ethical considerations, including conflict avoidance, confidentiality, competence and the like, attach to *all* attorney-client relationships, including those that may be formed inadvertently through attorney communications with persons seeking legal information over the Internet.

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*Opinion No. 317*

## Repudiation of Conflict of Interest Waivers

• If a client's waiver of his lawyer's conflict of interest has been relied upon by another client or the lawyer, the client's subsequent change of heart will not restore those involved to the *status quo ante*. Preferably, the consequences of any change of heart should be addressed when the waiver is granted. Absent such agreement, the consequences largely depend on whether another party (i.e., another client or the lawyer) has relied detrimentally upon the waiver. The limited exception for certain conflicts arising in the midst of a matter may be available to permit continuing representation of both clients. If not, and if there has been detrimental reliance by another client or the lawyer, the lawyer ordinarily should continue representing the other client. Absent such reliance, the parties normally will be restored to the *status quo* and the lawyer should conduct the conflicts analysis that would have been required when the waiver was secured.

### Applicable Rules

- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.16 (Declining or Terminating Representation)

*Inquiry*

The committee has been asked whether a client who waives a conflict of interest[1] on the part of his lawyer may later repudiate that waiver and, if so, the consequences of such an action.[2] The inquiring law firm, believing that with appropriate waivers, it could represent two bidders in a federal agency's licensing auction,[3] sought such waivers. Initially, Client A consented but Client B did not. "After considering this over the weekend," however, Client B's co-owner, who was a lawyer with experience practicing before the agency, agreed to "waive the conflict and if [the inquiring law firm] wants to represent [Client A] in the auction, it can do so without our objection." The law firm thereupon commenced the representations. More than two months later, Client B purported to withdraw its consent, stating that its waiver had been "sent in the heat of the moment and does not represent [Client B's] best interests."

*Discussion*

Permitting clients to waive conflicts of interest on the part of their lawyers is an alternative to automatic disqualification that has been recognized for a century. *See* American Bar Association, Opinions on Professional Ethics 22 (1967) (text of Canon 6 of the Canons of Ethics, adopted in 1908). The District of Columbia Rules of Professional Conduct ("D.C. Rules" or "Rules") prohibit a waiver that would let a lawyer[4] take adverse positions (i.e., represent differing interests) in the same matter.[5] D.C. Rule 1.7(a) & comments [1]-[6]. The Rules do permit, however, waivers of such other conflicts of interest as those in which a lawyer opposes her own client in a matter where that client is represented by a *different* law firm, *see* D.C. Rule 1.7(b)(1), and those in which a lawyer's personal interests, or her responsibilities to another client, might affect adversely the representation, *see* D.C. Rule 1.7(b)(2)-(4).[6] In some circumstances a waiver may be granted even before a conflict arises. D.C. Bar Ethics Op. 309 (2001). Finally, a conflict involving a *former* client, which arises only if the new matter is the same as or substantially related to the earlier one, also may be waived. D.C. Rule 1.9 & comment [3].

A waiver is sufficient if there has been "full disclosure of the existence and nature of the possible conflict and the possible consequences of [the] representation." D.C. Rule 1.7(c). The client's consent must be uncoerced and must follow "consultation"—which is "communication of information reasonably

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."

The Ethics 2000 Commission's proposed approach resembles Restatement (Third) of the Law Governing Lawyers § 19 (2000), which likewise permits lawyers to limit the duties they would owe a client under terms "reasonable under the circumstances." But, the Restatement, too, would set a "floor" for the competence required, using the following illustration that might be apropos to some chat room exchanges:

> 3. Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information.

[1] This opinion does not address waivers of *confidentiality*, other than to note that they cannot be implied from waivers of conflicts of interest. *See* D.C. Ethics Op. 309, at n. 10 (2001).

[2] This inquiry initially was addressed by an informal letter to the inquirer from the Acting Chair of the committee. This opinion is consistent with that letter.

[3] We have accepted for purposes of this opinion the inquiring firm's assertion that the conflict was one under Rule 1.7(b) of the D.C. Rules of Professional Conduct and hence waiveable. Were the situation one in which the same firm was representing the adverse interests of two clients in the same matter, the conflict would be one under Rule 1.7(a) and hence not waiveable.

[4] The disqualification of a single lawyer under Rule 1.7 is imputed to all the lawyers in that individual's firm. D.C. Rule 1.10(a); D.C. Ethics Op. 279 (1998). "Firm" includes a private firm, "lawyers employed in the legal department of a corporation or other organization, and lawyers employed in a legal services organization." D.C. Rules, Terminology, ¶ [4].

[5] The Rules define "matter" broadly as "any . . . representation." D.C. Rules, Terminology, ¶ [8].

[6] Paragraphs (2) through (4) of Rule 1.7(b) sometimes are referred to as "punch-pulling" rules because they address the concern that a lawyer might "pull her punches" (i.e., be less assertive, zealous or diligent) on behalf of one client out of concern for the interests of some other client or of the lawyer herself.

sufficient to permit the client to appreciate the significance of the matter in question." *See* D.C. Rules, Terminology, ¶¶ [2] (defining "consent"), [3] (defining "consultation"). Moreover, "'full disclosure' includes a clear explanation of the differing interests involved . . . and the advantages of seeking independent legal advice. It also requires a detailed explanation of the risks and disadvantages . . . entailed in the [waiver]." *In re James*, 452 A.2d 163, 167 (D.C. 1982) (interpreting former D.C. Code of Professional Responsibility). In sum, "the Rules require that a client who is asked to waive an actual or potential conflict have an adequate appreciation of what protection she is giving up," and more explanation may be required where the client is unsophisticated than otherwise. D.C. Ethics Op. 309 (2001).[7]

Given these restrictions and preconditions for conflict waivers, what happens when a client who has granted a waiver changes his mind? The problem, of course, is that the other clients involved, not to mention the lawyer, may have acted in good faith reliance upon the waiver. This is particularly likely if some time has elapsed between the grant of the waiver and its revocation. The short answer is that while nothing can prevent a waiving client from later changing its mind, such an action might not compel the lawyer to withdraw from representing the other affected client.

The issue is not addressed expressly by the D.C. Rules. Our Court of Appeals has said that a consent to dual representation, given when there were no actual or foreseen conflicts among the parties, *may* be subject to revocation when a conflict arises, *Griva v. Davison*, 637 A.2d 830, 846 (D.C. 1994), but has gone no farther than that. As outlined below, however, the issue has been addressed elsewhere—in the Restatement of the Law Governing Lawyers, the recent revision of the ABA Model Rules of Professional Conduct ("Model Rules") and, at least obliquely, in reported decisions from several other jurisdictions.

Although a waiver can be viewed as a contract between lawyer and client, the fiduciary nature of their relationship counsels against treating the question merely as one of contract law. *See Barr v. Day*, 879 P.2d 912, 917-18 (Wash. 1994) (noting "special nature of the attorney-client relationship"); Restatement of the Law Governing Lawyers ("Restatement"), at p. 244 (2000) ("special relationship between lawyers and clients"). After all, a client can discharge his lawyer at any time, with or without cause, D.C. Rule 1.16(a)(3) & comment [4]; *Tinney v. Duckett*, 141 A.2d 192, 193 (D.C. 1958); *Barr*, 879 P. 2d at 917-18, and regardless of any contrary contract between them, Restatement (Second) of Agency, § 118 & comment *b* (1958); ABA Informal Op. 1397 (1977); Warren A. Seavey, Law of Agency 87 (1964) (citing *Francis v. Bartlett*, 121 So. 2d 18 (La. App. 1960)). The Restatement and the Model Rules would accord the client the same rights where revocation of waivers is concerned, at least absent special circumstances. Restatement § 122, comment *f* (positing an absolute right to revoke a waiver at any time); Model Rule 1.7, comment [21] (adopted Feb. 2002) (same); *see Tinney*, 141 A.2d at 193.

But while a client can discharge his lawyer at any time, he cannot thereby escape his existing obligations to her (e.g., payment for services rendered prior to discharge). *See, e.g.*, D.C. Rule 1.16, comment [4].[8] By the same token, a change of heart about a conflict waiver also may lead to adverse consequences for the repudiating client. *See Crabtree v. Academy Life Ins. Co.*, 878 F. Supp. 727, 731 (E.D. Pa. 1995) (applying Pa. law); Restatement (Second) of Agency, § 118, comments *b* and *c* (1958).

The possibility of a change of heart, like other contingencies, typically can be addressed best by providing for it in advance. This can be done in the engagement letter, the communication in which the waiver is granted, or some other communication (preferably written[9]) between lawyer and client. Such an agreement can address whether a client that changes its mind will have a right to continued representation by the lawyer and, if the lawyer is permitted to withdraw from representation of that client, whether the lawyer may continue representing the other clients who are involved.

Absent advance arrangements, however, what consequences (if any) should ensue when a client changes its mind about a previously granted conflict waiver? Typically, neither the grant nor the effect of a conflict waiver is unilateral. Other clients and the lawyer may have been affected by the waiver and often will have acted in reliance upon it.

We disagree to some extent with the position of the Restatement. As noted above, the Restatement says that a waiver can be revoked at any time but that adverse consequences to the revoking client may ensue. Restatement § 122, comment *f*. The Restatement posits a two-step inquiry: First, is the revocation "justified," for example by a material change in expectations between the time the waiver is granted and the time of revocation, disloyalty of the lawyer to the revoking client, or violation by the other client of a joint representation arrangement. *Id.* If revocation is justified, the lawyer must withdraw from representing the other client, in which case the second issue need not be addressed. *Id.* Second, if the revocation is unjustified, would "material detriment to the [non-revoking] client or lawyer . . . result" from the lawyer's withdrawal? *Id.* (citing "reasonable expectations" of lawyer and non-revoking client). The Restatement's examples of material detriment are situations where substantial time, money, and effort have been invested in the representation, where confidential information has been disclosed to the lawyer by the non-revoking client and a trusting relationship has developed between the two, and where the lawyer or non-revoking client has elected to forgo other opportunities in reliance upon the consent. *Id.*

We also disagree somewhat with the Model Rules, whose view is that (1) waivers always are revocable and (2) whether the lawyer can withdraw from representing the revoking client and continue representing the other client "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 or the lawyer would result." Model Rule 1.7, comment [21] (adopted Feb. 2002).

Relevant judicial decisions from other jurisdictions typically have arisen in the context of disqualification motions. In

[7] Where the waiving client has other counsel (in-house or outside) available, there is a strong presumption that its conflicts waiver is informed and sufficient. *See* ABA Model Rule 1.0, comment [6] (adopted Feb. 2002). In some situations, this may counsel a lawyer requesting a waiver to suggest or recommend that her client engage in such consultation.

[8] This is not to suggest, of course, that client cannot dispute the nature and extent, if any, of such obligations.

[9] We recommend that conflict waivers, the consequences of a change of heart about such a waiver, and indeed, all the substantive elements of a lawyer's engagement be in writing. *See, e.g.*, D.C. Rule 1.7, comment [20] (recommending that conflict disclosures be written); D.C. Ethics Op. 248 n. 7 (1995) (encouraging that conflict waivers be in writing). Reducing the parties' understandings to writing avoids the uncertainty inherent in relying upon individuals' recollections—sometimes years after the fact—of what transpired in an oral exchange or whether such an exchange even occurred.

effect, a motion to disqualify a firm to whom the movant previously has granted a conflict waiver constitutes a client's attempt to revoke the waiver. *See Tinney*, 141 A.2d at 193 (principal's action inconsistent with agent's authority revokes that authority). A 1995 California decision examined whether a firm that had jointly represented an individual and his employer in a matter, but had withdrawn from representing the employee when his dishonesty in the matter came to light, could pursue the employer's ensuing fraud claim against the employee. *Zador Corp., N.V. v. Kwan*, 37 Cal. Rptr. 2d 754 (App. 1995). The Court of Appeals permitted the law firm to continue representing the employer because the former employee/client had stated, while a client and again at the time the firm withdrew from representing him, that he understood and agreed to the detailed waiver presented to him. *Id.* at 763-64. The court—in effect holding that the waiver bound the individual—let the representation of the employer continue because of the detailed nature of the waiver and the fact that it had been discussed repeatedly with the waiving employee. *Id.* at 763. The court also noted that more than three years had passed between the time the employee/client and the law firm parted company and the time he sought, in effect, to revoke his waiver by seeking the firm's disqualification. *Id.* at 763-64. Prejudice due to delay not only is relevant but may justify denial of disqualification. *Id.* at 764; *see Elliott v. McFarland Unified School Dist.*, 165 Cal. App. 3d 562 (App. 1985) (noting delay in bringing disqualification motion as partial grounds for its denial).[10]

A leading Ninth Circuit decision states expressly that revocation of consent does not preclude continuing representation of the other client where the law firm and other client had relied upon the waiver. *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1346 n. 6 (9th Cir. 1981); *accord Fisons Corp. v. Atochem N. Am., Inc.*, 1990 WL 180551, *6 n. 6 (S.D.N.Y. 1990). Another decision, while not expressly mentioning reliance, rests heavily, in denying the disqualification motion, on the law firm's long and continuous relationship with the non-revoking client and the revoking client's knowledge of that relationship before engaging the law firm. *Interstate Properties v. Pyramid Co. of Utica*, 547 F. Supp. 178 (S.D.N.Y. 1982). Several decisions permitting continued representation of the other client have relied in part upon the fact that independent counsel for the waiving client reviewed the waiver when it was granted. *Jelco*, 646 F.2d at 1342-43; *Fisons*, 1990 WL 180551, at *1-*2.

As noted above, our Court of Appeals has hinted in dictum that a waiver may be revocable where circumstances have changed beyond the contemplation of the waiving client at the time the waiver was granted. *Griva*, 637 A.2d at 846. In that case, however, the client arguably had not waived a current or even a potential conflict. Rather, she was one of a three-person family partnership who had permitted the lawyer for the partnership also to represent the two other partners as individuals. *Id.* at 833-34. A conflict, indicated the court, was not within the contemplation of that waiver. *Id.* at 846. Moreover, even were the permission in that case deemed to be an advance conflict waiver, it's unclear whether the court viewed the waiver as satisfying the disclosure, consultation and consent requirements of Rule 1.7(c).

We do not decide the somewhat metaphysical question of whether a conflict waiver is irrevocable or is revocable but with possible adverse consequences for the revoking client. What does require resolution here is this: When the waiving client's change of heart is manifested to the lawyer, what rules govern whether the lawyer may (or, for that matter, must) withdraw from representing one or both of the clients whose adversity was the reason for the waiver?

Several provisions of D.C. Rule 1.16 appear potentially relevant. First, the change of heart properly might be construed, at least in some circumstances, as a discharge of the lawyer by the revoking client. *See, e.g., Artromick Int'l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226 (S.D. Ohio 1991) (client conduct inconsistent with attorney-client relationship constitutes discharge); *Belli v. Shaw*, 657 P.2d 315, 319 (Wash. 1983) (client's action inconsistent with contract with lawyer constituted discharge of lawyer); *see also Tinney*, 141 A.2d at 193 (principal's action inconsistent with agent's authority revokes that authority); *Maddox v. Burlingame*, 517 N.W.2d 816, 818 (Mich. App. 1994) (engagement of replacement counsel "effectively terminates the attorney-client relationship"); *Costello v. Bruskin*, 395 N.Y.S.2d 116 (App. 1977) (commencement of malpractice action against lawyer constitutes notice of termination). A lawyer discharged by a client not only may, but must, withdraw. D.C. Rule 1.16(a)(3).

Even if the client's action doesn't constitute discharge of the lawyer by the revoking client, withdrawal is required where continuing the representation will result in a violation of the Rules. D.C. Rule 1.16(a)(1); Restatement § 32(2)(a) & comment *f*. Acting in an unwaived conflict situation will violate Rule 1.7 and hence requires withdrawal from at least one of the conflicting representations. Further, withdrawal is permissible if it will not have a "material adverse effect on the interests of the client." D.C. Rule 1.16(b). Where, for example, the lawyer has no current projects for a client, there is a strong presumption that this criterion is satisfied, even if the client reasonably believes that it has a continuing attorney-client relationship with the lawyer. D.C. Ethics Op. 272 (1997).[11]

Third, withdrawal is permitted, even where prejudice to the client might result, where after reasonable warning, a "client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services." D.C. Rule 1.16(b)(3). Fourth, the lawyer may withdraw where "obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult." D.C. Rule 1.16(b)(4); *see Sobol v. District Court of Arapahoe County*, 619 P.2d 765, 767-68 (Colo. 1980) (finding that "mutual antagonism . . . between lawyers and client was so intense that it rendered it unreasonably difficult for [lawyers] to carry out their employment effectively"); *McGuire v. Wilson*, 735 F. Supp. 83 (S.D.N.Y. 1990) (same). Finally, if the matter is before a tribunal, the tribunal might conclude that the lawyer has "other good cause" for withdrawal.[12] D.C. Rule. 1.16(b)(5); *see In re Admonition Issued in Panel File No. 94-24*, 533 N.W.2d 852 (Minn. 1995) (lawyer reasonably believed that client lacked confidence in lawyer's representation); *In re Anonymous Member of the Bar*, 379 S.E.2d 723 (S.C. 1989) (serious deterioration of attorney-client relationship, evidenced by client's filing of grievance against lawyer); *Kolomick v. Kolomick*, 518 N.Y.S.2d 413 (App. 1987) (breakdown of attorney-client relationship).

What process should be followed, then, when a current client changes its mind

[10] *Zador* properly is viewed as a case involving the waiver of a current, rather than a prospective, conflict. *See* D.C. Ethics Op. 309 n. 3 (2001).

[11] Opinion 272 thus accords a narrow construction to the so-called hot potato doctrine. *See* D.C. Ethics Op. 272 (1997).

[12] "If the matter is not pending in court, a lawyer will not have 'other good cause for withdrawal' unless the lawyer is acting in good faith and the circumstances are exceptional enough to outweigh the material adverse effect on the interests of the client that withdrawal will cause." D.C. Rule 1.16, comment [9].

about a previously granted waiver of his lawyer's conflict of interest? First, the Rule on "thrust-upon" conflicts may permit the lawyer to continue both representations, but only if the revival of the conflict (1) was not reasonably foreseeable (which likely will be so where a waiver was granted)[13] and (2) doesn't involve a "punch pulling"[14] situation. *See* D.C. Rule 1.7(d); D.C. Ethics Op. 292 (1999). If this option is unavailable, we see the applicable standard as one that blends the approaches of the Restatement, the Model Rules, and the *Jelco* decision, and that takes into account the permissibility, *see* D.C. Ethics Op. 309 (2001), of advance waivers of conflicts.

In the situation that occasioned this inquiry, the client who repudiated his waiver was a lawyer with experience practicing before the agency where the representations were pending. Hence we assume that the waiver satisfied the requirements of Rule 1.7(c).

The principal issue, then, is reliance. Some examples are offered by the Restatement—the investment of substantial time, money and effort in the representation of the other affected client, the disclosure of confidential information to the lawyer by the other client, the development of a relationship of trust between the lawyer and the other client, and the election of the lawyer or the other client to forgo other opportunities in reliance upon the consent. Restatement § 122, comment *f*. We note in respect of the last example that the lawyer's acceptance of the client who later reconsiders its waiver effectively may have precluded the lawyer from accepting future representations of clients, or categories of clients, normally adverse to that client. This is because the waiver may permit such other representations in circumstances subject to Rule 1.7(b) but it won't allow them in circumstances subject to Rule 1.7(a). In the case of an advance waiver, the lawyer's acceptance of the waiving client and commencement of that representation ordinarily will be sufficient to constitute reliance. Similarly, the lawyer's service to a waiving former client, *see* D.C. Rule 1.9 & comment [3], normally should constitute reliance sufficient to estop that party from changing its mind about its waiver.

If there has been detrimental reliance by the other client or the lawyer, the lawyer ordinarily should continue representing the other client. Whether the lawyer then may, or must, withdraw from representing the client that has changed its mind is governed by Rules 1.7, 1.9 and 1.16.[15] As discussed above, possible bases for such a withdrawal may be that the repudiation of the waiver effectively has discharged the lawyer, *see* D.C. Rule 1.16(a)(3) (mandatory withdrawal), continuing both representations will cause the lawyer to violate the conflict of interests prohibition of the Rules, *see* D.C. Rules 1.7, 1.9; D.C. Rule 1.16(a)(1) (mandatory withdrawal), withdrawal can be accomplished without prejudice to the repudiating client (if that indeed is the case), *see* D.C. Rule 1.16(b) (permissive withdrawal); D.C. Ethics Op. 272 (1997) (same), the repudiation constitutes failure "to fulfill an obligation to the lawyer regarding the lawyer's services," D.C. Rule 1.16(b)(3) (same), "obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult," D.C. Rule 1.16(b)(4) (same), and a tribunal has found "other good cause" for withdrawal, D.C. Rule 1.16(b)(5) (same). *See generally* Restatement § 132, comment *j* (permitting withdrawal where conflict arises due to action of client, rather than of lawyer). Of course, if the matter is a proceeding before a tribunal, consent of the tribunal may be a prerequisite for withdrawal. *See* D.C. Rule 1.16(c).[16]

If there has been no detrimental reliance by the other client or the lawyer, the lawyer and both clients in effect are restored to their positions immediately prior to the grant of the waiver. Given that the lawyer's acceptance of, and beginning work for, the other client (and in many cases, the repudiating client as well) typically will constitute reliance, cases in this category presumably will be rare, particularly where more than a brief period has elapsed since the waiver was granted. Should such a situation nevertheless arise, the lawyer must perform the same analysis that would have been required had the waiver been refused initially. Assuming that withdrawal from representation of one client (or both, for that matter) is required, the most likely basis will be that continuing the representation will result in a violation of the Rules' prohibition on conflicts of interest. *See* D.C. Rule 1.16(a)(1).

As in all matters involving client relationships, the lawyer should apply a measure of prudence to her actions. For example, that the Rules may permit a lawyer to continue the representation of both parties does not mean that the lawyer should do so if the interests of the parties or common sense dictate otherwise. If the lawyer does withdraw from one or both representations, she must protect her former clients' interests, *see* D.C. Rule 1.16(d) & comment [10], and may not disclose or use the former clients' secrets or confidences other than as prescribed by applicable law, *see* D.C. Rule 1.6.

Finally, we reiterate that an advance agreement can avoid many, if not most, uncertainties surrounding repudiation of a conflict waiver. Such an agreement could specify, for example, the effect of repudiation upon such aspects of the matter as the lawyer's right to continue representing the other clients.[17]

Inquiry No. 01-6-14
Adopted: November 19, 2002
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*Opinion No. 318*

**Disclosure of Privileged Material by Third Party**

• When counsel in an adversary proceeding receives a privileged document from a client or other person that may have been stolen or taken without authorization from an opposing party, Rule 1.15(b) requires the receiving counsel to

[13] We do not believe that providing in advance for the consequences of the client's change of heart means that such an action was reasonably foreseeable, particularly where the lawyer routinely makes such provision in her engagement letters or otherwise.

[14] *See supra* note 6.

[15] This assumes that the safe harbor provision of Rule 1.7(d) is unavailable. If Rule 1.7(d) is available, the lawyer may continue representing both clients in their respective matters. As noted in footnote 13 above, the fact that the lawyer has made advance provision for the consequences of a change of heart does not mean that change was "reasonably foreseeable" within the meaning of Rule 1.7(d).

[16] If the tribunal orders that representation of the repudiating client continue, the lawyer may be able to continue representing both clients, *see* D.C. Rule 1.16(c); *In re Lathen*, 654 P.2d 1110 (Ore. 1982) (finding violation of lawyer-witness rule but declining to impose discipline where trial judge ordered respondent to continue as defense counsel), but otherwise may be required to withdraw from representing the other affected client.

[17] For example, an agreement could state as follows: "You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in reliance on the waiver, we will have the right—and possibly the duty, under the applicable rules of professional conduct—to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you."

refrain from reviewing and using the document if: 1) its privileged status is readily apparent on its face; 2) receiving counsel knows that the document came from someone who was not authorized to disclose it; and 3) receiving counsel does not have a reasonable basis to conclude that the opposing party waived the attorney-client privilege with respect to such document. Receiving counsel may violate the provisions of Rule 8.4(c) by reviewing and using the document in an adversary proceeding under such circumstances and should either return the document to opposing counsel or make inquiry of opposing counsel about its status prior to determining what course of action to take.

Receiving counsel would not violate Rules 1.15(b) and 8.4(c) by reviewing and using the document whose source is unknown if: 1) its privileged status is not readily apparent on its face, or if privileged, receiving counsel has a reasonable basis to conclude that the privilege has been waived; and 2) receiving counsel did not know that the document came from someone who was not authorized to disclose it. Rule 1.3(a)'s emphasis on zealous representation may provide support for receiving counsel to review and use the document in such a situation. The Committee takes no position with reference to the question whether review and use of documents that are confidential but non-privileged would violate Rules 1.15(b) and 8.4(c) because it is outside the scope of the inquiry.

Counsel who created the opportunity for the disclosure or was otherwise responsible for maintaining the confidentiality of the document may violate Rules 1.1(a) and (b) and 1.6(a) and (e) by failing to exercise reasonable care to prevent the unauthorized disclosure of the client's confidences and secrets.

**Applicable Rules**

- Rule 1.1(a) and (b) (Competence)
- Rule 1.3(a) (Diligence and Zeal)
- Rule 1.6(a) and (e) (Confidentiality of Information)
- Rule 1.15(b) (Safekeeping Property)
- Rule 8.4(c) (Dishonesty, Fraud, Deceit, or Misrepresentation)

*Inquiry*

The inquirer, inside corporate counsel for an entity involved in a contested administrative proceeding, states that a temporary employee of the entity obtained a copy of an attorney-client privileged document containing client confidences and secrets either by theft or without authorization and disclosed it to the opposing party in the proceeding. The actual manner in which the temporary employee gained access to the document is not known. The document was not marked "attorney-client privileged," "attorney work product" or "confidential," but the information contained at the top of the first page of the six page document makes it clear that the document was from the entity's inside counsel, was sent to members of its management team, and addressed a number of legal questions and concerns. Some of the legal analysis in the document was pertinent to the dispute that was the subject of the administrative proceeding.

After receiving the document, the opposing party gave it to its litigation counsel, who reviewed the document and then used it as part of a filing with the administrative tribunal without first contacting opposing counsel. It is not known whether the receiving counsel knew the source of the document or the manner in which his client received it. When the inquirer learned of the pleading, he challenged the admissibility of the document on grounds that it was privileged and that the privilege was not waived. Receiving counsel filed an opposition, asserting that the document was admissible because it was relevant to an issue in the proceedings, had not been marked "confidential," and had been "leaked" by a temporary employee to his client. The dispute over the admissibility of the document was never resolved in the administrative proceeding because the matter was settled, but the inquirer has asked for our opinion regarding the ethical implications of its submission to the tribunal.

*Discussion*

In 1995, this Committee adopted Opinion No. 256, which determined that a receiving lawyer did not violate the D.C. Rules of Professional Conduct by reviewing privileged documents inadvertently delivered by opposing counsel during discovery so long as receiving counsel was unaware of the inadvertent disclosure prior to the time the documents were examined. The Committee has now been asked to review a related issue: Does receiving counsel violate the D.C. Rules of Professional Conduct by reviewing and using what may be a privileged document in an adversary proceeding that receiving counsel's client or other person obtained from a third party who may have stolen the document or taken it without authorization?

This is a matter of some importance because, as Judge Royce Lamberth noted in *Wichita Land & Cattle vs. American Federal Bank*, 148 F.R.D. 456, 458-59 (D.D.C. 1992), efforts are more commonly being used to "surreptitiously gain access to confidential communications." Despite some obvious differences from, situations involving inadvertent disclosures, the Committee finds that the conclusions reached in Opinion No. 256, with some modifications, apply to this inquiry as well.

The ethics rules are silent on the review and use of privileged materials which may have been stolen or otherwise acquired without permission from their rightful owners by third parties. In the absence of precise direction from the rules, the Committee must begin its analysis by looking for guiding principles that will help shape the ways in which the ethics rules are interpreted. The guiding principles most pertinent to our problem relate to the primacy given in the ethics rules to confidentiality, zeal, and fair dealing with opposing counsel.

To begin with, the need to protect the confidentiality of the attorney-client relationship permeates the ethics rules. As noted in Comment [4] to Rule 1.6: "A fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences." Comment [4] further reflects that knowing that this confidential relationship exists encourages a client "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." Maintaining confidentiality is so essential that a lawyer is required to exercise reasonable care to prevent others with whom the lawyer works from disclosing or using a client's confidences or secrets. Rule 1.6(e). A lawyer is arguably also obliged to protect client confidentiality under his or her broader mandate to "serve a client with skill and care." *See* Rule 1.1(b). There clearly is a tension between these ethical and evidentiary principles and the notion that in their efforts to seek the truth, tribunals should, for the most part, have unfettered access to relevant evidence. *See Wichita Land & Cattle*, 148 F.R.D. at 462.

While fidelity to the principle of protecting client confidentiality is a basic tenet of the rules, so is the notion that in the exercise of professional judgment, a lawyer should act in a manner consistent with the best interests of the client. Rule 1.3(a), Comment [5]. The rules require that a lawyer represent a client zealously within the bounds of the law. Rule

1.3(a). This may have implications for a lawyer who gains access to a document that can beneficially be used on a client's behalf in an adversary proceeding without first being aware that it is privileged. But such an attorney is also constrained by ethical principles of fair dealing. Rule 1.15(b), for example, requires a lawyer who receives property in which third persons have an interest to notify these persons and promptly deliver the property to them. This is consistent with commentary to Rule 1.3 that the duty of a lawyer to represent a client wall zeal "does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." Rule 1.3, Comment (6). A lawyer who reviews and uses material that he knows is privileged may be engaging in a dishonest act in violation of Rule 8.4(c). *See* D.C. Ethics Opinion 256 n.8.

In its assessment of the inadvertent disclosure of privileged material to opposing counsel, the Committee previously concluded that receiving lawyers engage in no ethical violation by retaining and using those materials if they review them in good faith before the inadvertence of the disclosure is brought to their attention. D.C. Ethics Op. 256. Under that Opinion, however, receiving lawyers must return privileged documents without reviewing them if they learn about their privileged nature before reviewing the documents. Opinion 256 further reflects that lawyers who make the inadvertent disclosures may violate Rule 1.1 if they do so by failing to exercise diligence and care during a representation. The conclusions reached in Opinion 256 were largely consistent with earlier ABA Formal Opinions, Formal Opinions 92-368[1] and 94-382 and with case precedents in this circuit. *See In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989), and *Wichita Land & Cattle v. American Federal-Bank*, 148 F.R.D. 456 (D.D.C. 1992) (inadvertent disclosure of privileged documents waives the attorney-client privilege).

The question of what ethical obligations exist when privileged material *may have been* stolen or taken without authority is not addressed in either Opinion 256 or in ABA Formal Opinion 92-368. ABA Formal Opinion 94-382, however, did address the issue of the unsolicited receipt of privileged or confidential materials. It concluded that a lawyer who receives such materials of an adverse party should refrain from using them if she *knows* that they are privileged. The District of Columbia Circuit specifically reserved decision on the issue of the unsolicited receipt of privileged documents in *In re Sealed Case* when it stated that "[w]e do not face here any claim that the information was acquired by a third party despite all possible precautions, in which case there might be no waiver at all." 877 F.2d at 980, n. 5.

This issue was addressed, however, in *In re Grand Jury Proceedings Involving Berkeley & Co.*, 466 F. Supp. 863 (D. Minn. 1979). In *Berkeley*, a former employee allegedly stole corporate documents and turned them over to the government. The company argued that the documents should be returned because they were privileged. The court noted initially that it had long been assumed that the privilege was deemed waived for all involuntary disclosures of privileged documents, even those that were stolen. This had been the position taken in Dean Wigmore's highly respected treatise on evidence. *See* 8 *Wigmore on Evidence* §§ 2325-26 (McNaughton rev. 1961).

But *Berkeley* concluded that the privileged status of document should not be lost in such circumstance if "the attorney and client take reasonable precautions to ensure confidentiality." The approach taken in *Berkeley* has been largely adopted by the American Law Institute in the Restatement of the Law Governing Lawyers. Under § 129 of the Restatement, the attorney-client privilege is waived only if "the client, the client's lawyer, or another authorized agent of the client *voluntarily* discloses the communication in a non-privileged communication." Restatement of the Law Governing Lawyers § 129 (2000). *See* comment *g*. And, in one of the illustrations interpreting § 129, the Reporter states that the privilege is not waived if a burglar steals privileged files.

The Restatement comment also adopts the same basic approach taken in our Opinion 256 and ABA Formal Opinion 92-368 with reference to inadvertent disclosures of privileged materials. The Restatement concludes that waiver does not result from inadvertent disclosures as long as the client or any other disclosing person "took precautions reasonable in the circumstances to guard against such disclosure." Restatement of the Law Governing Lawyers § 129, comment *h*.

These sources provide us with a basis for responding to this Inquiry. First, a lawyer cannot, consistent with the Rules of Professional Conduct, solicit or otherwise encourage a client or other person to obtain privileged or documentary evidence in an unlawful or unauthorized manner. If a lawyer receives materials that are privileged on their face, having a reasonable basis to conclude that the privilege has not been waived and that they have been obtained without authorization, he may violate Rules 1.15(b) and 8.4(c) by reviewing the material or by using it in an adversary hearing.[2] This is consistent with the position taken in ABA Formal Opinion 94-382. But the ethics rules are not violated unless the receiving lawyer acts knowingly.[3]

Other state ethics opinions have reached contrary results. *See, e.g.*, Maryland Bar Ass'n Op. 89-53 (1989), Virginia Bar Ass'n Op. 1076 (1988); and Michigan Bar Ass'n Op. CI-970 (1983). These opinions conclude that lawyers who receive privileged materials unsolicited have no obligation to make disclosure to a tribunal or an adverse party and may review and use such materials. But such a result is inconsistent with the conclusion reached by this Committee in Opinion 256.

The more difficult questions relate to situations in which a receiving lawyer does not have such knowledge of the document's origin prior to conducting a review, or if the status of a document is unclear. A lawyer may still violate the ethics rules if the source and status of documents can be inferred from circumstances at the time he received them because "knowingly" is so defined in the Terminology Section of the Rules, Definition 6. Whether knowledge can be inferred from circumstances is fact specific. But if a lawyer receives what appears to be a privileged document under highly suspicious circumstances, such as from a client or other person who says with a wink, "don't ask me how I got this," the prudent receiving lawyer, would make further inquiry prior to reviewing or using the document.[4]

[1] Opinion 256, however, rejected the position taken in ABA Formal Opinion 92-368 that a document must be returned even if the receiving lawyer learns about the inadvertent disclosure after the document had been reviewed.

[2] This Opinion does not address the question of whether all or just a portion of a particular document is privileged.

[3] This requires actual knowledge of the fact in question. *See* definition of "knowingly" in Terminology Section of the Rules, Definition [6]. As the Definition of "knowingly" indicates, however, knowledge can be inferred from circumstances.

[4] This is consistent with the admonition in Opinion 256 of what an ambivalent lawyer should do when receiving documents from another lawyer when there are conflicting indications as to whether the disclosure of privileged documents was inadvertent or not. D.C. Opin. 256 at n.13.

If, prior to his review, receiving counsel determines that a privileged document was obtained surreptitiously and without the knowledge or approval of the opposing party and its counsel, and has a reasonable basis to conclude that the privilege was not waived as to this document, receiving counsel should either return the document to opposing counsel, or make inquiry about its source and status prior to determining what course of action to take. This is consistent with the approach taken in ABA Formal Opinion 94-382.[5]

A receiving lawyer would not violate Rules 1.15(b) and 8.4(c) by reviewing and using the document whose source is unknown if: 1) its privileged status is not readily apparent on its face; and 2) receiving counsel did not know that the document came from someone who was not authorized to disclose it. If the privileged status of the document does not become apparent to receiving counsel until after the document has been reviewed, as reflected in D.C. Opinion 256, it is too late for receiving counsel to take corrective action because the information cannot be purged from his mind and his obligation of zealous representation under Rule 1.3 at that point trumps confidentiality concerns. The Committee takes no position with reference to the question whether review and use of documents that are confidential, but non-privileged would violate Rules 1.15(b) and 8.4(c) because it is outside the scope of the inquiry.

In the matter that is the subject of this Inquiry, there is no indication what the receiving lawyer's client said about the document or its source at the time it was given to him. Receiving counsel asserted in a pleading that the document was not marked "confidential" and that it was leaked to his client by a temporary employee of the opposing entity. Even though the document was not marked "attorney-client privilege," "attorney work product," or "confidential," the information at the top of the first page of the document made it clear that it was from the opposing entity's inside counsel and that counsel was analyzing legal questions and concerns for members of the management team.

The Committee concluded in Opinion 256 that a receiving attorney could reasonably presume that documents were intended for him when they are disclosed to him by opposing counsel. This may not be the case when documents are disclosed to a lawyer by a third party. In such a situation, a receiving counsel may violate the ethics rules if he knowingly received privileged documents, had no basis to conclude that the privilege had been waived, and reviews and uses them anyway.

But again this responsibility only exists if the privileged nature of the document is apparent on its face. There is no indication in this Inquiry whether the receiving counsel knew about the nature of the document, other than that it was not marked "confidential," at the time he received it. In the absence of additional facts, we can only reiterate the general guidance provided in Opinion 256: it would be unethical to read a document if the lawyer knew before reading it that it was privileged and that it had been sent inadvertently. The same would be true if receiving counsel reads a document that he knows is privileged and was either stolen by a third party or taken without authorization, unless he has a reasonable basis to conclude that the privilege was waived as to that document. *See also* ABA Formal Opinion 94-382.

On the other hand, Opinion 256 states that a receiving lawyer commits no breach of ethics if he reads a document that "has no facial or contextual indication of privilege and the receiving lawyer has not learned of its inadvertent disclosure." Again, the Committee reaches the same conclusion for documents improperly taken by third parties.

The determination of what a receiving lawyer knows about the source of a document and about its privileged status, as noted above, is fact specific. A document is not necessarily privileged on its face even when it is marked "privileged" or "confidential," as markings like this often are used indiscriminately. Opinion 256 at n.12. But a receiving attorney proceeds at his own risk if indicia of a privileged document do exist and there is not a reasonable basis to conclude that the privilege has been waived. This can often be gleaned by seeing on the face of a document the sending and receiving parties and the nature of the subject matter.

If, for example, sending and recipient parties are counsel and members of corporate management, respectively, the subject relates to the results of attorney-client communications or legal advice, and the document is marked "attorney-client privilege," then the ethics rules are implicated. But, where the source of the document and/or its privileged status is less clear, as indicated in ABA Formal Opinion 94-382, the prudent course for a receiving lawyer might be to contact the opposing party and raise the issue directly, have another lawyer not working on the matter assess the document separately to help determine whether it is privileged, or refrain from reviewing the materials until a definitive resolution of the proper disposition of the materials is obtained from a tribunal. For comparable suggestions, *see* Opinion 256 at n.13. *See also* ABA Formal Opinion 94-382.

It also bears repeating that internal (or outside) counsel having the responsibility for protecting privileged documents that subsequently are "leaked" may violate Rules 1.1(a) and (b) and 1.6(a) and (e) if they fail to exercise reasonable care to prevent the unauthorized disclosure of their client's confidences and secrets.[6]

Again, any such determination is fact specific. There is no indication in the Inquiry what steps had been taken to protect the confidentiality of the document at issue prior to the time it was obtained by the third party.

In summary, given the importance of preserving the confidentiality of privileged documents, lawyers have an ethical responsibility to take reasonable measures to ensure that confidential documents are protected so that they do not fall into the hands of third parties. The failure of counsel to take reasonable measures to protect a client's confidences and secrets can both waive the privilege and result in ethics violations.

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*Opinion No. 319*

**Purchase by a Lawyer of a Legal Claim From a Nonlawyer**

• The D.C. Rules of Professional Conduct do not bar the purchase by a lawyer (not acting in the course of representing a

[5] As reflected in Opinion 256, a lawyer may also decline to review or use documents that may not be the subject of ethical restraints, and that he may otherwise be entitled to use, as a matter of "courtesy." See Opin. 256 at n.7. Depending on the significance of the documents, however, a lawyer may be required to consult with the client and Rules 1.2(a) and 1.4(b) prior to making such a determination.

[6] Opinion 256 provides some general guidance on the factors to be taken into account in making such assessments. If a lawyer fails to use reasonable care in instructing those who work for him on the handling of confidential material, that lawyer may violate Rule 1.6(e), if, as a result of his failure, the confidential material falls into the hands of a third party. A lawyer may also violate Rule 1.1 if he fails to devote sufficient care and attention to the protection of privileged documents. Both of these rules may be implicated, for example, if a lawyer fails to train his employees to properly mark and file confidential documents and to avoid leaving them in areas exposed to the general public.

client) of a legal claim (i.e., a chose in action) where the seller is not and has not been the lawyer's client. However, if the seller is not represented by counsel or otherwise experienced in dealing in choses in action, the lawyer should be careful to avoid actions by which in the course of negotiation and sale the lawyer may be deemed to be providing legal advice to the seller. Such actions risk creation of a lawyer-client relationship between buyer and seller that would transform the transaction into one governed by Rule 1.8(a).

**Applicable Rules**

- Rule 1.8(a) (Business Transaction With a Client)
- Rule 8.4(c) (Lawyer Misconduct)

*Inquiry*

This Committee has received an inquiry asking whether a lawyer may purchase a chose in action[1] from a nonlawyer who is not the lawyer's client, with the lawyer acting either on his or her own behalf or as an agent for a corporation created and controlled by the lawyer. In 1931, the ABA Committee on Professional Ethics (predecessor of the present ABA Standing Committee on Ethics and Professional Responsibility) concluded that a lawyer could not buy choses in action. ABA Formal Opinion 51 (Dec. 14, 1931). The precise question referred to that committee was whether a lawyer might ethically purchase "judgments, notes[, or] other choses in action . . . from bankrupt estates for much less than their face value and . . . then collect[] them at large profit [to the lawyer]." With one member dissenting, the ABA Committee concluded that this practice would violate Canon 28 of the Canons of Professional Ethics by stirring up strife and litigation.[2] The ABA Committee thought that its result, though it deprived lawyers of the opportunity to "enter a speculative field which might be profitable and which is open to laymen," was "entirely consonant" with the "dignity of the profession."

It does not appear that the D.C. Bar has ever considered this issue, and the topic is not at least directly covered in the D.C. Rules of Professional Conduct or the ABA Model Rules of Professional Conduct. Under D.C. law, a chose in action can be assigned, and the assignee may sue in the assignee's name. D.C. Code § 28-2304.[3] The question is whether a lawyer may do what others may do under this D.C. law. Of course the ABA's Canons of Ethics in effect in 1930 have long since been replaced, first by the ABA Model Code of Professional Responsibility and then by the Model Rules of Professional Conduct, a modified version of which is in force in the District of Columbia. We conclude that while prudence will often counsel lawyers strongly against such purchases, with some restrictions the D.C. Rules of Professional Conduct do not forbid a lawyer's purchase of a chose in action.

*Discussion*

If X has a chose in action, then X has a legal claim against another that might be pursued in court. Selling the chose in action is a way for X to obtain some value for this claim without having to bear the cost and risk of litigation. It thus may be a desirable goal for X. A lawyer with an understanding of litigation might be an apt purchaser for such a claim. Accordingly the sale transaction would appear to be potentially beneficial to both. With an important reservation that we discuss below, we do not see any ethical bar to an otherwise legal purchase by a lawyer from a nonlawyer of a chose in action, where the nonlawyer is not and has not been a client of the lawyer.

The concerns expressed in ABA Formal Opinion 51 do not support a conclusion under today's rules that there is anything intrinsically wrong with the purchase of a chose in action by a lawyer from a nonlawyer who is not a client. As we noted above, the sale may be a positive good to the seller. In general, we do not see any concerns in a lawyer's seeking out such a transaction, and there is certainly no concern expressed in our Rules about such a transaction where the seller is not the lawyer's current or former client. Consistently with that view, comment b to § 36 of the Restatement of the Law Governing Lawyers (2000) specifically notes that the Restatement does not disapprove a lawyer's purchase of a chose in action as long as the seller is not a current or former client of the lawyer.[4]

There is no equivalent in the D.C. Rules of Professional Conduct to the former Canon 28, which was originally adopted in 1908. Indeed that Canon may be said to have evidenced or reinforced an inequity that used to exist but, we believe, no longer exists in the District of Columbia and many other jurisdictions. Under Canon 28 "stirring up litigation" was not really an inherent evil on all sides. Under the terms of that Canon a lawyer was explicitly allowed to initiate a recommendation of litigation to a person with whom the lawyer was in a position of "trust"—that is to say, to an existing client. The Canon merely forbade lawyers from recommending litigation to a non-client (unless a family member by blood or marriage). Without offending Canon 28, therefore, a person or a corporation with the means to employ lawyers generally could be kept advised about such litigation opportunities by existing counsel without having to know enough to request that information. Under that Canon it was only a person without such means and without existing counsel who could not receive such advice from a lawyer—unless well-enough informed to ask for it.

Our Rules of Professional Conduct afford more consideration for persons who may have significant legal problems or opportunities but who do not have existing counsel and a lawyer may advise a prospective client of the possibility of litigation as long as the requirements of Rule 7.1 are met. Thus the concern expressed in ABA Opinion 51 that a lawyer buying a chose in action from a non-client was "stirring up litigation" does not resonate under our existing

[1] A chose in action is a right to recover personalty—money or other personal property—by a lawsuit.

[2] Canon 28 provided in part:

> It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof [sic] in order to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action to secure them as clients, or to employ agents or runners for like purposes . . . .

[3] This provision states:

> **§ 28-2304. General assignments including choses in action.**
>
> In a general assignment which includes choses in action, it is not necessary to execute a separate assignment of each chose in action, but the assignee, by virtue of the general assignment, may sue in his own name on the several choses in action included therein.

[4] Section 36 of the Restatement describes those financial transactions that a lawyer may not enter into with a client. Comment b thereto notes that this section "does not forbid a lawyer from taking an assignment of the whole [legal] claim [against another] and then pressing it in the lawyer's own behalf, so long as the lawyer has not represented the claim's original owner in asserting the claim."

Rules, and the reasoning of ABA Formal Opinion 51 does not form any part of our opinion herein.

That does not mean that there are no provisions of the D.C.Rules of Professional Conduct that would bear on the action by a lawyer of purchasing a chose in action from a nonlawyer who was not a client. First, the provisions of Rule 8.4 govern all conduct of lawyers, whether client-related or not. Rule 8.4(c) declares it to be misconduct for a lawyer to engage in conduct "involving dishonesty, fraud, deceit, or misrepresentation." This places obvious limits on the negotiation and execution of any transaction, including one with a non-client.[5]

A critical feature of the inquiry is the statement that the seller of the chose in action is not the lawyer's client and that the lawyer is not acting on behalf of a client when engaged in the purchase.[6] If the seller were a client, then the severe restrictions of Rule 1.8 would apply to any business transaction between the lawyer and client, including the purchase of a chose in action from the client. Under Rule 1.8(a), any business transaction between a lawyer and a client must be objectively fair and reasonable to the client and documented in a writing that can reasonably be understood by the client, and the client must consent in writing. Moreover, the client must be "given a reasonable opportunity to seek the advice of independent counsel" for the transaction.

Although the inquiry states that the seller would not be a client, we sound a note of caution on this point. There are many circumstances in which there would be no difficulty in accepting the assumption that the seller and the lawyer-purchaser would be at arms' length and negotiating as equals. The seller may be engaged in business and advised by other counsel or be experienced in assessing the value of such assets as the chose in action. In such situations, the lack of a lawyer-client relationship between buyer and seller would be apparent.

On the other hand, where the seller is an ordinary person who has a chose in action that the lawyer views as potentially valuable, there may well be a significant disparity of knowledge between the lawyer as a prospective purchaser and the lay seller. Buying a chose in action is not like buying a used car; almost everything about the existence and worth of a chose in action involves a legal issue. The lawyer-purchaser of a chose in action is in a position of expertise in understanding and assessing the worth of the purchase. The seller, if an ordinary person not represented by counsel, presumably lacks this knowledge. In a negotiation between them the lawyer-purchaser may make (or appear to make), and the seller may rely on, representations concerning such matters as the worth of the chose in action, the difficulty of success, and so on.

In addition, there may be other factors further increasing the disparity of bargaining power between them. If the lawyer as buyer is confident enough of ultimate recovery on the chose in action to make a present, unconditional payment to purchase it, then the seller might very well also have the option, in addition to selling the claim, of finding a lawyer to represent the seller on a contingent fee basis and with the possibility (though not a certainty, of course) of obtaining a larger ultimate recovery at an indefinite point in the future.[7] A seller contemplating selling the chose in action outright rather than becoming a plaintiff in contingent-fee litigation may be motivated by particularly pressing and immediate needs, such as for funds to meet other obligations.

In such potentially highly charged situations, the lawyer would face a grave risk in proceeding, and we think that lawyers would be well advised to avoid situations in which the seller is a person not represented by counsel, for the following reasons. Because a negotiating buyer typically urges the seller to accept, it would also be difficult in many circumstances to distinguish between such representations made in negotiating such a transaction and the provision of legal advice. The seller may not understand that the lawyer's adversity in the sale transaction should be a warning that the lawyer may not have the buyer's interests at heart in stating legal reasons or providing legal advice to the seller as to whether to agree to the transaction. In such circumstances—even if everything said by the lawyer-purchaser were absolutely correct—there would be a danger that representations as to legal questions made by the buyer and reasonably relied on by the seller would create ambiguity regarding the existence of a lawyer-client relationship between the two, converting the situation to one in which Rule 1.8 applied. In Opinion No. 313 we recently discussed the factors that may govern the creation of a lawyer-client relationship. We pointed out that no formal arrangement or retainer is necessary, and that the critical feature is the putative client's reasonable expectation that the lawyer is providing legal advice on which the lawyer expects the putative client to rely, or gives the putative client reason to rely. This doctrine was applied in circumstances similar to those we are discussing in *Nelson v. Nationwide Mortgage Corporation*, 659 F. Supp. 611, 617-18 (D.D.C. 1987). There, a borrower who had executed loan and mortgage documents asserted that in doing so she had relied on statements explaining the documents made by the lender's attorney at

[5] This of course does not exhaust the prohibitions in Rule 8.4—other possibly relevant parts would include the ban on criminal activity that "reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;" that on engaging in conduct that seriously interferes with the administration of justice, and that forbidding stating or implying an ability to influence improperly a government agency or official. *See* Rule 8.4(b), (d), and (e).

[6] The second question asked by the inquirer is whether a lawyer could incorporate a business for the purpose of purchasing a chose in action from an individual and then, "identify[ing] himself as an attorney acting as an agent for a corporation," attempting to purchase the chose in action from the individual. We take this as an alternative question—that is, in the event that our conclusion is that the inquirer cannot purchase the chose in action directly from the seller, could he instead form a corporation to do that and then personally serve as the corporation's agent. Because we answer the first question in the affirmative with limitations that would also apply to the second, we do not see any need to examine the second question in detail. Nonetheless we note that if such a corporation were formed and a lawyer served as its "agent" for this purpose, the lawyer would most likely be deemed to be acting as a lawyer with the corporation as client. *See* Rule 49(b)(2) of the Rules of the District of Columbia Court of Appeals. This would mean that in the lawyer's dealings with the seller, those Rules of Professional Conduct that limit behavior of a lawyer serving a client would apply—most notably including Rule 4.1 (duty of truthfulness in statements to others when representing a client) and Rule 4.3 (preventing a lawyer who is representing a client from (a) giving advice to an unrepresented person adverse to his client other than the advice to secure counsel, and (b) stating or implying that the lawyer is disinterested in the matter while also requiring the lawyer to clarify the situation if the third person does not understand it). Rule 4.3 would severely constrict what the lawyer could say to an unrepresented person about the desirability of entering into the transaction.

The third question posed by the inquiry is, we take it, a further alternative: whether the lawyer could serve as an attorney to a corporation advising it whether a chose in action held by a third party might have value to the corporation. This seems to us to be a traditional attorney-client relationship and completely innocuous on the facts presented, as the lawyer in this case has no apparent contact with the owner of the chose in action (an issue might be presented if the lawyer used a nonlawyer to communicate the lawyer's views to the seller, but we see no need to delve into that completely hypothetical situation).

[7] *See* the discussion in comment b to § 36 of the Restatement, supra.

the loan closing. The borrower later sued the attorney for legal malpractice in failing to explain the documents adequately. The lawyer moved to dismiss on the ground that he was not the borrower's lawyer. Applying Virginia law, the District Court for the District of Columbia held that a claim for legal malpractice was stated because the plaintiff might be able to demonstrate that her "reliance [on the lawyer's statements] was both reasonable and foreseeable." *Id.* at 618; *see* Restatement of the Law Governing Lawyers, § 14 and comment f (1998). We can imagine that a similar result could well arise where the seller of a chose in action relied on statements of a lawyer-purchaser.

The question of what circumstances give rise to a lawyer-client relationship is one of substantive law rather than professional responsibility under the Rules of Professional Conduct, and accordingly we go no further than to suggest the significant possibility of such a result. But, as noted above, the existence of a lawyer-client relationship would trigger the applicability of Rule 1.8, which imposes strict substantive and procedural requirements on commercial transactions between a lawyer and a client.[8] The lawyer-purchaser in such circumstances would find himself or herself in difficult circumstances, as Rule 1.8(a) requires a written waiver from the client, an opportunity for the client to obtain independent counsel, and that "the transaction [be] . . . fair and reasonable to the client and transmitted to the client in a manner which can be reasonably understood by the client . . . ."

*Conclusion*

Therefore, while the D.C. Rules of Professional Conduct do not forbid a lawyer from purchasing a chose in action from a nonlawyer, the purchasing lawyer should be aware of the risk that, given the legal nature of the thing sold, the seller may rely on representations by the buyer as to legal matters and later claim that an attorney-client relationship resulted, imposing Rule 1.8 requirements. To avoid misunderstandings and to protect both the seller and the buyer, we recommend that if possible the would-be purchaser seek to deal only with sellers who are represented by counsel and that the purchaser strongly suggest representation by counsel for sellers who are not represented. In the absence of such independent representation, the risk is that Rule 1.8 will later be argued to have applied, with the consequences, among others, that the deal will be subject to examination (probably after the fact and perhaps when the deal has proven decidedly favorable to the lawyer-purchaser) as to whether it was objectively fair and reasonable to the seller pursuant to Rule 1.8(a)(1).

If the seller refuses to obtain independent representation, it may be possible for the purchasing lawyer to (1) convince the seller to disclaim any intention of relying on the purchaser for legal advice or (2) avoid the making of representations in negotiation concerning the legal questions underlying the valuation of the chose in action, and by either or a combination of these to avoid a later claim by the seller of a lawyer-client relationship. However, we cannot state with certainty what would or would not be sufficient to establish that an unrepresented person had disclaimed such a relationship (particularly in a situation where it would be most likely to be raised—namely, where the deal had turned out to be markedly unfavorable to the seller), because, as pointed out above, that is a question of substantive law rather than professional responsibility.

Adopted: March 2003
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*Opinion No. 320*

## Jury Nullification Arguments by Criminal Defense Counsel

• A lawyer defending a criminal case may zealously advocate for the acquittal of his client using any evidentiary argument for which he has a reasonable good faith basis. Current legal standards strongly disfavor jury nullification and prohibit express exhortations that a jury nullify the law. Accordingly, a lawyer may not, consistent with the rules of professional conduct, expressly urge a jury to disregard the law. Nor may a lawyer disregard a ruling of the tribunal limiting the scope of permissible argument. The legal system continues, however, to permit juries to exercise the power to nullify. A lawyer may, therefore, within the bounds of zealous advocacy, advance arguments that have a good faith evidentiary basis even though those same arguments may also heighten the jury's awareness of its capacity to nullify.

**Applicable Rules**

- Rule 1.3 (Diligence and Zeal)
- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor Toward the Tribunal)
- Rule 8.4 (Misconduct)

*Inquiry*

The Committee has received an inquiry on a matter of criminal law advocacy: Do the District of Columbia Rules of Professional Conduct prohibit an attorney for a criminal defendant from pursuing a "jury nullification" argument? The inquirer notes that the limited authority on the subject seems in conflict. Some judges appear to believe that pursuit of a jury nullification argument may subject an attorney to sanction under the rules. *See, e.g., People v. Williams*, 25 Cal.4th 441, 448, 21 P.3d 1209, 1212, 106 Cal.Rptr.2d 295, 298 (2001) (characterizing a jury nullification argument in closing as "a violation of the Rules of Professional Conduct"). However, in *dicta* in an unpublished decision, one court has suggested that such arguments may constitute effective advocacy that satisfies the constitutional requirement that a defendant receive the effective assistance of counsel. *See United States v. Sams*, 104 F.3d 1407, 1996 WL 739013 at *2 (D.C. Cir. 1996) (unpublished opinion) (it "may be possible" for counsel to satisfy effectiveness standard through "reasonable strategy of seeking jury nullification when no valid or practicable defense exists"). We are asked to address this question.

*Discussion*

The power of a jury to nullify a prosecution—by which we mean the jury's decision to acquit the defendant despite its conclusion that he committed the offense, because of its disavowal of the law or circumstances under which the defendant is charged, *see Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (characterizing jury nullification as acquittal of defendant despite the

[8] Interestingly, ABA Opinion 51 did not involve any issue concerning sale of a chose in action by an unsophisticated, unrepresented person. The inquiry there involved a lawyer purchasing choses in action "from bankrupt estates," which is to say not from ordinary persons but from trustees in bankruptcy, whose obligation was to raise as much money from the estates for creditors as possible. Presumably those trustees had both sophistication and access to independent legal advice and could not be gulled into taking much less than what the choses were worth. Moreover, because trustees in bankruptcy would be able to make the claims in court if they could not have sold them, the question of whether to sell the choses in action would appear to have been more one of efficiency to the bankrupt estate than whether the claim would be made or not. Thus the logic of the opinion, which accuses the purchasing lawyer of stirring up litigation, is somewhat impenetrable.

weight of the evidence)—has a long and storied history in American law. It can be traced back at least as far as the seditious libel trial of John Peter Zenger in 1735, who was "obviously guilty" of the crime of publishing an item that held up public officials to ridicule but was acquitted nonetheless, to the wide approval of the public. *See* J. Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* (S. Katz, ed., 1963). Or consider the 1851 case of several abolitionists who stormed into a Boston federal court and took by force a slave who was being held for return to Virginia under the Fugitive Slave Law, spiriting him to Canada. They, too, were acquitted of the federal criminal charge of aiding and abetting the escape, after their lawyer urged the jurors to find the fugitive slave laws unconstitutional. *See United States v. Morris*, 26 F.Cas. 1323 (C.C.D. Mass. 1851).

In these early periods of American history, the power of the jury to nullify the law was explicit and affirmatively approved. With the turn of the 20th century, however, the law has developed a more strict separation between the domain of the court (to say what the law is) and the domain of the jury (to determine the facts). Jurors today are routinely instructed that they must accept the law as given to them by the court in its instructions. *E.g., Sparf & Hanson v. United States*, 156 U.S. 51 (1895).[1] Thus, under contemporary substantive legal standards, a suggestion by a lawyer to a jury that it should ignore the law as stated by the judge may be tantamount to an explicit invitation to the jury to ignore the judge's instructions. The question is when, if ever, do such invitations by criminal defense lawyers violate the Rules of Professional Conduct.

Our discussion is necessarily general in nature. Whether a particular jury nullification argument contravenes the Rules of Professional Conduct is, of course, case-specific and outside the scope of this Committee's inquiry. Counsel contemplating a jury nullification argument should be guided, however, by the following general principles:

Criminal defense lawyers representing an accused play a unique role in our legal system. They, perhaps more than any other attorneys, have a duty to "represent a client zealously and diligently within the bounds of the law." *See* D.C. Rule 1.3. Indeed, lawyers defending a criminal case are authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules.

Defense counsel are not only permitted but also required, for example, to defend an adversarial proceeding and "require the government to carry its burden of proof" whenever the client elects to contest the proceeding. *See* D.C. Rule 3.1; *see also id.* Comment [3]; Restatement of the Law Governing Lawyers § 110(2) (2002) (same). They must do so even if convinced that their client's guilt of the offense charged can be proven beyond a reasonable doubt. *See* Restatement of the Law Governing Lawyers, § 110, Comment f. Accordingly a defense lawyer may always oblige the government to prove its case, without violating the Rules of Professional Conduct. *See United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994). In this regard, the Rules act uniquely to assure that criminal defense lawyers will do their utmost in zealously representing a client.

Similarly, while most lawyers operate under an absolute obligation of candor to the tribunal, in this jurisdiction defense counsel who are unable to dissuade their clients from presenting false evidence and cannot withdraw from the representation without harming the client may put their client on the stand to testify in a narrative fashion. *See* D.C. Rule 3.3(b); *see also id.* Comments [4]-[8]. Although counsel may not argue this false evidence to the jury they nonetheless can participate indirectly in its presentation. *Cf. Nix v. Whiteside*, 475 U.S. 157, 166-71 (1986) (Sixth Amendment not violated when attorney refuses to cooperate with defendant in presenting perjured testimony). This D.C. provision, which reflects solicitousness to a defendant's right to testify, seeks to assure that a criminal defense lawyer's ethical obligations do not abridge a defendant's right to present a defense.[2]

Notwithstanding the somewhat greater latitude afforded the counsel for a criminal defendant, the lawyer remains subject to ethical restrictions contained in the Rules of Professional Conduct. *United States v. Young*, 470 U.S. 1 (1984); *see also State v. Bennefield*, 567 A.2d 863 (Del. 1989) (defense counsel characterization of State witnesses as "scum," "liars," and "snakes" deemed improper conduct).[3]

Thus, at a minimum defense counsel must necessarily conform their conduct to the substantive law of the jurisdiction in which the lawyer is appearing. *See* D.C. Rule 8.5(a); *see also* Restatement of the Law Governing Lawyers § 105 (2000) ("a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings"). In this jurisdiction, such substantive law appears to preclude express advocacy of the jury nullification power.

The District of Columbia has no rule or statute authorizing jury nullification. Both the local courts and the federal courts have rejected assertions that juries are entitled to an instruction apprising them of their "right" to nullify the law. *See United States v. Washington*, 705 F.2d 489 (D.C. Cir. 1983) (fact that juries can abuse their power and return verdicts contrary to the law does not mean that courts must give such instruction); *Reale v. United States*, 573 A.2d 13 (D.C. 1990) (trial court not required to instruct jurors about their power of jury nullification). Indeed, both federal and local courts in this jurisdiction have endorsed jury instructions that are designed to discourage jury nullification. *See, e.g., United States v. Pierre*, 974 F.2d 1355 (D.C. Cir. 1992) (approving jury instruction that jury "should" return a guilty verdict if the government has proven its case beyond a reasonable doubt); *United States v. Braxton*, 926 F.2d 1180 (D.C. Cir. 1991) (same); *Watts v. United States*, 362 A.2d 706 (D.C. 1976) (en banc) (jury instruction may discourage nullification).

Moreover, the standard jury instruction given in District of Columbia courts contains this express admonition to the jury: "You may not ignore any instruction, or question the wisdom of any rule of law."

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[1] Two states, Indiana and Maryland, retain state constitutional provisions that enshrine a jury's authority to determine the law as well as the facts. *See* Ind. Const. art. I, § 19; Md. Decl. of Rights, art. 23. But even in those states the jury instructions typically admonish the jury not to arbitrarily and willfully disregard the law or substitute their own judgment for what they think the law should be in a particular case. *See e.g.* Indiana Jury Instruction (*quoted* in Kourlis, "Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control," 67 U. Colo. L. Rev. 1109, 1111 (1996)).

[2] The District's version of Rule 3.3 is substantially more permissive than that in many other jurisdictions. While its scope does inform our construction of the Rules, our resolution of the underlying question presented would be the same if the District's Rule were identical to that prevalent in other jurisdictions.

[3] Though examples of discipline for violations of the rules of professional conduct by defense counsel are rare, admonitions that they remain bound by those rules are more common. *See, e.g., United States v. Rico*, 51 F.3d 495, 511 (5th Cir. 1995) ("current professional standards do not require defense counsel to assert every potential defense, regardless how far-fetched or implausible"); Ethics Comm. of Bd. of Professional Responsibility of Tenn. Sup. Ct., Op. 88-F-11 7 (1988) (criminal defense lawyer who files motion to suppress without first investigating facts must comply with rules against asserting defenses solely for delay or harassment).

Criminal Jury Instructions for the District of Columbia, Instr. 2.01 (Bar Assn. of D.C. 4th ed 1993). Within this jurisdiction express exhortations to ignore the law are, therefore, likely to be deemed prohibited by law and may, therefore, result in violations of the D.C. Rules of Professional Conduct by lawyers who advocate such a course. *See* D.C. Rule 8.4.

The Committee recognizes, however, that there are many variant forms that a jury nullification argument made by a zealous advocate can take—forms that may range from explicit requests to ignore the law to far more nuanced arguments that arguably have the same effect (and about which reasonable minds may differ). Consider the following hypothetical: Counsel wishes to argue that the police investigation of and testimony about a crime is not credible because it is biased by animus toward the political viewpoint of the defendant. At one level this is a straightforward argument based upon reasonable inferences from the evidence—officers with political bias might, indeed, fabricate evidence. At another level, however, the same argument may also be characterized as a call for the jury to acquit based not on the evidence but on the political viewpoint of the defendant.

It is in practice often impossible to distinguish between these two forms of argument. Counsel may often be able to make good-faith evidentiary arguments that have the collateral effect of heightening the jury's awareness of its capacity to nullify. When do such arguments violate the Rules?

As guidance to the limits on closing argument that may be made consistently with the Rules of Professional Conduct, we find informative the ABA Standards for Criminal Justice. They provide:

> (a) In closing argument to the jury, defense counsel may argue all reasonable inferences from the evidence in the record. Defense counsel should not intentionally misstate the evidence or mislead the jury as to the inference it may draw.
>
> (b) Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence.
>
> (c) Defense counsel should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) Defense counsel should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-7.7 (3d ed. 1993). The Restatement, similarly, precludes a defense counsel from expressing a personal opinion or alluding to a matter that is not supported by admissible evidence. *See* Restatement (Third) of the Law Governing Lawyers § 107 (2000).[4]

As we have already noted, some closing arguments may have a good faith basis yet nonetheless have the incidental effect of appealing to a jury's prejudice or enhancing its awareness of its ability to decide the case against the evidence. Thus, there is an obvious tension inherent in application of the ABA standards. Whatever may be said for the resolution of that tension in other contexts, in the context of criminal advocacy that tension should be resolved in favor of permitting any evidentiary argument for which a reasonable good faith basis exists, provided that the lawyer exercises his ability to do so within the constraints of existing law. *See id.* § 105 Comment c (2000); id. § 110, Comment d (same).

This is consistent with the treatment of other areas where the line between permissible and impermissible advocacy is difficult to police. As the Restatement notes in discussing limits on a lawyer's ability to express a personal opinion: "It may be difficult in practice to maintain the line between permissible zealous argument about facts and inferences to be drawn from them and impermissible personal endorsement. Latitude is left to the advocate in doubtful cases, subject to the superintending power of the presiding officer to prevent improper or misleading argument." *Id.* § 107, Comment b.[5]

We think this analysis strikes the correct balance in the context of jury nullification arguments as well—unless the advocate expressly urges nullification (an expression likely prohibited by the substantive law of this jurisdiction) or has been prohibited by the presiding officer from making a particular argument, a criminal defense counsel may zealously represent his client and may offer any argument for which he has a good faith evidentiary basis. Such arguments should not be deemed a violation of the Rules of Professional Conduct.

Indeed, we can imagine situations in which it "may be possible for a defense lawyer to satisfy [the effective assistance requirement through] a reasonable strategy of seeking jury nullification when no valid or practicable defense exists." *United States v. Sams*, 104 F.3d 1407, 1996 WL 739013 at *2 (D.C. Cir. 1996). Because a "criminal defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel," Restatement of the Law Governing Lawyers, § 110, comment f, it is unlikely that any such step for which a reasonable evidentiary basis exists will be deemed to violate the Rules of Professional Conduct.

Thus, to consider a final hypothetical, imagine a situation in which the court rejects a defendant's pre-trial challenge to a police search as a violation of the Fourth Amendment. Given that definitive ruling it is unlikely that a lawyer could argue that the jury should acquit the defendant because the scope of the search was excessive and that a not guilty verdict would send a message to the police to stop using such aggressive, impermissible tactics. Conversely, if the evidentiary predicate for the argument were laid, it might be appropriate for the lawyer to argue that the police's violation of departmental procedures designed to limit the scope and extent of a search were a basis for questioning the credibility of their testimony and the evidence gathered as a result of such violations. Although the distinction between the two arguments is, perhaps, a fine one, it is a distinction with substantial significance under the Rules.

### *Conclusion*

Good-faith arguments with incidental nullification effects do not violate the Rules of Professional Conduct. Despite its disfavor, "the law permits a jury to

[4] Notably, the ABA commentary also provides that the defense may argue for "jury nullification" in jurisdictions permitting such arguments—a comment presumably meant to refer to Indiana and Maryland. *See* ABA Standards § 4-7.7 commentary. By negative implication, this suggests that the ABA Standards counsel against the use of an express jury nullification argument where the substantive law of the jurisdiction in question precludes making such an argument. This is consistent with our understanding of counsel's obligation to comport their conduct to the prevailing substantive law in the governing jurisdiction.

[5] The presiding officer of a tribunal will, of course, judge the propriety of any argument in the first instance. When directed by a tribunal to abandon a line of argument because it is deemed to have crossed the line into impermissible advocacy of jury nullification, a violation of the Rules of Professional Conduct may arise from counsel's persistence in pursuing the line of argument after the trial court has deemed it unacceptable. Failure to obey a court order may subject an attorney to discipline. *See* D.C. Rule 8.4 & comment [4]; *see also* Restatement of the Law Governing Lawyers § 105 (2000) ("a lawyer must comply with applicable law, including rules of procedure and evidence and specific tribunal rulings").

acquit in disregard of the evidence, and . . . such an acquittal is unreviewable." *Watts*, 362 A.2d at 710. That power is a necessary consequence inherent in the right to trial by jury. So long as the power to acquit in disregard of the evidence exists, we do not believe that the Rules of Professional Conduct prohibit zealous advocacy by a criminal defense lawyer that appeals indirectly to that power. Unless prohibited by the presiding officer of a tribunal, arguments that have a good-faith evidentiary basis ought not to be deemed violations of the Rules of Professional Conduct, even if those same arguments also have the potential for enhancing the jury's exercise of its power of nullification

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*Opinion No. 321*

**Communications Between Domestic Violence Petitioner and Counsel for Respondent in a Privately Litigated Proceeding for Criminal Contempt**

• Counsel for a respondent may send an investigator to interview an unrepresented petitioner in preparation for a contempt proceeding in which the petitioner has alleged that the respondent has violated the terms of a domestic violence civil protection order, provided that respondent's counsel makes reasonable efforts to ensure that the investigator complies with the requirements of the D.C. Rules of Professional Conduct. These obligations include ensuring that the investigator does not mislead the petitioner about the investigator's or the lawyer's role in the matter and that investigators do not state or imply that unrepresented petitioners must or should sign forms such as personal statements or releases of medical information. Counsel should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding.

If the petitioner is represented by counsel in connection with the domestic violence matter, respondent's counsel may not contact the petitioner without permission of petitioner's counsel.

**Applicable Rules**

- Rule 1.3 (Diligence and Zeal)
- Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.2 (Communication Between Lawyer and Opposing Parties)
- Rule 4.3 (Dealing with Unrepresented Person)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

*Inquiry*

We have received an inquiry from counsel representing domestic violence petitioners in the District of Columbia, who raises questions related to interviews of domestic violence petitioners by investigators working for defense counsel. For purposes of this opinion we have constructed a set of hypothetical facts, which we do not mean to suggest are true or typical of the conduct of defense counsel in similar cases. We instead use these hypothetical facts to illustrate the workings of the D.C. Rules in order to provide guidance on interviewing unrepresented and represented persons. The facts we will use for this purpose are as follows:

A woman secured a Civil Protection Order (CPO) from the D.C. Superior Court in a case in which she alleged that her former intimate partner had engaged in domestic violence against her.[1] The woman later filed a motion for contempt against her former partner for violation of the CPO. The motion alleged that the former partner had engaged in serious violations of the CPO, including death threats. Because such a motion may result in criminal sanctions, including fines and incarceration, the court appointed counsel to represent her former partner. Petitioner proceeded *pro se*, without the assistance of a prosecutor and without counsel.

Respondent's counsel sent an investigator to interview the petitioner at her home. The investigator, a friendly female college student, disclosed that she worked for respondent's "court-appointed" counsel but did not tell the petitioner that the petitioner had a right to refuse to speak to her. The investigator expressed sympathy for the petitioner's situation and asked the petitioner to explain her version of events. Based on their conversation, the investigator drafted a "statement of the petitioner" and asked the petitioner to sign the statement. The petitioner provided her initials and signature on the statement. The investigator then asked the petitioner to sign a release of confidential medical records, which the petitioner also signed.

After the interview described above had occurred, a lawyer began to represent the petitioner as *pro bono* counsel. In the course of that representation, the lawyer learned that the petitioner had agreed to the interview with the investigator because she believed that the investigator was a person "from the court" who was sympathetic and could help her in convincing the respondent to stay away from her. The petitioner also believed that she was required to cooperate and would be penalized if she refused. This belief arose in part from a prior experience in which the petitioner had been chastised by a judge for declining to speak with a guardian ad litem appointed to represent her son. The petitioner likewise believed that she was required to sign the papers the investigator presented to her, because the investigator had told her that she "needed" to sign the papers so that the investigator could obtain these records. Later, in the contempt proceeding, respondent's counsel used the signed statement obtained by the investigator to impeach the petitioner on cross-examination.

In this opinion we first discuss lawyers' responsibilities for the conduct of the investigators they supervise. We then analyze how an interview by an investigator supervised by respondent's counsel similar to the hypothetical above should be analyzed under Rule 4.3 of the D.C. Rules of Professional Conduct. Finally, we consider whether, in cases in which the petitioner is represented by counsel, respondent's counsel must, under D.C. Rule 4.2, obtain permission of petitioner's counsel before seeking to interview the petitioner.

*Discussion*

Under D.C. Rules 5.3 and 8.4, respondent's counsel must make reasonable efforts to ensure that non-lawyer assistants, including investigators, conduct themselves in a manner consistent with the D.C. Rules.[2] D.C. Rule 8.4 (a) pro-

[1] D.C. law provides that when a judge finds good cause to "believe the respondent has committed or is threatening an intrafamily offense," the court may issue a CPO. D.C. Code § 16-1005 (1981).

[2] D.C. Rule 5.3 states:

> With respect to a nonlawyer employed or retained by or associated with a 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

vides that it is "professional misconduct for a lawyer to . . . 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." *See also* ABA Formal Op. 95-396 (1995) (lawyer with direct supervisory authority over an investigator is responsible for contacts made by the investigator if the lawyer did not make reasonable efforts to prevent them, instructed the investigator to make them, or, knowing that the investigator planned to make them, failed to instruct the investigator not to do so). Accordingly, the central question here is whether counsel for a respondent who requested, ratified or failed to take reasonable steps to prevent the conduct by an investigator described above would run afoul of any of the D.C. Rules of Professional Conduct. D.C. Rule 5.3.

Under the hypothetical facts summarized above, where the petitioner was proceeding *pro se* without being represented by counsel at the time the interview occurred, the applicable rule is D.C. Rule 4.3, "Dealing with Unrepresented Person." That rule provides:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:
> (a) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client;
> (b) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client 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.

Thus, as we have previously stated, under D.C. Rule 4.3, "a lawyer representing a client shall not give advice to an unrepresented person (other than advice to secure counsel) where the interests of that person may be in conflict with the interests of the lawyer's client, and shall not, even with respect to a person whose interests are not in conflict with those of the lawyer's client, leave the impression that the lawyer is disinterested. . . . Rule 4.3 requires the investigating lawyer to clarify his position '[w]hen the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter.'" D.C. Legal Ethics Op. 269 n.3 (1997).

Although the specific language requiring counsel to make reasonable efforts to correct misunderstandings about the lawyer's role appears in Rule 4.3(b), addressing dealings with unrepresented persons whose interests are not adverse to those of counsel's client, rather than Rule 4.3(a), which is applicable here because the petitioner's interests clearly were adverse, Rule 4.3(b) also applies *a fortiori* where an unrepresented person misunderstands a lawyer's role in dealings with the person where the interests are adverse. Thus, among other requirements, D.C. Rule 4.3 requires lawyers to make reasonable efforts to ensure that, where investigators either know or *"reasonably should know"* that the unrepresented person misunderstands their role, the investigators make reasonable efforts to correct the misunderstanding. Indeed, as we have previously emphasized, Rule 4.3 requires lawyers "to take affirmative steps to avoid misunderstandings and assure" that the unrepresented person "correctly understands the lawyer's role in the matter." D.C. Legal Ethics Op. 287 (1999).

Whether an investigator "reasonably should know" that a petitioner misunderstands her role must be inferred from all of the circumstances, including the level of sophistication of the unrepresented person and the nature of the proceedings at issue. The inquirer suggests that it can generally be inferred that indigent unrepresented petitioners in domestic violence cases who decide to speak to a respondent's investigator misunderstand the investigator's role.[3] We cannot make this blanket assumption, however, because D.C. Rule 4.3 takes a different tack. Rather than barring counsel's contact with vulnerable unrepresented persons with adverse interests—clearly a choice available to the Court of Appeals—Rule 4.3 permits such contacts, so long as that counsel does not misrepresent his or her role.

This policy determination in Rule 4.3 serves several important purposes. One is the preservation of the ability of respondent's counsel to conduct an investigation in order to defend her client against serious criminal charges. Indeed, the responsibility of defense counsel to conduct a thorough investigation is embodied in D.C. Rule 1.3's mandate that counsel represent their clients with diligence and zeal. Rule 4.3 thus allows defense counsel to have access to information from witnesses, even complaining witnesses, so long as that contact with defense counsel is voluntary on the part of the unrepresented witness.

A second purpose of Rule 4.3 is to allow unrepresented persons to make their own decisions about whether to speak to counsel representing a client with adverse interests. The inquirer correctly emphasizes that the voluntariness of that choice may be called into question if the unrepresented person is confused about counsel's role. Rule 4.3 addresses that problem by requiring that respondent's counsel "make reasonable efforts to correct the misunderstanding" whenever he or she "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role."

Our hypothetical posits that the petitioner misunderstood the investigator's role, believing that the investigator was a person "from the court" who was in a position to "help her" by intervening with the respondent to stop the abuse. The relevant question under the language of Rule 4.3, however, is not whether the petitioner misunderstood the investigator's role, but whether the investigator *knew or reasonably should know* that the petitioner misunderstood her role. The circumstances under which respondent's counsel "reasonably should know" that an unrepresented person misunderstands the lawyer's role will vary by context. One relevant factor is the likelihood of misunderstandings generated by the nature of the proceedings at issue. In the hypothetical presented above, for example, another "court appointed" figure—a guardian ad litem—had also previously appeared at the petitioner's door requesting an interview, and the petitioner had been chastised by a judge for declining to speak to that "court-appointed" official. Respondent's counsel cannot automati-

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the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer 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.

[3] The inquirer also suggests that respondent's counsel is barred from contacting unrepresented petitioners under the D.C. Domestic Violence Rule 8, which regulates discovery from the opposing party in privately prosecuted contempt proceedings. Rule 8 provides that "[f]or good cause shown and with due regard for the summary nature of the proceedings, the Court may authorize a party to proceed with discovery from the other party by requests for written interrogatories or production of documents." SCR-DV Rule 8. We do not address this issue because it is outside the scope of our authority, which is confined to questions of interpretation under the D.C. Rules of Professional Conduct.

cally be charged with knowledge of such a situation, but, to the extent that respondent's counsel is or reasonably should be aware that multiple interventions by the state are in process in a particular case, that counsel must instruct investigators not to mislead the unrepresented petitioner and to "make reasonable affirmative efforts to correct" any misunderstanding on the part of the unrepresented petitioner as to counsel's role in representing the respondent.

Another question raised by the hypothetical concerns the likelihood for misunderstanding generated when investigators for respondent's counsel identify themselves as working for "court appointed" counsel or counsel "from the court." To the extent that counsel or investigators reasonably should know, given the specific wording of such a statement and the context in which it is made, that such references to "the court" increase the probability that an unrepresented person will misunderstand counsel's partisan role in the matter, such language should be avoided. The fact that the language may be literally true does not cure the potential professional responsibility issue, because the D.C. Rules are clear that counsel must not "state *or imply*" to unrepresented persons that "the lawyer is disinterested." D.C. Rule 4.3(b) (emphasis supplied). Thus, in order to avoid any misunderstanding generated when investigators for respondent's counsel identify themselves as working for "court appointed" counsel or counsel "from the court," counsel and investigators must clearly identify themselves as representing the respondent in the matter.[4]

A similar potential for misunderstanding may arise to the extent that an investigator agrees to a petitioner's request to intervene with a respondent on her behalf, as in the situation we hypothesize. Here again, the relevant factor is whether the respondent's counsel "stated or implied" neutrality or nonpartisan authority in the situation. An investigator interviewing an unrepresented petitioner might agree to carry a message to the respondent, but should make clear to the petitioner that the investigator has no authority to require respondent to agree to petitioner's request. Counsel for the respondent should also remind the petitioner that, regardless of what act counsel for the respondent agrees to take—such as urging the respondent to stay away from the petitioner—counsel is representing the respondent's interests and not the petitioner's.

Similarly, if it becomes apparent that the unrepresented petitioner believes she is *required* to speak to the investigator from respondent's counsel, Rule 4.3 requires the investigator to take "whatever reasonable, affirmative steps are necessary" to correct such a misunderstanding. *See* Rule 4.3, comment [2].

Many other factors affect when counsel reasonably should know that an unrepresented person misunderstands the lawyer's role. One such factor is the degree to which the unrepresented person understands the English language. Hearing impairment, psychological disorder or other mental incapacity, and juvenile status are other examples of factors that tend to lead counsel "reasonably to know" that an unrepresented person misunderstands the lawyer's role. This list is far from exhaustive, but illustrates that what an investigator reasonably should know about whether a petitioner misunderstands the investigator's role must be inferred from all of the circumstances. While an investigator is not required to be a mind reader, she is not permitted under Rule 4.3 to ignore circumstances indicating that a petitioner misunderstands the partisan, adversarial role of respondent's counsel in the proceedings at issue.

Another question the inquirer raises is whether an investigator in circumstances such as those described in the hypothetical above would violate Rule 4.3(a) in obtaining a signed personal statement and release of medical records from an unrepresented petitioner. The answer depends on whether the investigator, in stating that the petitioner "needed to" sign the forms so that she could obtain the petitioner's medical information, in effect stated *or implied* that the petitioner was required to or should sign the release forms. An investigator who did state or imply such an obligation would be transgressing the prohibition in Rule 4.3(a) against giving legal advice to unrepresented persons whose interests are adverse to those of the supervising counsel's client.

The inquirer asks whether Rule 4.3 requires lawyers to advise unrepresented persons of their right to obtain independent legal advice before signing any substantive legal documents, including releases, drafted for an unrepresented person's signature by counsel for a client with adverse interests. The inquirer cites South Carolina Ethics Opinion 94-07 (1994), which supports this position. Other jurisdictions, however, have reached the opposite conclusion. *See, e.g., Dolan v. Hickey*, 385 Mass. 234, 236, 431 N.E.2d 229, 231 (1982) ("the acts of drafting documents and presenting them for execution, without more, do not amount to 'advice,' and are proper as long as the attorney does not engage in misrepresentation or overreaching"). The compilers of the Restatement of Law Governing Lawyers similarly reject the South Carolina Ethics Committee's view. *See* Restatement of Law Governing Lawyers § 103, Reporter's Note, Comment b, Rationale (rejecting approach adopted in S.C. Ethics Op. 94-07).

We do not see a basis in the D.C. Rules of Professional Conduct for adopting the South Carolina Ethics Committee's approach. D.C. Rule 4.3(a) states that the only legal advice counsel for a client with adverse interests *may* give an unrepresented person is the legal advice "to secure counsel." Because the language of Rule 4.3(a) is permissive, rather than mandatory, we do not see grounds for adopting a general requirement that counsel advise an unrepresented petitioner to seek the advice of counsel. We note, however, that Comment [1] to Rule 4.3 emphasizes that an "unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer will provide disinterested advice concerning the law even when the lawyer represents a client," and that a lawyer "*must take great care* not to exploit these assumptions" (emphasis added); *see also* Charles W. Wolfram, *Modern Legal Ethics* § 11.6.3, at 617 (1986) ("when the lawyer makes clear that he or she is representing only the interest of the client, the mere presentation of the document for signing should not constitute implicit advice. Nonetheless, the position of the lawyer is precarious, and a written notice to the unrepresented party, making the lawyer's limited interests quite clear, is advisable.") Thus, investigators "must take great care" to ensure that unrepresented persons understand that the presentation of documents does not amount to offering advice to sign them.

Finally, the inquirer asks whether respondent's counsel should be required to instruct investigators to explain that any statements an unrepresented petitioner makes, or releases of information she provides, may be used against her in the contempt proceeding. D.C. Rule 4.3 contains no such a general requirement that counsel give this type of "Miranda"

[4] *See, e.g.*, ABA Formal Op. 93-378 (1993) ("When a lawyer contacts any witness, lay or expert, actual or potential, the lawyer must not knowingly leave the witness in ignorance of the lawyer's relationship to the case that gives occasion to the contact.")

warning in the context of an interview of an unrepresented person, and we have found no substantive District of Columbia law that imposes such a requirement. To the contrary, in adopting Rule 4.3 the Court of Appeals struck a different balance between the public interest in protecting unrepresented persons from being misled about counsel's role and adverse counsel's interests in interviewing unrepresented persons. That balance seeks to protect the unrepresented person from being misled about counsel's role, but does not require that counsel actively discourage the unrepresented person from providing information to counsel or counsel's agents.

Other sources of professional responsibility guidance further support the conclusion that it is not within the scope of defense counsel's duties to inform unrepresented persons, even complaining witnesses, of their legal situation. *See, e.g.*, A.B.A. Standards for Criminal Justice 4-4.3, "Relations with Prospective Witnesses" ("It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel."); Restatement of the Law Governing Lawyers § 106, comment c ("A lawyer other than a prosecutor . . . is not required to inform any nonclient witness or prospective witness of the right to invoke privileges against answering"). It follows that, if defense counsel has no duty to advise an unrepresented person of potential criminal consequences in agreeing to an interview, that counsel also has no duty to advise an unrepresented person, including an opposing party, of other legal consequences. Accordingly, we see no warrant to extend the requirements of Rule 4.3 to require Miranda-type warnings in the context of interviews of unrepresented persons by counsel or counsel's agents representing clients with adverse interests.

In sum, we conclude that, as general matter, counsel for a respondent may direct an investigator to seek an interview with an unrepresented petitioner, but must make reasonable efforts to ensure that the investigator does not mislead the petitioner about the investigator's role. In addition, respondent's counsel must instruct the investigator that, if it appears that the petitioner misunderstands the investigator's role, the investigator should take "whatever reasonable, affirmative steps are necessary to correct the misunderstanding." D.C. Rule 4.3 comment [2]. Finally, an investigator may ask an unrepresented petitioner to sign substantive documents, but must take "great care" that the unrepresented person understands that neither the lawyer nor the investigator is giving legal advice in connection with the preparation or execution of such documents. D.C. Rule 4.3, comment [1].

The second general matter the inquirer raises is whether, in cases in which counsel represents the petitioner in a contempt proceeding based on violation of a CPO, respondent's counsel must obtain permission of petitioner's counsel before seeking to interview the petitioner. The inquirer reports that some defense counsel view such petitioners not as parties, but merely as witnesses in the contempt proceeding, and argue that Rule 4.2 therefore does not apply or that Rule 4.2 is trumped by defense counsel's duty of zealous advocacy. Such a characterization is precluded by commentary to Rule 4.2 and by earlier opinions of this Committee.

Comment 4 to D.C. Rule 4.2 explicitly provides that any person who is represented by counsel concerning "the matter in question" falls within the ambit of the Rule, "whether or not a party to a formal proceeding." D.C. Rule 4.2 comment [4]. Accordingly, if the petitioner is represented by counsel, Rule 4.2 is applicable and forbids the respondent's lawyer from interviewing the petitioner without permission from the petitioner's lawyer, regardless of whether the petitioner is a formal "party" to the contempt proceeding.

Our conclusion further rests on our Opinion No. 263, in which we opined that a CPO modification proceeding and a CPO contempt proceeding, both based on the same underlying CPO, constitute the same "matter" under Rule 4.2. D.C. Ethics Op. 263 (1996). In that opinion we addressed a situation in which a lawyer representing a domestic violence CPO petitioner sought communication with the respondent about seeking a modification of the CPO to strengthen its protections. The petitioner's lawyer had also filed contempt charges based on alleged violations of the CPO. The court appointed counsel to represent the respondent in the contempt proceeding, but that counsel represented the respondent only in the contempt proceeding, and not on the CPO modification motion. The petitioner's lawyer accordingly inquired whether the respondent was "represented" for purposes of D.C. Rule 4.2 in the separate CPO modification proceeding. We concluded that, "at least with respect to litigation, a particular litigation is a 'matter.'" *Id.* In support of this conclusion, we reasoned that:

> While litigation may have many facets to it, those facets typically have at least some facts, evidence and legal principles in common. Activities or developments in one facet of a case rarely fail to have implications in others.

We also relied on ABA Ethics Opinion 95-396 (1995), which interpreted the term "matter" in ABA Model Rule 4.2 as encompassing that which was sufficiently "defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation." D.C. Ethics Op. 263, *quoting* ABA Ethics Op. 95-396 (1995). Accordingly, we decided that "the relevant 'matter' is the legal proceeding brought by the domestic violence victim, with the CPO modification and contempt motions being but different aspects of that proceeding."

Under this approach, the domestic violence case constitutes the litigation, and the CPO and contempt proceedings involve aspects of the same underlying "matter" for purposes of D.C. Rule 4.2(a), even though counsel may represent the persons involved only with respect to some aspects of the litigation. If the petitioner is represented by counsel in connection with the domestic violence matter, the petitioner is represented as to "the subject of the representation" for purposes of Rule 4.2 (a). Accordingly, the respondent's lawyer or investigator may not contact the petitioner without the consent of the petitioner's lawyer or unless otherwise authorized by law to do so.

Inquiry No.: 00-10-37
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*Opinion No. 322*

**Whether a Nonlawyer Employed by a Law Firm May Be Partly Compensated by a Percentage of the Profits of the Cases on Which He Works**

• A law firm may not compensate a nonlawyer employee, hired to work on designated class action claims against defendants who are members of a particular industry, based on a percentage of the profits earned from those cases. If the lawyers in the firm and the nonlawyer were to establish a separate partnership or other form of organization to litigate the class action cases, the fee arrangement would be permissible, provided that there were compliance with the restric-

tions of Rule 5.4(b) and other relevant rules governing such organizations.

**Applicable Rule**

- Rule 5.4 (Professional Independence of a Lawyer)

*Inquiry*

The inquirer is a partner in a small law firm. The firm is engaged in a series of class actions, in which it represents the plaintiff class, asserting claims against defendants who all are members of a particular industry. Notice to class representatives of compensation arrangements with employees would be possible, but it would be impractical to notify the putative class members. It is likely that these cases and new, related cases will continue for some years. Fees are contingent upon settlement or recovery. The firm contemplates that it will collect fees irregularly as some cases are resolved.

The firm has hired—as an employee—a nonlawyer, who has worked as a consultant in the relevant industry, to assist it in this series of cases. The employee is currently paid a modest base salary and is paid on an hourly basis for the time that he spends on the series of cases. The firm wishes to alter the compensation system for this employee. It proposes to continue paying him a modest salary, but for future cases, plans to compensate him from the revenue received from the series of class actions. The compensation would work in the following fashion: The employee and the firm's lawyers would keep track of their hours spent working on this series of cases as well as their expenses. As fees from these cases were received, they would be used to pay the employee for his expenses and for his time spent on the series of cases at an agreed-upon hourly rate. The firm also would be paid for its lawyers' expenses and time spent as fees were received. If the fees were insufficient to compensate both the employee and the firm for the time spent prior to receipt, the fees would be divided on a pro rata basis between the employee and the firm, and the uncompensated hours, as well as any additional hours spent, would be compensated from the next fees that were received. If the fees were more than sufficient to compensate the employee and the firm for expenses and hours, the remaining funds would be divided between the employee and the lawyers on a pro rata basis depending on their respective contributions of expenses plus hours times hourly rates. The employee could never receive more than 49 percent of those fees. If the fees did not materialize, the employee would receive no compensation other than his modest base salary. If the fees were inadequate to compensate the employee and the lawyers for all their hours at their agreed-upon hourly rates, they would share proportionally in the shortfall.

The following example illustrates the proposal: Assume that the employee has worked 90 hours and has expenses of $1,000. Assume his hourly rate is $100 per hour. Assume that the lawyer[1] has worked 75 hours, that his hourly rate is $200 per hour, and that he has incurred $5,000 in expenses. These hours are not spent by either the employee or the lawyer on just one case, but on a series of cases. One of these cases settles, resulting in fees of $100,000. The employee would be paid $10,000 ($1,000 in expenses + 90 hours × $100). The lawyer would be paid $20,000 ($5,000 in expenses + 75 hours × $200). That would leave $70,000 in fees. These fees would be divided based on the respective "investments" of the employee and the lawyer or at a ratio of $10,000 to $20,000 or 1 to 2. Thus, of the remaining $70,000, the employee would receive $23,333, and the lawyer would receive $46,667. If fees for the same hours and expenses were only $21,000, the employee would receive $7,000, the lawyer would receive $14,000, and the uncompensated hours and expenses ($3,000 and $6,000 respectively) would be carried over and added to future hours and expenses until another fee was received. That fee would then be divided using the ratio of hours times hourly rate plus expenses invested as of that time, which might differ from the first ratio. If no more fees were earned, there would be no compensation for these hours and expenses.

The inquiry is whether this compensation system satisfies the requirement of Rule 5.4(a)(3), which is one of the exceptions to the prohibition on a lawyer or law firm sharing legal fees with a nonlawyer.

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

If this proposed compensation system does not fall within this exception, the inquirer asks whether, pursuant to Rule 5.4(b), the firm and the employee could enter into a joint venture arrangement. The employee would be a principal of and have a financial interest in the joint venture, which would represent the plaintiffs in this series of class actions. Were such an organization formed, could it use the proposed compensation system?

*Discussion*

As this inquiry illustrates, the line between the prohibited sharing of legal fees with a nonlawyer and a permissible compensation plan based on profit-sharing is not clearly demarcated. This is so because a law firm's profits result almost entirely from its fees. In a sense, even paying nonlawyer employees a salary could be viewed as a sharing of fees, since fees are the firm's source of revenue.

*Previous Committee Opinions*

Comment [1] to Rule 5.4 provides, without further elaboration, that the rule is "to protect the lawyer's professional independence of judgment." Presumably, the notion is that a nonlawyer with a stake in the outcome might influence the handling of the case, for instance by pressuring the lawyer either to settle faster or to hold out for more, based on the nonlawyer's financial interest. Comment [10] says, however, that when a nonlawyer becomes a partner or principal in a law firm, as permitted by Rule 5.4(b), he or she may share in the fees.

In Opinion 233 (1993) this Committee described two historical motivations for prohibiting fee-sharing with nonlawyers in addition to preserving independent professional judgment: (1) preventing the unauthorized practice of law and (2) preserving client confidences. It is not immediately apparent how fee-sharing would threaten client confidences, at least in the context of this inquiry. It would appear that the employee would have the same job and presumably the same access to client confidences regardless of how he is paid. Nonlawyer exposure to client confidences by consultants, expert witnesses, secretaries, paralegals, and law clerks is, of course, common. We are not sure that preventing unauthorized practice is conceptually different from preserving professional independence. Both reasons add up to discouraging nonlawyers from influencing or making decisions about the practice of law, which should be reserved for lawyers. Arguably, if the employee had a more direct stake in the outcome of the class action cases, he

[1] For simplicity, assume only one lawyer in the firm works on these cases.

might be tempted to interfere improperly in those cases. But if the law firm met the requirements set out in Rule 5.4(b) for admitting nonlawyers to the firm as partners (particularly assuring that they comply with the Rules of Professional Conduct), the threat to independent professional judgment or of unauthorized practice does not seem appreciably greater than in the case of a nonlawyer partner.

Some of this Committee's opinions, issued after Rule 5.4 was adopted, have taken a liberal approach to what might be called fee-sharing. Opinion 298 (2000) said that paying a collection agency a percentage of collections does not violate the prohibition against fee-splitting. Opinion 307 (2001) said that a firm may pay one percent of its fees to a government agency for referring a case. This referral fee clearly involved fee-splitting with a nonlawyer, but we said it was not the "evil" that the rule was designed to prevent. The aforementioned Opinion 233 permitted the sharing of a "success fee" with an independent consulting firm, provided that the client consented in advance. This "success fee," while clearly contingent on the outcome, was not clearly defined, so we do not know if it was to be fixed or to be designated as a percentage of the amount of the recovery. In fact, it is not clear from the Opinion whether the firm represented only plaintiffs, so the success fee might be triggered by a successful defense of a case.[2]

We must confront, however, Opinion 286 (1998). That opinion concerned referral fees to nonlawyers. The Committee thought that such fees were prohibited if contingent on the amount of recovery because such a payment is in effect paying some of the specific proceeds of a representation to a nonlawyer. If the referral fee were not contingent, if it were fixed and paid regardless of success, we said it would not be a division of fees and would be permissible. This distinction has the advantage of drawing what appears to be a clear line. If the nonlawyer is paid a flat fee, regardless of outcome, he/she is unlikely to pressure the lawyer as to how to handle the case or cross over the line of actually practicing law. Still it is hard to reconcile this result with paying a consulting firm, which will presumably participate in the case, unlike the referring party, a fee contingent on success, as long as the client grants advance approval.

*Other Jurisdictions*

The opinions of other jurisdictions weigh against the inquirer's proposal[3]. These opinions generally stand for the proposition that paying a percentage of firm net profits to nonlawyer employees is permissible, whereas paying a percentage of a fee in an identifiable case or series of cases is not. The inquirer referenced five opinions that he believed supported his proposed compensation system. We discuss each below.

(1) The Philadelphia Bar Association Professional Guidance Committee endorsed the payment of a percentage bonus to a nonlawyer employee if collections exceeded a predetermined figure, provided that "the bonus is not tied to or contingent on the payment of a fee from a particular case or specific class of cases relating to a particular client or debtor." Opinion 2001-7 (2001).

(2) The Utah State Bar Ethics Advisory Opinion Committee approved the payment to a non-employee paralegal, provided that the paralegal's compensation is independent of the lawyer's compensation by the client. Employee paralegals may be compensated based upon a percentage of gross or net income, provided compensation is not tied to specific fees from a particular case. UT Eth. Op. 02-07, 2002 WL 31079593 (Utah St. Bar).

(3) The New York State Bar Association Committee on Professional Ethics would prohibit paying an employee a percentage of a fee for cases that the employee referred. It would permit payment of a percentage of the firm's profits. NY Eth. Op. 733, 2000 WL 33347719 (N.Y. St. Bar Assn. Comm. Prof. Eth.).

(4) The South Carolina Ethics Advisory Committee approved a bonus system for paralegals based on a percentage of the paralegal's billings to the clients, as long as the percentage is not tied to a particular fee. SC Adv. Op. 97-02, 1997 WL 582907 S.C. Bar Eth. Adv. Comm.).

(5) The Illinois State Bar Association was ambiguous. A lawyer had a substantial collections practice, mainly from a single collection agency. He segregated his collections practice from the rest of his practice and determined that practice's net income on a monthly basis. He paid an employee a set percentage of the net monthly profit from the collections practice. The Illinois Committee found this "profit-sharing arrangement would be proper provided sharing is based on a percentage of overall firm profit and is not tied to fees in a particular case." IL. Adv. Op. 89-05, 1989 WL 550785 (Ill. St. Bar Assn.). This opinion's ambiguity arises out of the fact that the employee apparently would not share in the lawyer's total profit, but in the profit from the collections practice only. Arguably, our inquirer wants to do something similar: isolate a part of his firm's practice and pay the employee a percentage of the profits from that part of the practice. The difference, as we see it, is that the collections practice presumably would have a high volume of cases, none of which individually would be likely to have a significant effect on the collections profits.[4] The class action cases with which the inquirer is concerned would be few in number and might result in substantial fees, such that one successful result could have a major impact on the profitability of that part of the practice.

In addition to the Illinois opinion, we have found one other opinion that permits a nonlawyer to be compensated by a percentage of a subset of a law firm's profits, as opposed to its total profits. MI Eth. Op. RI-143 (1992) approved payment of a percentage of the net profits from a law firm's sports and entertainment practice area to a legal assistant who worked in that practice area. The Michigan committee had earlier approved paying a nonlawyer employee a bonus calculated on a lawyer's gross or adjusted gross income, but not tied to the employee's efforts to solicit clients. The committee did not think that basing the employee's compensation on the net profits of a practice area, rather than the net profits of the entire firm, jeopardized a lawyer's exercise of professional judgment. It stated that the result might be different if the compensation plan were

[2] Comment [8] to Rule 3.4 endorses the payment of a contingent fee to an expert witness, provided that the fee is not a percentage of the recovery. This may not be fee-splitting since the expert would presumably be paid from the client's share of the recovery. An expert witness may not have much opportunity to interfere with the lawyer's professional independence given the witness's limited role. It was important to the Committee's analysis in Opinion 233 that the same economic result could have been achieved had the client contracted with the consulting firm to pay a success fee directly rather than the fee flowing through the law firm.

[3] Currently no U.S. jurisdiction other than this one permits nonlawyers to participate as partners or principals in law firms. The precedent from other jurisdictions reflects a more strict prohibition on the sharing of fees with nonlawyers, and thus its relevance is lessened somewhat.

[4] The assumption is based on the typical nature of a collections practice. The Illinois opinion does not address this point.

based on the fees generated from a particular case or a particular client. Like the Illinois opinion, this opinion is cryptic, but we assume that the sports and entertainment practice of the law firm was extensive enough so that compensation was not tied to a handful of cases or clients, which is not the case with the proposal we confront.

Moreover, all other opinions and cases that we have found permit profit-sharing with nonlawyer employees only as long as it is tied to the firm's overall profits and not to receipt of particular fees. ABA Informal Eth. Ops. 1440 (1979) and 1519 (1986); *Trotter v. Nelson*, 684 N.E. 2d 1150 (Ind. 1997) (profit-sharing plan may not be tied to a particular fee); *State Bar of Texas v. Faubion*, 821 S.W. 2d 203 (Tex. 1991) (shared fee with a nonlawyer prohibited if based on a particular case); *In re Anonymous Member of the South Carolina Bar*, 367 S.E. 2d 17 (S.C. 1988) (compensation plan for nonlawyers permissible based on a percentage of profits, but not if directly related to percentage of fees generated in individual case); FL Eth. Op. 02-1 (2002) (nonlawyer assistant's bonus must be for extraordinary efforts and cannot be based upon percentage of fees generated by the assistant); KS Eth. Op. 95-09 (1995) (may share fees with collection firm, but may not base compensation on collection firm's collections); CT Eth. Op. 93-1 (1993) (nonlawyer employees can be paid a bonus based on firm profits as long as they do not make professional decisions for the firm); NC Eth. Op. RPC 147 (1993) (cannot pay to legal assistant bonus based on income from assistant's real estate closings).

### *Prohibition on Sharing Fees from a Distinct Set of Cases*

Although blurred somewhat by the past opinions of this Committee, there emerges a prohibition on splitting fees with a nonlawyer employee on a contingent basis arising out of a case or a category of cases, at least unless the client approves in advance (an impracticality here). This rule and its exceptions flow from precedent, but they may not be entirely logical. How does advance client approval guarantee the lawyer's independence, for example? Money is fungible, and every employee is going to be paid out of a law firm's revenues, which are its fees. If it is a firm's practice to pay bonuses tied to firm profitability, each employee has an incentive to influence the outcome of significant cases, particularly in small firms where such cases could have a major effect on profitability. In fact, even if a firm has no profit-sharing program, a nonlawyer has some incentive to affect the outcome of cases because she knows if the firm does not make a profit, it cannot afford to employ her. Nonlawyer employees or employees sharing in fees on a contingent basis would seem to pose less of a threat to independence of professional judgment than permitting a nonlawyer to be a partner in a law firm and be compensated like most partners based on a percentage of profit, particularly in a small firm where one case can have a major effect on profitability.

If we accept Opinion 286's distinction between bonuses contingent on the fees from a specific case or series of related cases, as opposed to bonuses contingent on overall profitability, we must conclude that the inquirer's proposal would violate Rule 5.4(a). The inquirer suggests that his proposal is not tied to a specific referral, client, or fee, but rather to revenue from pooled cases. We do not see this distinction as meaningful. If the underlying policy is to diminish the incentive for the nonlawyer to interfere with the lawyer's practice, tying the compensation to a small, identifiable set of related cases is no different than tying the compensation to a single case.[5]

### *Establishing a Joint Venture Organization*

If Rule 5.4(a) prohibits the proposed compensation system, the inquirer asks whether the firm can enter into a similar compensation arrangement with the consultant if, rather than hire the consultant as an employee, the firm and the nonlawyer were to form a joint venture organization pursuant to Rule 5.4(b).

Rule 5.4(b) provides

> A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
>
> 1. The partnership or organization has as its sole purpose providing legal services to clients;
> 2. All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
> 3. The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;[6]
> 4. The foregoing conditions are set forth in writing.

From the description the inquirer has provided, we assume that the employee "performs professional services which [would] assist the organization in providing legal services to clients." Rule 5.4(a)(4) provides, "Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b)."

The District of Columbia Court of Appeals, which governs the D.C. Bar, has determined that lawyers and nonlawyers should be permitted to form a partnership or some other form of business venture. This reflects a judgment that clients can be better served when lawyers and other professionals combine to provide professional services to the public. *See* D.C. Rule 5.4, comments [3], [4], and [7]. Our Court of Appeals has decided that so long as the principals of these business units adhere to the Rules of Professional Conduct, such ventures are permissible.

We conclude, therefore, that forming such an organization is permissible under Rule 5.4(b). In reaching this conclusion, we recognize that it would clearly be permissible under Rule 5.4(b) for the law firm to admit the consultant as a partner. Partners are compensated in a myriad of ways, and compensation could be based on the success of the cases on which the partner/consultant works. If the compensation system could be effected in this fashion, we see no impediment to the consultant and lawyers entering into the proposed joint venture arrangement. We take comfort from Rule 5.4(b)'s requirement that nonlawyer partners adhere to the Rules of Professional Conduct and that their lawyer partners are responsible for seeing that they do. Because the cases on which the consultant/partner would

[5] We do not mean in any way to suggest that nonlawyer employees may not be paid a bonus because of exceptional performance or that a bonus or other compensation may not be tied to firm profitability. Many other jurisdictions have approved such arrangements and found them not to violate Rule 5.4, as long as the compensation was not tied to the fees earned from a specific case or set of cases.

[6] Rule 5.1 sets forth the responsibilities of a partner or supervisory lawyer to make reasonable efforts to ensure that the lawyers she supervises or practices with conform to the Rules of Professional Conduct.

work are class actions, and because all members of the class are unknown, some of the joint venture's "clients" will not know that a nonlawyer is a principal in the joint venture. This also would be the case if a law firm with a nonlawyer partner wants to bring a class action, and the joint venture would have to adhere to the various special rules that govern class actions and protect class members.

We point out, however, that the organization must adhere to the restrictions set out in Rule 5.4(b) as well as other restrictions set out in the Rules and elsewhere. For example, Rule 7.5(d) would require clients to be informed with clarity whether they were being represented by the law firm or by the joint venture organization, which would have to have a different names. These two entities would have to be separate entities in fact. Efforts would have to be made to protect the client secrets of the law firm from the members of the joint venture organization who were not firm members. Many of the considerations set forth in our Opinion No. 303, which concern the sharing of office space by unaffiliated lawyers, would apply. These would include separate letterhead, separate filing systems, appropriate signage if the same offices are utilized by both entities, proper telephone greetings by the receptionists, restrictions on access to computerized records, and the like.

We also believe that there would be some substantial practical barriers to the formation of such a joint venture organization unless the class action cases were all brought in the District of Columbia. No other U.S. jurisdiction permits lawyers and nonlawyers to practice together in this fashion. In fact, a member of the Virginia bar, who practices in a District of Columbia law firm that includes a nonlawyer as a partner, apparently may not engage in the practice of law in Virginia. VA Eth. Op. 1584 (1994). Were this joint venture organization to litigate any of these class actions in jurisdictions other than the District of Columbia, it might well face a claim that under the rules of the forum jurisdiction, it had entered into an unethical fee arrangement. *See* Rule 8.5(b) (choice of law rule applies disciplinary rules of foreign jurisdiction to conduct in connection with judicial proceedings in that jurisdiction.) In short, we believe that these practical limitations, plus the requirement that separate firms adhere to the appropriate formalities to operate in fact separately, may mean that such arrangements will be of utility only in limited circumstances.

Nevertheless, our Rules permit such organizations, and we see little distinction between forming such a joint venture organization with a consultant as a principal and the formation of a small public utilities law practice with an economist as principal. In each case the nonlawyer shares the fees, has a say in the organizational governance, and may be involved in every case. Rule 5.4 expressly allows the latter structure, and Comment 7 expressly endorses an economist's joining a public utility practice. If our Rules allow one, they should allow both. So while the compensation plan would violate Rule 5.4(a) if implemented by a law firm, it is permitted by Rule 5.4(b) if the firm and the nonlawyer employee form a joint venture organization, provided that they adhere to the restrictions that the Rules impose on such an organization.

Adopted: 16 February 2004
Published 17 February 2004

*Opinion No. 323*

**Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties**

• Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

**Applicable Rules**

• Rule 8.4 (Misconduct)

*Inquiry*

The Committee has received an inquiry on a matter relating to the obligation of an attorney under Rule 8.4(c). We are asked to determine whether attorneys who are employed by a national intelligence agency violate the Rules of Professional Conduct if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties.

*Discussion*

Rule 8.4(c) of the Rules of Professional Responsibility makes it professional misconduct for a lawyer to "engage in conduct involving fraud, deceit, or misrepresentation." This prohibition applies to attorneys in whatever capacity they are acting—it is not limited to conduct occurring during the representation of a client and is, therefore, facially applicable to the conduct of attorneys in a non-representational context. See ABA Formal Op. No. 336 (1974) (lawyer must comply with applicable disciplinary rules at all times).[1]

The prohibition on misrepresentation would, therefore, facially apply to attorneys conducting certain activities that are part of their official duties as officers or employees of the United States when the attorneys are employed in an intelligence or national security capacity. Thus, though the inquirer asked specifically about misrepresentations made by intelligence officers acting in their official capacity as authorized by law, the principles enunciated in this opinion are equally applicable to other governmental officers who are attorneys and whose duties require the making of misrepresentations as authorized by law as part of their official duties.

Such employees may, on occasion, be required to act deceitfully in the conduct of their official duties on behalf of the United States, as authorized by law. It is easy, for example, to imagine attorneys whose work for the CIA might require their personal clandestine work and falsification of their identity, employment status, or fidelity to the United States. We are confronted with the question whether such misrepresentations run afoul of Rule 8.4's anti-deceit prohibition.[2]

For three reasons, we conclude that Rule 8.4 does not prohibit conduct of the nature described.

First, our conclusion is premised on our understanding of the purposes for which Rule 8.4 was adopted. The prohi-

[1] This opinion applies only to the conduct of attorneys acting in a non-representational capacity. It does not address potentially applicable requirements under Rule 4.1(communication with clients), or Rule 4.3 (dealing, on behalf of clients, with unrepresented parties) which, *inter alia*, prohibits attorneys from making a false statement of material fact to a third party "in the course of representing a client."

[2] Rule 8.4(c) prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation." And "fraud" is, of course, separately defined by the Rules. *See* D.C. Rules of Prof. Conduct, Terminology (defining "fraud" and "fraudulent" as "conduct having a purpose to deceive"). For convenience sake, we refer to Rule 8.4(c) as the anti-deceit provision, while recognizing that the scope of the prohibition may depend upon a close analysis of the meaning of each of the four related prohibitions.

bition against engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" applies, in our view, only to conduct that calls into question a lawyer's suitability to practice law. The Comments to Rule 8.4 discuss why the current version discarded earlier references to a prohibition on conduct involving "moral turpitude" (as the conduct that had been proscribed was referred to in our former Code of Professional Responsibility). Comment [1] explains that this somewhat archaic formulation,

> 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.

D.C. Rule 8.4, Comment [1]; *see also In re White*, 815 P.2d 1257 (Or. 1991) (concluding that Rule applies to conduct in violation of criminal law if it "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").

Thus, in rejecting the formulation of "moral turpitude" and substituting the current anti-deceit formulation, the District of Columbia Court of Appeals has indicated its intention to limit the scope of Rule 8.4 to conduct which indicates that an attorney lacks the character required for bar membership. As the Comments elaborate, this may include "violence, dishonesty, breach of trust, or serious interference with the administration of justice." D.C. Rule 8.4, Comment [1].[3] But, clearly, it does not encompass all acts of deceit—for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.

Given this understanding of Rule 8.4, in our judgment the category of conduct proscribed by the Rule does not include misrepresentations made in the course of official conduct as an employee of an agency of the United States if the attorney reasonably believes that the conduct in question is authorized by law. An attorney's professional competence and ability are not called into question by service in our intelligence or national security agencies in conformance with legal authorization, nor is it called into question by the use of effective covert means to achieve legitimate national security goals. *Cf. Apple Corps Ltd. v. International Collectors Society*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998) (concluding that investigator's and tester's misrepresentation of identity is not a misrepresentation of "such gravity as to raise questions as to a person's fitness to be a lawyer"). As a consequence, we do not believe that Rule 8.4(c) is intended to reach lawful, authorized official conduct, even if there is a deceitful component to that conduct.

Second, our conclusion in this regard is buttressed by an analogous provision of the Rules and its construction within this jurisdiction. Rule 4.2 prohibits certain communications between a lawyer and an opposing party who is represented by counsel. This jurisdiction has construed the Rule to permit lawful law enforcement activity. Thus, our Commentary says that:

> This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and the laws of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law.

Rule 4.2, Comment [8].[4]

The Virginia Standing Committee on Legal Ethics recently recognized the parallel between law enforcement and intelligence activity in an opinion that is consistent with our views. In Va. Legal Ethics Opinion 1738 (2000), the Virginia Standing Committee considered whether the ethical rule prohibiting non-consensual tape recording then in effect in Virginia applied to law enforcement undercover activities. The Virginia Standing Committee concluded that it did not. In Va. Legal Ethics Opinion 1765 (2003), the Virginia Standing Committee then considered whether the policies animating the exception for law enforcement undercover activities expressed in Opinion 1738 also authorized the use of non-consensual tape recording and other covert activities by attorneys working for a federal intelligence agency. Reasoning by analogy to its earlier decision concerning law enforcement undercover activities, the Committee agreed that covert intelligence activities also serve "important and judicially-sanctioned social policies." Accordingly Opinion 1765 concluded that "when an attorney employed by the federal government uses lawful methods such as the use of 'alias identities' and non-consensual tape-recording, as part of his intelligence or covert activities, those methods cannot be seen as reflecting adversely on his fitness to practice law; therefore such conduct will not violate the prohibition in Rule 8.4(c)." That reasoning is equally persuasive to this Committee.

To be sure, Rule 8.4 does not have an "authorized by law" proviso, like that in Rule 4.2, and the absence of such a provision authorizing deceit in the intelligence, national security, or other foreign representational context might be construed as indicating that such conduct is not permitted. Nonetheless, we agree with Virginia that the treatment of law enforcement activity is instructive of the proper treatment of intelligence activity. A better construction is to view Comment [8] to Rule 4.2 as expressing a general approval of lawful undercover activity by government agents and the failure to mention the myriad ways in which the issue might arise simply reflects the drafters' focus on the more immediate issue of law enforcement activity that was before them. We do not think that the Court of Appeals intended to authorize legitimate law enforcement undercover activity while proscribing covert activity in aid of our national security; we would not impute so illogical an intent to the drafters absent far stronger evidence.

Third, "[t]he 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." D.C. Rules, Scope, Comment [1]. Some activities conducted on behalf of the United States necessarily involve circumstances where disclosure of one's identity or purpose would be inappropriate—and, indeed, potentially dangerous. We do not think that the Rules of Professional Conduct require lawyers to choose between their personal safety or compliance with the law, on the one hand,[5] and

[3] In March 2003, the Virginia Supreme Court made this connection explicit by amending the Virginia version of Rule 8.4(c) to prohibit "dishonesty, fraud, deceit or misrepresentation which reflects adversely on a lawyer's fitness to practice law." Va. R. Prof. Cond. 8.4(c).

[4] Some other jurisdictions have construed this provision to preclude law enforcement agents, acting at the direction of a lawyer, from conducting covert, undercover activity against individuals who are represented by counsel. *Cf. In re Gatti*, 8 P.3d 966 (Or. 2000), *overruled*, Or. DR 1-102(D) & Or. Formal Op. 2003-173.

[5] In some circumstances, federal law affirmatively prohibits disclosure of information relating

maintenance of their bar licenses, on the other. *See* Utah State Bar Ethics Advisory Committee Op. No. 02-05 (2002) (relying on "rule of reasons" provision to conclude that government attorneys' "lawful participation in a lawful government operation" does not violate Rule 8.4 if deceit is "required in the successful furtherance" of the undercover or covert operation).

For these several reasons we are convinced that the anti-deceit provisions of Rule 8.4 do not prohibit attorneys from misrepresenting their identity, employment or even allegiance to the United States if such misrepresentations are made in support of covert activity on behalf of the United States and are duly authorized by law.[6]

Finally, we emphasize the narrow scope of this opinion. It applies only to misrepresentations made in the course of official conduct when the employee (while acting in a non-representational capacity, *see supra* n.1), reasonably believes that applicable law authorizes the misrepresentations. It is not blanket permission for an attorneys employed by government agencies to misrepresent themselves. Nor does it authorize misrepresentation when a countervailing legal duty to give truthful answers applies. Thus, for example, false testimony under oath in a United States court or before the Congress is prohibited, *see In re Abrams*, 689 A.2d 6 (D.C. 1997) (en banc), notwithstanding any countervailing intelligence or national security justification. And, of course, this opinion does not authorize deceit for non-official reasons, or where an attorney could not, objectively, have a reasonable belief that applicable law authorizes the actions in question.

With that limitation, our conclusion is as follows: Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.

to the identity of covert agents, for example. *See, e.g.*, 50 U.S.C. § 421.

[6] This Committee lacks the expertise to precisely identify, for example, which covert activities are authorized by law. Moreover, such an enumeration would exceed our charter, which ordinarily limits our opinions to interpretations of the District of Columbia Rules of Professional Conduct. We emphasize, however, that for conduct to come within the safe-harbor of this opinion the lawyer must reasonably believe that the conduct in question was both authorized by law and reasonably intended to further the attorney's official duties.

Inquiry No.: 01-11-25
Adopted: 29 March 2004
Published: 30 March 2004

*Opinion 324*

**Disclosure of Deceased Client's Files**

- When a spouse who is executor of a deceased spouse's estate requests that the deceased spouse's former attorney turn over information obtained in the course of the professional relationship between the deceased spouse and the former attorney, the former attorney may provide such information to the spouse/executor, if (1) the attorney concludes that the information is not a confidence or secret, or, (2) if it is a confidence or secret, the attorney has reasonable grounds for believing that release of the information is impliedly authorized in furthering the interests of the former client in settling her estate. Where these conditions are not met, the deceased spouse's former attorney should seek instructions from a court as to the disposition of materials reflecting confidences or secrets obtained in the course of the professional relationship with the former client. In the absence of such a court order, the attorney should dispose of the materials according to the guidance in Opinion 283.

**Applicable Rule**

- Rule 1.6 (Confidentiality)

*Inquiry*

We have received a request for an opinion concerning disposition of documents in the possession of an attorney following a client's death. The inquirers are members of a law firm who represent a husband who is executor and sole heir of his deceased wife's estate. The husband has asked that his wife's former attorney[1] turn over to the estate all documents and files his deceased wife furnished to her attorney, as well as all documents and files the attorney generated or retained in connection with the representation of the wife. These documents and files may be relevant to a legal claim the estate may have against third parties. The inquirers state that the wife's attorney has expressed concerns that releasing the requested documents and files might violate "the attorney-client or attorney work product privileges" and that, "due to the nature of the representation of the deceased spouse," the materials "constitute secrets [sic] and are protected by attorney-client privilege."

The inquirers ask three questions: First, what should become of the documents and files the deceased wife furnished to her attorney? Second, what should become of the documents and files the attorney has generated and retained in connection with her former representation of the deceased wife? Third, may this attorney speak with the former client's husband, who is the executor and sole heir to the estate, without violating "the attorney-client or attorney work product privileges"?

Although the inquirers cast their questions in the framework of privilege law, our answers are confined to their professional responsibilities under the D.C. Rules of Professional Responsibility ("D.C. Rules"), because our charter ordinarily does not extend to questions of substantive law beyond interpretation of the Rules. We thus offer this analysis of the scope of an attorney's continuing duties of confidentiality to a deceased client under D.C. Rule 1.6.

*Discussion*

D.C. Rule 1.6(a) provides that a lawyer may not reveal "a confidence or secret of the lawyer's client," except under certain specified circumstances. Rule 1.6(b) defines a "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as any "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Thus, unlike ABA Model Rule 1.6 and the rules of many other jurisdictions, D.C. Rule 1.6 does not define as confidential all information relating to legal representation.[2] Material that is not privileged under applicable evidentiary law and does not

[1] The term "former attorney" refers to the fact that the client is deceased. We do not intend to imply that the attorney-client relationship terminated for some other reason prior to the client's death.

[2] The deliberate decision to incorporate this difference from ABA Model Rule 1.6 is reflected in the legislative history of D.C. Rule 1.6. See Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and

meet the definition of a "secret" under D.C. Rule 1.6(b) may be disclosed. *See* D.C. Rule 1.6 Comment [6].

The "fundamental principle" underlying D.C. Rule 1.6 is that the lawyer should hold inviolate client "secrets and confidences" so that the client will be "encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." D.C. Rule 1.6 Comment [4]. This duty of confidentiality applies to information in any form,[3] and continues after the termination of the lawyer's employment. D.C. Rule 1.6(f). The "duty of confidentiality continues as long as the lawyer possesses confidential client information" and extends "beyond the end of the representation and beyond the death of the client." Restatement of the Law Governing Lawyers § 60 comment e (2000).

The attorney-client privilege also usually extends beyond the death of a client. *See, e.g., Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (holding that attorney-client privilege extends beyond the death of a client and citing numerous cases in agreement from a wide variety of jurisdictions.) As the Court in Swidler discussed, the testamentary exception to the general rule that attorney-client privilege extends beyond a client's death may permit disclosure of privileged information in the context of settling a deceased client's estate, because "the privilege, which normally protects the client's interest, could be impliedly waived in order to fulfill the client's testamentary intent." *Id.* at 405 (citations omitted). A spouse may waive a deceased former client's attorney-client privilege in other circumstances as well, such as where a statute authorizes or requires this step. *See, e.g., State v. Doe*, 101 Ohio St. 3d 170, 803 N.E.2d 777 (2004) (applying 50-year old untested Ohio statute authorizing surviving spouse to waive deceased spouse's attorney-client privilege to require an attorney to testify about what a deceased client told her in a missing-child case).

In short, whether the materials at issue in the inquirers' situation can be revealed to the inquirers' client in his capacity as executor of his wife's estate depends on the nature of the information they contain. Revealing the information would be appropriate if it does not constitute a confidence or secret under the definitions in D.C. Rule 1.6(a). Even if the information is covered by the duty of confidentiality as defined in Rule 1.6, release would be appropriate so long as the attorney has reasonable grounds for concluding that release of the information is impliedly authorized in furthering the former client's interests in settling her estate. The inquirers have told us nothing about the nature of the matter in which the wife sought an attorney's representation, except that it may be relevant to a legal claim the estate may wish to pursue against third parties. With these limited facts we cannot opine on the proper disposition of the documents and files retained by the deceased wife's former attorney, but do offer a more general analysis that we hope will be of help.

In general, the exceptions to D.C. Rule 1.6 permit a lawyer to reveal confidences and secrets when: (i) the "lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation," Rule 1.6(c)(4); (ii) with the client's consent, after full disclosure to the client, Rule 1.6(d)(2); or when permitted by the Rules or (iii) "required by law or court order," Rule 1.6(d)(1). Much information an attorney gains in the course of a representation is routinely disclosed on grounds of implied authorization to carry out the representation, as in drafting a complaint, for example. In the ordinary case, release of information an executor requests would be impliedly authorized under D.C. Rule 1.6(d)(4). In some unusual circumstances, however, an attorney facing the question of disclosure of a deceased client's files or other information to a spouse/executor may confront a more difficult dilemma. An attorney unsure whether a deceased former client wanted information to be disclosed cannot seek the client's instructions as contemplated under D.C. Rule 1.6(d)(1). Instead, the attorney must decide what the client's instructions would have been if the attorney could have consulted her, and this may present a close question.

To take a hypothetical example: Imagine that a wife's will states that she wishes to divide her property equally among her children. The wife later consults another attorney ("second attorney") and confides to this second attorney that, prior to her current marriage, she gave birth to a child about which she has not informed her current husband, and wishes to provide for that child in her will without disclosing the nature of her relationship to this individual. The second attorney begins to prepare a new draft of her will, but the wife unexpectedly dies before it is finalized and signed. After the wife's death, the husband, who is executor of the wife's estate, asks the second attorney for information about the representation. The second attorney must decide whether she has information that is a confidence or a secret. In the example, the fact of the wife's prior child is probably both: the wife told the second attorney this information in the course of seeking legal advice, and stated that she did not want this information disclosed to her husband. But whether the wife would want her wishes to provide for this individual to be known after her death is a more difficult question. The wife expressed to the second attorney her wish that all of her children be provided for, on the one hand, but may wish that her husband not learn of her prior child, on the other.

The decision about what to do in such a situation will require the attorney to exercise her best professional judgment. An attorney who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes. The attorney will usually be best situated to make this determination. In rare situations, however, the attorney may wish to seek an order from the court supervising disposition of the estate and present the materials at issue for the court's in camera consideration.

In reaching these recommendations, we are assisted by a number of opinions from other jurisdictions. The Disciplinary Board of the Hawaii Supreme Court, for example, addressed the question of when an attorney may disclose confidential information concerning a deceased client in Formal Opinion No. 38 (1999). The

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Changes Recommended by the Board of Governors of the District of Columbia Bar (unpublished document dated November 19, 1986), at 41 (deleting ABA Model Rule language covering all "information relating to representation of a client" and inserting D.C. Rule 1.6(b) language defining "confidence" and "secret"); *id.* at 44 (adding same language to D.C. Rule 1.6 comment [6] ); *id.* at 50 (explaining that D.C. Rule 1.6(a) is substantially identical to ABA Model Code DR 4-101(A), which defines "confidence" and "secret"); *id.* at 52 (explaining that the Committee and Board preferred the narrower scope of DR 4-101(A) to the ABA's unexplained change in the scope of Model Rule 1.6).

[3] See D.C. Rule 1.6 Comment [6] ("This ethical precept, unlike evidentiary privilege, exists without regard to the nature or source of the information or the fact that others share the knowledge"); Restatement of the Law Governing Lawyers § 59 comment b (definition of confidential information includes documents, files, photographs and other similar materials).

Board noted that the duty of confidentiality is broader than the attorney-client privilege and that, although a client's heir or personal representative may have authority to waive the attorney-client privilege, the confidentiality protection under the Hawaii Rules of Professional Conduct may still apply. The Board further noted that obtaining client consent to such a disclosure under the Hawaii rules would not be possible once the client was deceased. The Board concluded, however, that such disclosure might be impliedly authorized in order to carry out the representation, and that in determining the necessity of disclosure of confidential information on this ground the attorney should "consider the intentions of the client." Thus, if an attorney reasonably determines that confidentiality should be waived in order to effectuate the deceased client's estate plan, the attorney would be both "permitted and obligated to make such disclosure." See also Restatement of the Law Governing Lawyers § 60 comment I ("the lawyer may reveal confidential client information to contending heirs or other claimants to an interest through a deceased client" if there is "a reasonable prospect that doing so would advance the interest of the client-decedent").[4]

The Philadelphia Ethics Committee recently considered a situation in which an inquiring attorney represented a client who committed suicide while being treated for mental health problems in a treatment facility. Philadelphia Bar Ass'n Ethics Op. 2003-11 (2003). The former client's father asked the inquirer for information about his son's death, and the inquirer asked whether Pennsylvania Rule of Professional Conduct 1.6 prohibited the inquirer from complying with the father's request. The Committee reasoned that none of the exceptions to Rule 1.6 applied, but that the lawyer could look to the legal representative of the client for decisions on the client's behalf.[5] The Committee concluded that if the father was appointed executor of his son's estate, he would be authorized to consent to the disclosure of information relating to his son's representation. The Committee cautioned, however, that if the attorney were aware that the former client would not have consented to the revelation of information, the information should not be disclosed.

Finally, in Nassau County (N.Y.) Committee on Professional Ethics Opinion No. 03-4 (2003), the inquirer had represented a woman who sought to file a divorce action against her husband. The client told the inquirer that she did not want to serve papers against her husband or tell him about her plans until she had discussed the matter with her children after they finished their pending college semesters. Ten days later, the client died suddenly. The client's husband discovered that his wife had sought legal representation when he found a check stub showing her payment of the inquirer's retainer fee, and asked the inquirer for itemized billing information. The Nassau County Ethics Committee concluded that, if the information sought revealed the former client's confidences or secrets related to the inquirer's representation of her, the inquirer could not disclose the information requested. The Committee noted that the spouse/executor was the very person whom the inquirer's former client requested not be informed of her plans to seek a divorce until she had "informed her children, a plan upset by her sudden death," and that it was unclear whether the spouse/executor, in requesting the detailed billing records, was "acting to protect the estate and its beneficiaries, or to satisfy his own personal interests." Nassau Op. 03-4 at 2, 5.

The Nassau County Ethics Committee had several helpful suggestions for lawyers facing similar situations. First, the Committee suggested that the inquirer determine whether the spouse/executor would accept the requested itemized billing information in a redacted form that avoided disclosure of his wife's secrets and confidences. This course, the Committee pointed out, could satisfy the spouse/executor's fiduciary duty to determine the proper amount of the partial refund of the retainer fee owed the estate. A similar result might be achieved by offering the written retainer agreement redacted so as to omit the purpose of the legal representation. Op. 03-4 at 6. Finally, the Committee noted that, if the spouse/executor was not satisfied with such offers of redacted documents, the inquirer's refusal to turn over all of the information requested might lead the spouse/executor to seek judicially ordered disclosure in the probate proceeding or related separate action. This development would require the inquirer to present the relevant facts and professional responsibility issues to a court for its determination, including a possible in camera examination of the inquirer's unredacted records. If a court ordered disclosure of the records, the inquirer could either comply with the order, as permitted under the New York provision equivalent to D.C. Rule 1.6(d)(2)(A), or seek appellate review if appropriate.

Our prior opinions have said that an attorney must refuse requests for disclosure of confidential client information until a court has entered a final judicial order requiring such disclosure. See D.C. Bar Ethics Op. 214 (1990). We concluded that the attorney need not also pursue appellate review of that order. Id. We further noted that the attorney must give the client notice of the order and a reasonable opportunity to seek review of the order independently. *Id.* These are conditions that cannot be satisfied when the client is deceased. Nonetheless, we think the reasoning of the Nassau Committee is sound on this point, and that, in the general case of a deceased client, an attorney may disclose confidential client information once he or she has been finally ordered to do so by a court, without necessarily seeking appellate review of the court's order. D.C. Rule 1.6(d)(2)(A).

Our prior opinions have also offered guidance to attorneys on handling documents and other materials related to the representation of a former client. In D.C. Bar Ethics Opinion 283 (1998), we advised that lawyers must take care to protect the confidentiality of the contents of clients' closed files. We advised that in a situation in which it was not possible to obtain instructions from the former client or his legal representative as to what to do with such files, a lawyer who concludes that "further retention of a former client's closed files is 'not reasonably practical to protect a client's interests' may destroy the files five years after the termination of the representation." *Id.*

In sum, the proper disposition of the documents the wife's former attorney retains from the prior representation depends on the husband/executor's status

[4] Other ethics committee opinions reaching similar conclusions include Kansas Bar Association Professional Ethics Advisory Comm. 01-1 (2001) (a lawyer may use or reveal confidential client information or documents to advance a deceased client's interests in the disposition of property rights by inheritance, but the transfer of information or documents should be limited to that necessary to defend and prove the rights at issue and should not contain information that could be adverse to the deceased client); North Carolina State Bar Ethics Op. 206 (1995) (a lawyer may reveal a client's confidential information to the personal representative of the client's estate, unless the disclosure of confidential information would be clearly contrary to the goals of the original representation or would be contrary to the instructions of the client to the lawyer prior to the client's death).

[5] Here the Committee turned to Rule 1.14, which deals with a client under a disability, perhaps because that Rule would have applied to the former client while living.

in relation to the matter handled in the prior representation. If the matter relates to the husband's fiduciary duties in handling the disposition of the wife's estate, and if disclosure of the information is impliedly authorized in order to further the deceased client's interests as the former attorney can best ascertain them, then the attorney should furnish the materials to the husband/executor. On the other hand, if these conditions are not met, the wife's former attorney should not turn over the documents. If the attorney reasonably believes that the correct course of conduct is uncertain, she should seek instructions from a court. If no such instructions are forthcoming, the attorney should dispose of the documents according to the guidelines in our Opinion 283. The same analysis applies on the inquirers' question whether the former wife's attorney may speak to the executor/husband. An attorney may disclose a deceased former client's secrets and confidences in any manner, including oral conversation, only if the conditions discussed in this opinion have been met.

Inquiry No. 04-01-02
Adopted: 18 May 2004
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*Opinion No. 325*

**Agreement to Distribute Former Firm Profits to Partners From Former Firm Only as Long as They Continue To Practice in new Merged Firm: Rule 5.6(a)**

- When a law firm is about to merge with another firm, its partners agree to distribute profits already earned by the former firm, but which will be paid in the future, only to partners who continue to practice with the post-merger firm. This agreement violates Rule 5.6(a) because it creates a financial disincentive to partners to leave the merged firm and practice with another firm. The exception in Rule 5.6(a) for an agreement relating to benefits upon retirement applies only to the type of retirement typical at the end of a career and not to all departures from a firm.

**Applicable Rule**

- Rule 5.6(a)

*Inquiry*

The inquirer poses a question of the interpretation of Rule 5.6(a) as applied in the context of law firm mergers. As stated by the inquirer, the facts are these:

*1. Factual background*

The inquirer was a partner in a Law Firm, which merged with another firm to become Merged Law Firm. Before the merger, the Law Firm was owed fees by some clients for work that had already been completed. These fee payments were to be made over time, but the Law Firm needed to do nothing further to be entitled to them. Anticipating the merger, the partners of Law Firm assigned the future right to receive these fees to a new entity, Receivables LLC. Under the agreement of those partners that created this LLC, each Law Firm partner was entitled to a fixed and specifically stated percentage share of the LLC's receivables equal to that partner's share of Law Firm profits. This was called a Management share. In addition, those partners who were regarded as having originated client business that led to the receivables were entitled to a further specifically enumerated percentage of the receivables, called an Originator's share. The inquirer was an Originator and thus was entitled both to a Management share representing his share of the pre-merger Law Firm's profits, plus an Originator's share. Thus, after the merger the LLC received sums attributable to Law Firm work done before the merger and paid those out to the partners of the pre-merger Law Firm.

Under the documents creating Receivables LLC, the partners' rights to receive Management and Originator's shares were not unconditional. The agreement creating the LLC provides that if any partner of the pre-merger Law Firm who is a member of Receivables LLC leaves the Merged Law Firm before December 31 of the year following the year of the merger (a period of two years from the effective date of the merger), that partner's Management share in Receivables LLC ceases at that time—does not vest[1] in the terminology of the agreement—and the payments stop, unless the departure within that period from the Merged Law Firm is attributable to death, illness, or retirement from the practice of law, in which case the payments do not stop with the departure from the Merged Law Firm. If the partner leaves the Merged Law Firm after two years have elapsed since the merger, then the payments continue despite the departure. In addition, if any partner who is also an Originator, like inquirer, leaves the Merged Law Firm at any time and for any reason, then that Originator's share becomes void and the payments of the Originator's share stops. Thus, documents creating Receivables LLC condition the right to receive sums owed to the pre-merger Law Firm in such a way as to create incentives to partners of the former Law Firm to continue practicing with the Merged Law Firm.

The inquirer reports that after the merger, the Merged Law Firm decided to pursue clients whose interests tended to conflict with those of the clients whom the inquirer tended to represent. It was not possible for inquirer to continue to represent the clients that were the inquirer's traditional client base. The inquirer states, "At the [Merged Firm's] direction, I am forced to find a new firm to practice with." The departure of the inquirer would effectively be before the expiration of the two-year period, so that departure would result in the loss by the inquirer of all rights to a continuing share, including both a Membership share and an Originator's share of income from Receivables LLC.

*2. The Applicable Rule*

Rule 5.6(a) provides that a lawyer may not "make or participate in making a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits on retirement ..." While there has been a great deal written about Rule 5.6(a) (including our opinions 291, 241, 221, and 65 [2]), we think it useful to discuss its basic framework.

The Rule first bars a lawyer from participating in the offering or making of a partnership or employment agreement that "restricts the right of a lawyer to practice after termination of the relationship . . ." There is then an exception for agreements "concerning benefits upon retirement ..." Rule 5.6(a) is "substantially similar" to its predecessor, DR 2–108(a) of the Model Code of Professional Responsibility. See the report of the District of Columbia Bar Model Rules of Professional Conduct Committee, with the changes recommended by the Board of Governors, submitted with the Board's Petition recommending adoption the Rules to the D.C. Court of Appeals, November 1986 at page 210.

Rule 5.6(a) seeks to prevent lawyers from entering into agreements that will discourage lawyers from moving from

[1] The term "vest," while perhaps not entirely legally accurate, is used in the LLC documents, and for convenience we will use it here.

[2] Opinion 65 interpreted the former DR 2-108(A).

one firm to another. The reason for the Rule is that clients may benefit when their lawyers (either at the beginning of their careers or later) can improve their work environment. The D.C. Court of Appeals has favorably quoted the Committee's determination in Opinion No. 241 that the Rule is a mechanism "to protect the ability of clients to obtain lawyers of their own choosing and to enable lawyers to advance their careers." *Neuman v. Akman*, 715 A.2d 127, 131 (D.C. 1998). The Committee has more recently stressed that clients not infrequently recommend a change of law firm to lawyers, for various reasons, and Opinion No. 273 (1997) requires lawyers to consult with their clients before changing firms precisely because such changes are often important to clients. This principle of facilitating lawyers' changes in their practice environment to benefit clients finds expression elsewhere in our Rules, such as the special provisions seeking to facilitate the movement of lawyers from firm to firm in Rule 1.10. See Comments [10], [11], and [21] to Rule 1.10.[3] Such considerations are not unique to the District of Columbia but are shared by other jurisdictions. See 2 Hazard & Hodes, *The Law of Lawyering* § 47.4 at 47-5 (3d ed. 2001).

It has long been clear that Rule 5.6(a) bars not only agreements that would explicitly restrict lawyers' practices but also reaches agreements that may not explicitly bar such actions but create financial disincentives to taking these actions. In Opinion No. 65 (1979) this Committee considered an agreement that sought to compel a lawyer to pay 40 per cent of any fees received from a client of the lawyer's former firm if earned within two years after the lawyer's departure from the firm. It concluded that such an agreement violated DR 2 108(a) because "[i]ts effect is to impose a barrier to the creation of a lawyer/client relationship between the departing lawyer and the clients of his former firm." Even if it did not do so literally, the Committee noted, such a barrier interfered with clients' choice of attorney because "[t]he departing attorney would find work for clients of the former firm economically less attractive than work at similar rates received from other clients, and might be deterred from accepting employment from such clients."

Opinion No. 241 (1991) concluded that an agreement created a financial disincentive on a departed lawyer's competition with the lawyer's former firm. There, a law firm's partnership agreement provided for the repayment of a partner's capital account over a period of five years, except that where after departure a partner practiced law in the District of Columbia, the repayments were delayed for five years or until the departing partner had reached the age of 65 or stopped practicing in the District of Columbia. The Committee concluded that the agreement violated Rule 5.6(a) because "the financial penalties imposed on a departing lawyer serve no other purpose than restricting practice and insulating the firm from potential competition."

We note, however, that the simple existence of an economic cost to leave a firm does not necessarily mean that Rule 5.6(a) has been violated. To constitute a violation, an agreement must effectively "restrict the rights of a lawyer to practice after termination of the relationship." Where such a restriction is not explicit, the effect of the agreement must be to create such a restriction on competition or other limitation on practice. For this reason, it can be necessary to examine surrounding circumstances to determine whether a violation of the Rule 5.6(a) has occurred where the restriction on a lawyer's practice is not expressed.[4]

The Rule also contains an exception for "an agreement concerning benefits on retirement." Much of the attention that has been paid to this rule by courts, ethics committees, and commentators has dealt with this exception, whose scope is often debated. See, e.g., *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti LLP*, 844 A. 2d 521 (N.J. 2004) (in which, at 530-31, the New Jersey Supreme Court called upon its Professional Responsibility Rules Committee to review Rule 5.6(a) "to determine whether the rule should define 'retirement' and, if so, to propose a definition or related criteria"); *Neuman*, supra, 715 A. 2d at 136 (in which the D.C. Court of Appeals discussed, but found it unnecessary to decide, the issue of the scope of the exception). Courts that have decided the issue have generally concluded that the exception extends only to the kind of retirement that occurs at the end of a career. E.g., *Cohen v. Lord, Day and Lord*, 550 NE 2d 410 (N.Y. 1989); *see Borteck*, 844 A.2d at 527. Professors Hazard and Hodes agree that if "retirement" meant simply the termination of the "partnership or employment" relationship, then the exception would swallow the rule. It would except from the Rule's prohibition every agreement made on termination of every relationship. 2 Hazard and Hodes, *The Law of Lawyering* § 47.4 at 47-5 to 47-6. (3d ed. 2001). Although in *Neuman v. Akman*, 715 A. 2d at 126, the D.C. Court of Appeals did not have to decide the issue, by extensively describing why the agreement there at issue constituted a "retirement agreement" within the meaning of a retirement at the end of a career, and by favorably citing *Gray v. Martin*, 663 P. 2d 1285, 1290 (Oregon App. 1983), see *Neuman*, 715 A. 2d at 134, the court suggested that if called upon it would view this issue no differently from the other authorities we have cited. We therefore conclude that the provisions in question here, which apply when a partner leaves the Merged Law Firm regardless of age, do not come within the "retirement" exception of Rule 5.6(a).

*3. Discussion*

We first note that it might be argued that the agreement to form Receivables LLC was not a "partnership" agreement within the meaning of the Rule. However, the LLC was created by the partners of the pre-merger Law Firm solely to obtain and distribute to those partners funds owed to the pre-merger Law Firm in payment for its previously completed legal work. We therefore conclude that the agreement that created Receivables LLC is a "partnership . . . agreement" within the meaning of the Rule. Otherwise, a firm could avoid the prohibition of Rule 5.6 by creating a separate organization to handle portions, but not all, of the firm's law practice. Law firm mergers have become more frequent in recent years. Individual

[3] The case at hand is an example of the benefit that may flow to clients from a change of firm by a lawyer. The inquirer changed firms because the Merged Firm's practice had become less hospitable to the clients he represented, and he sought to practice in a different firm where his clients' goals did not conflict with those of other firm clients.

[4] See Opinion No. 221, involving a lawyer who had departed from a firm taking contingent fee clients along with him. An employment agreement between the lawyer and that firm provided that in the event of such a departure and the later receipt by the lawyer of a contingent fee from that client, a portion of that fee would be allocated and paid back to the former firm, with the allocation made on the basis of a percentage formula depending on the length of time the lawyer had worked on the case while at the firm. The Committee concluded that if the percentage formula "represent[ed] a generally fair allocation of fees based on the firm's historical experience there is no violation of Rule 5.6(a). On the other hand, if the firm's share is excessive, this would have the effect of restricting the right of the departing lawyer to practice after the termination of the relationship in violation of Rule 5.6(a)." The Committee also pointed out that it "cannot make fact findings" and thus "can neither approve nor disapprove the specific percentages used by the firm."

lawyers in a firm that is contemplating merging with another may be concerned about whether the firm that would result from the merger would be as satisfactory a place for them to practice for clients as was their pre-merger firm. Similarly, the question of which partners in the negotiating firms are likely to remain at the merged firm can be a feature of merger negotiations. In these contexts the limitations of Rule 5.6 can be particularly significant. It would not be consistent with the language or purpose of that Rule to allow partners of one or both of the merging firms to escape scrutiny under it by forming separate organizations to achieve some of their purposes.

We now examine in turn the two kinds of payments made under the agreement forming the LLC. We note as a preliminary point that we do not think that it could be argued that for purposes of this analysis under Rule 5.6 the Merged Firm is somehow a continuation of the pre-merger Law Firm. The LLC was formed only by the partners of the pre-existing Law Firm (and not by others involved in the merger) and applies only to them, and operation of the LLC is independent of the compensation of the Merged Law Firm.

Under the LLC, the Membership share amounts are paid to former Law Firm partners pursuant to fixed percentages attributable to each partner's ownership share of the pre-merger firm. These Membership interests expire, i.e., do not "vest," if a lawyer leaves the Merged Firm before the end of the two-year period, unless the reason for departure during that period is death, disability, illness, or retirement from the practice of law, in which case the right to continue receiving the payments vests even though the lawyer in question has departed before the two years had passed. As we have seen, the inquirer left within the two years, before his interest became fixed, because he felt that he could not pursue his practice freely and serve the clients that would most benefit from his experience and developed expertise, in the new direction that the Merged Firm took.

In effect, the imposition of the two-year vesting period is an action by the partners of the pre-merger Law Firm that uses assets belonging to them to induce themselves not to depart from the Merged Firm for at least two years after the merger. The pre-merger firm's entitlement to the payments was fixed before the merger. With the termination of the pre-merger Law Firm, its partners had the unconditional right to receive those sums as they were eventually paid. The agreement creating the LLC provides that these payments are to be distributed based on a formula using each lawyer's percentage share of the profits of the pre-merger Firm, a fixed formula entirely based on past events. But the agreement goes further and adds the condition that each lawyer's entitlement to continue to receive these payments depends on that lawyer remaining with the Merged Firm for two years. The fact that there is an exception to the two-year vesting requirement for partners who may retire from practice, die, or become disabled before the end of the two years underscores that those partners who are capable of leaving the firm to practice elsewhere are the ones who are affected by a financial disincentive inherent in the vesting period.[5]

For this reason, while the agreement here does not explicitly say that it cuts off payments where a lawyer leaves the Merged Firm to practice with others before the two-year vesting period ends, that is its clear impact—and it is what happened in the inquirer's situation. The two-year vesting requirement applies to cut off payments of the Management shares only to those lawyers who depart because they intend to practice law elsewhere.[6] It accordingly penalizes (by stopping the flow of previously earned income) those who continue to practice but do not do so with the Merged Firm. While it is of course possible that a partner would leave to practice law but not in competition with the Merged Firm (such as by moving to another city—although in specialized practice areas even such a move may not avoid competition with a lawyer's former firm), we believe that that is a comparatively rare occurrence for lawyers who have reached the stage in their careers where they are partners in a firm. That mere possibility does not change the dominant practical impact of the provision, which is to penalize those partners who seek to serve their clients by practicing elsewhere than the Merged Law Firm by depriving them of a portion of previously earned fees that otherwise would be theirs. Nor does the fact that the inquirer left the Merged Law Firm to conduct a kind of practice that that firm was not interested in pursuing affect our view. The inquirer wished to continue to represent clients with views generally opposed to that of the Merged Law Firm's clients. The purpose of Rule 5.6 is to bar agreements among lawyers that would create restrictions on a lawyer's ability to move to a better practice environment within which to seek to represent his or her clients' interests. An agreement that penalizes a lawyer for leaving a firm where most of the practice is hostile to the lawyer's particular clients is just as harmful to the purpose of Rule 5.6 as trying to prevent a lawyer from competing for the same kinds of clients as his former firm.[7]

The Originators' shares present a different and more difficult issue. The right to continue to receive an Originator's share does not ever become fixed, or vest, and therefore a partner who departs from the Merged Firm for any reason, including death, illness, retirement, moving to another firm (whether in competition with the Merged Firm or not), or leaving the profession to pursue another endeavor,

[5] Even with our conclusion that "retirement" means the end of a career practicing law, this portion of the agreement is not an "agreement concerning benefits on retirement" within the meaning of Rule 5.6(a). Its primary purpose is not to provide for retirement benefits, but to create a vesting period for continued entitlement to a division of fees earned in the past. This vesting period is imposed on partners who do not retire; the fact that it is waived for those who do retire does not alter its impact on those who do not. Moreover, none of the factors relied on by the court in *Neuman* as showing the kind of agreement that is a true retirement agreement under this view is present here. The funds distributed here are profits from work already done, not work to be done; there is no requirement that entitlement to those distributions is limited to partners of conventional retirement, and the payment of the benefits is not spread "over the entire remaining lifetime of the retiring partner." *Neuman*, 715 A 2d. at 136 - 38.

[6] Presumably a partner who enters another field of endeavor has "retire[d] from the practice of law" and would thus be entitled to continue to receive the Management shares even if he or she left the firm before the two years had expired.

[7] We also do not believe that the fact that a lawyer need remain at the Merged Firm for only two years before being able to depart assured of continuing to receive the Management share makes a difference. Clients whose situations would improve if their counsel could change firms should not be asked to wait while their preferred counsel fulfills a two-year vesting period. It is possible that in setting the two-year period the drafters of the Receivables LLC documents sought to derive some comfort from footnote 13 in *Neuman*, 715 A.2d at 136. That footnote deals, however, with a provision in a retirement plan approved by the Court under which a retired lawyer could resume practice after two years of retirement and still receive retirement benefits from the lawyer's former firm. The Court describes that provision as having "limited anti-competitive effect". But under the retirement exception to Rule 5.6, when a lawyer retires is when a full restriction on the lawyer's right to practice is permitted. Thus, as a condition to the continued receipt of retirement benefits a law firm could demand a much longer period of restricted practice than two years, and it is only by comparison to that possibility that a two year restriction is "limited." A two year restriction on practice in the middle of a lawyer's career is not "limited."

loses the right to continue to receive Originator's shares. Indeed, the inquirer informs us that in the case of a partner entitled to an Originator's share who died, the payment of that share was indeed terminated. Upon inquiry from the deceased partner's estate, the Merged Firm stated that this treatment of Originators' shares existed because while under the compensation arrangements of the pre-merger Law Firm, partners were given recognition for matters that they "originated" (i.e., were responsible for bringing in to the firm), such an arrangement was no longer possible in the Merged Law Firm, and the LLC treatment of Originators' shares was created to mimic the compensation from these sources of income in the pre-merger Law Firm.

While we do not see the issue as wholly free from doubt, we conclude that the treatment of the non-"vested" Originators' shares also falls afoul of Rule 5.6. With respect to these shares, the Receivables LLC agreement conditioned the distribution of the previously earned assets of the pre-merger Law Firm, which was ending its business, so that they continued to be paid only as long as the pre-merger firm's ex-partners continued to practice at the designated new post-merger firm. If the pre-merger firm had simply wound up its affairs entirely, presumably the partners would have distributed this right to future income to themselves as individuals, unconditionally. But instead the partners of the pre-merger Firm conditioned the future distribution of that asset on continued practice with a new and different firm. Moreover, while the Originator's share ceases to be paid to a partner who leaves the Merged Firm for any reason, including illness, death, and retirement, this fact would have more force if it were applied by a law firm that was operating and continuing to operate its own practice. With a firm that is an ongoing practice, it makes basic sense to stop compensating partners who depart. But in the context of a firm that has wound up its affairs and sought nonetheless to exercise some future control over the distribution of previously earned assets, it would blink reality to fail to observe that death and disability are not voluntary departures and that retirement, while it may be delayed, is also ultimately largely involuntary. Thus the clear effect of the non-vesting feature of the Originators' shares is to discourage partners from *voluntarily* leaving the Merged Firm as long as the payments continue, and the primary route of voluntary departure is, as in the case of the inquirer, leaving to practice at another firm. We do not see why the future payout of a previously fully earned asset would be conditioned on a partner's staying with the Merged Firm unless the purpose of the condition were to incentivize the recipients to stay with the firm by depriving them of that previously earned asset if they left it. We believe that Rule 5.6(a) does not allow the partners of a firm that is winding up its affairs because the partners are, as part of a merger, joining a new firm, to use their former firm's assets to create financial disincentives to themselves to leave the new firm.

As just suggested we do not mean to imply that the same considerations apply when a firm has an ongoing practice and simply ceases to compensate lawyers who leave it. Firms whose method of current compensation takes account of contributions of partners in previous years, even identifying streams of income as having been attributable to partners' work in previous years and increasing their compensation by a portion of that amount, do not run afoul of the Rule simply because when a partner leaves the firm, regardless of the reason, the firm stops compensating that partner and thus does not continue to compensate the partner for continued benefit of his or her prior work to the firm. Firms benefit presently and in the future from the contributions of their partners, and the quantification of this as part of the compensation process is common and does not violate the Rule (at least not without more, such as some inequality of treatment that falls disproportionately on those partners who leave to compete with the firm). Any partner who leaves a firm that has such a compensation system cuts himself or herself off from future compensation at that firm, even where the departing partner contributed measurably to the continuing success of the firm and could have continued to participate in that success by remaining there. Thus, we do not conclude that an ongoing firm that cuts off elements of compensation at the time of a lawyer's departure from a firm, no matter what the lawyer intends to do after departure, necessarily violates Rule 5.6(a) merely because some departing lawyers would thereafter be competing with the firm, and we are not aware of any case or authority that so concludes.[8]

But in the matter now before us, the pre-merger Law Firm wound up its affairs and distributed its assets to the partners, yet the former partners sought to retain some control over those assets after distribution, and sought thereby to continue—for years into the future—to condition future entitlement of the former partners' right to receive payment on their continued work for the Merged Firm. It is this attempt by partners of the pre-merger Law Firm to continue to influence the future practices of partners some time after their departure from the pre-Merger Firm that leads us to conclude that treatment of this payment as well violates the Rule.

Adopted: October 2004
Published: December 2004

*Opinion No. 326*

**Referral of Person Adverse to a Client to Another Lawyer**

• When a lawyer is approached by a potential client about a representation adverse to an existing client, after declining the case, the lawyer may refer the potential client to another lawyer.

**Applicable Rules**

- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 4.3 (Dealing with Unrepresented Persons)

*Inquiry*

A lawyer is approached by a person seeking representation in a matter adverse to a party with whom the lawyer has an on-going lawyer-client relationship. After declining the representation, may the lawyer refer the person to another lawyer?

*Discussion*

Lawyers frequently decline representations but suggest the names of other lawyers who might represent the potential client. For example, a lawyer who is approached by a person seeking to write a will might refer that person to another lawyer or other lawyers who have expertise in trusts and estates law that the referring lawyer lacks. A lawyer who represents a client in a grand jury investigation might refer another person who has been subpoe-

[8] Compare comment b. to § 13(b) of the Restatement of the Law Governing Lawyers (2000), which discusses denial of "benefits" effective at the time of a lawyer's departure from a firm.

naed to testify before the grand jury to another lawyer or other lawyers to avoid a possible conflict of interest. But what are a lawyer's obligations when approached by a person who wants to sue an existing client? We assume, for purposes of this opinion, that the lawyer would decline the representation.[1] May the lawyer recommend another lawyer or a list of lawyers to the person who wishes to sue her client?[2]

*The Rules of Professional Conduct*

The District of Columbia Rules of Professional Conduct do not speak directly to this situation. Nor have we been able to find authority from other jurisdictions directly on point. Two Rules seem to be relevant indirectly. First, Rule 4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

> (a) give advice to the unrepresented person other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client . . .

Rule 4.3(a) contemplates a different situation than the inquiry under consideration, namely that the lawyer is already representing a client in a matter potentially adverse to the unrepresented person. The inquiry presumes either that the matter has not yet been initiated or that the lawyer does not represent the existing client in that particular matter.[3] Nor does the Rule address whether it is appropriate for the lawyer to recommend a specific lawyer or list of lawyers whom the unrepresented person might engage as opposed to advising the person that he needs to engage (unspecified) counsel. We can, however, distill from Rule 4.3(a) that a lawyer is permitted to advise an unrepresented person, adverse to her client, to retain counsel even though her client might gain a tactical advantage if the person remained unrepresented. Lawyers frequently give this advice and tell persons potentially adverse to their clients that they ought to engage counsel.

Rule 1.3 is also tangentially relevant. In addition to the requirement that a lawyer represent her client zealously and diligently within the bounds of the law, Rule 1.3(a) provides that "A lawyer shall not intentionally: . . . (2) prejudice or damage a client during the course of the professional relationship." The requirement that a lawyer not damage a client does not mean, however, that the lawyer must press for every conceivable tactical advantage. Comment [1] to Rule 1.3 provides that the duty of zealous representation does not require a lawyer to press for every advantage that might be realized for a client. Moreover, zealous representation must at times be tempered by the lawyer's obligation to the administration of justice. In fact, certain conduct that might arguably prejudice a client's case is mandatory under the Rules such as the requirement in Rule 3.3(a)(3) that the lawyer disclose adverse and dispositive legal authority adverse to the client's position, if her opponent overlooks it.

Recommending that an adverse person retain counsel does not constitute damage or prejudice to a client within the meaning of Rule 1.3(a). Rule 4.3(a) specifically permits such a recommendation. In the situation under inquiry, where the person has already determined to engage counsel prior to approaching the lawyer, such general advice would be superfluous. We do not believe that the further step of recommending a specific lawyer or list of lawyers prejudices the referring lawyer's existing client. We assume that in making such a referral, the lawyer will act in good faith and will recommend competent and independent counsel. First, the person would almost certainly find a lawyer even in the absence of a recommendation. Second, it would be mere speculation to conclude that the lawyer that the person might find on his own would not be as competent as the one recommended by the conflicted lawyer. The lawyer could be as good, better, or not as good as the one that the conflicted lawyer might recommend. Moreover, we cannot assume that it is disadvantageous to the referring lawyer's existing client for its adversary to be represented by competent counsel. Competent opposing counsel is likely in many cases to contribute to reaching a reasonable resolution of the dispute.

More basically, inherent in our adversary system is the principle that persons ought to be represented by competent lawyers and that disputes ought to be resolved on their merits. Assisting a person to obtain competent representation is entirely consistent with that principle. Once the issue is joined, a lawyer can and should take whatever lawful and ethical measures that are required to vindicate her client's position. Assisting an adversary to obtain competent representation, so that the issue can be joined, is not inconsistent with that duty. It is consistent, however, with the lawyer's obligation to the administration of justice. At times, the interests of the legal system and the public interest may prevail over that of the client, *e.g.*, Rule 3.3(a)(3). We believe that recommending competent counsel to an unrepresented person, can never constitute prejudice to a client within the meaning of Rule 1.3(a).

*Practical Considerations*

There are, however, some practical considerations to recommending counsel to a potential adversary of a lawyer's client. First, will the person trust the recommendation? Second, while the principles that underlie our adversary system may permit such a recommendation, some clients may not understand why their lawyer assisted an adversary to obtain counsel to sue them. Thus, as a matter of client relations, a lawyer may prefer not to make such a recommendation. Moreover, a prudent lawyer who elects to make a recommendation might be wiser to suggest more than one name to avoid recriminations from the inquirer, should the recommended lawyer prove unsatisfactory, or from her client, should the recommended lawyer turn out to be vexatious.[4]

The practical consideration relating to two other Rules merit discussion. There is always the possibility that in discussions with a potential client, a lawyer may learn confidences or secrets that the person does not want revealed.[5] If the

[1] Rule 1.7 generally prohibits the lawyer from accepting such a representation. It is possible, of course, for the lawyer to seek a waiver from the existing client (and the potential client) under Rule 1.7 and sue her client, if that existing client were represented by another lawyer in the matter.

[2] The most likely scenario is that the lawyer is approached by a potential plaintiff. She could also be approached by a defendant, already sued by her client who is represented by another lawyer in the matter. Presumably similar situations might arise in a non-litigation context such as a potential client who wants to retain counsel to represent him in a business transaction with the lawyer's existing client. In a non-litigation context, where the adversarial relationship is less stark, the existing client is less likely to be offended by its lawyer's referral of the potential client to another lawyer.

[3] If the lawyer represents the client in a matter already initiated, presumably the unrepresented person would not seek to engage the lawyer representing his adversary.

[4] It may not always be possible to recommend more than one lawyer. For example, if the person is seeking *pro bono* counsel, furnishing a list of names may be impractical.

[5] We assume that the lawyer discovers the conflict before forming a lawyer-client relationship. Whether such a relationship has been formed is a matter of substantive law. Comment [7] Rule 1.6. *See* ABA Formal Op. 95-390 (citing Restatement (Third) of the Law Governing Lawyers § 26 (Tent. Draft No. 5 1992) for the indicia of when a lawyer-client relationship arises.

lawyer does learn of these confidences or secrets and then realizes that the potential client is adverse to an existing client, she faces a dilemma: Under Rule 1.4, which concerns the lawyer's obligation to communicate with clients, she may have an obligation to inform her existing client that someone intends to sue it. In some circumstances the failure to inform the existing client could be damaging. Suppose, for example, the potential client seeks to bring a sexual harassment claim against her employer, an existing client, because of an on-going hostile environment. The client should want to know this as soon as possible so that it could investigate and if necessary remediate the situation. On the other hand, the potential client might not want to disclose to the lawyer's existing client that she is contemplating a lawsuit. Comment [7] to Rule 1.6, which prohibits, in general, the disclosure of confidences and secrets, makes it clear that the lawyer's duty of confidentiality attaches when the lawyer agrees to consider whether to take on a client. "Thus, a lawyer may be subject to a duty of confidentiality with respect to information disclosed by a client to enable the lawyer to determine whether representation of the potential client would involve a prohibited conflict of interest . . ." Presumably, most lawyers ascertain at the outset the name of the adverse party prior to discussing with a potential client a new matter. But if a lawyer neglects to do so or if a lawyer, particularly in a large firm, does not recognize at the outset that the adversary is a firm client, the lawyer may be seized with confidential or secret information.[6]

Under those circumstances, the specific obligation under Rule 1.6 not to reveal those confidences and secrets trumps the more general Rule 1.4 obligation to keep clients informed. Nevertheless, a lawyer who must refrain from telling her client information that the client would wish to know—even if the only "secret" was the potential client's contemplated suit—might hesitate before taking the steps of actually recommending counsel to the inquiring person. Many clients might find it difficult to understand that their lawyer not only failed to tell them they were about to be sued, but also recommended counsel to file that suit.

In sum, we believe that it is consistent with a concept of our adversary system, and not prohibited by the Rules of Professional Conduct, for a lawyer, if she chooses, to refer a person seeking representation to another lawyer, even if the representation would be adverse to the referring lawyer's existing client. Each lawyer must decide for herself whether under the particular circumstances this is a wise thing to do.

Adopted: December 2004
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*Opinion 327*

**Joint Representation: Confidentiality of Information Revisited**

• Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer *may* reveal the confidence or secret. Here we conclude that the lawyer *must* do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.

**Applicable Rules**

- Rule 1. 3 (Diligence and Zeal)
- Rule 1. 4 (Communication)
- Rule 1. 6 (Confidentiality of Information)
- Rule 1. 7 (Conflict of Interest)
- Rule 1. 16 (Terminating Representation)

*Inquiry*

The inquiry comes from a law firm that has succeeded to the representation of several clients who had been represented by a prior firm. The prior firm had originally represented multiple clients in the same matter. In its retainer agreement, the prior firm had explained to all of the jointly represented clients that it was "understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent."[1] After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets.

*Discussion*

In Opinion No. 296, we concluded that the mere fact of joint representation, without more, does not provide a basis for a lawyer to conclude that the client has impliedly authorized disclosure of confidences or secrets to another client. "Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client." D.C. Ethics Op. 296.[2] Under

[6] Under some circumstances, disclosure of confidential information by a potential client that might be useful to the representation of an existing adverse client, might disqualify the lawyer from representing the existing client in the matter adverse to the potential client. Comment [7], Rule 1.10. *See* N.Y. Eth. Op. 643, 1993 WL 57240 (N.Y. St. Bar Assn. Comm. Prof. Eth.) (a confidence revealed in an intake interview of prospective client relevant to representation of existing client requires withdrawal from existing representation and separate lawyers for each client.) Fl. Eth. Op. 92-1, 1992 WL 602798 (Fla. St. Bar Assn.) (presuming confidential information is always obtained in Legal Aid intake interview). A conflict obtained as a result of learning confidential information in deciding whether to enter into a representation is not imputed to other associated lawyers when no lawyer-client relationship is formed. Rule 1.10(a) and Comment [7].

[1] The retainer agreement defined the term "Other Individuals" by listing the names of those individuals whom the prior firm "may represent."

[2] We do not read D.C. Ethics Op. 296 to suggest that privileged information provided by one client during the course of a joint representation (that is also relevant to the joint representation) remains privileged in a subsequent dispute between the two clients. Such an interpretation would appear to be inconsistent with District of Columbia law. *See Griva v. Davison*, 637 A. 2d 830, 847-48 (D.C. 1994) (with respect to matters known at the time of communication to be in the common interest of an attorney's two clients,"'a communication by A to X as the common attorney of A and B, who afterwards become party opponents, is not privileged as between A and B since there was no secrecy between them at the time of communication.'") (quoting 8 J. Wigmore, *Evidence* § 2312 at 605-06 (McNaughton rev. ed. 1961)) (citing *Eureka Inv. Corp., N. V. v. Chicago Title Ins. Co.*, 743 F. 2d 932, 937 (D.C. Cir. 1984)).

such circumstances, the lawyer's only option is to seek consent of the disclosing client to share the information or ask the client to disclose the information directly. If the client refuses, the resulting conflict of interest requires the lawyer's withdrawal.[3]

The inquirer presents a variation on the question addressed in Opinion No. 296: in contrast to the earlier opinion, where we recognized that "[t] he retainer agreement did not address the impact of joint representation on client confidences or seek consent for the Firm to share confidences of one party to the joint representation with the other," *id.* at 174, the retainer agreement here expressly provided that information disclosed in connection with the representation "may be shared" with the other clients in the same matter. The question raised by this inquiry, however, is not whether the information "*may*" be shared but whether it "*must*" be shared. Rather than seeking permission to disclose the confidential information (which is the way this issue has often arisen in other jurisdictions), the prior firm has refused to reveal the information. The issue we now consider is whether, under the specific facts presented here, the prior firm has an affirmative obligation to disclose.[4]

When one client provides a lawyer with material information and makes clear (either directly or indirectly) that such information is not to be communicated to another, jointly represented client, the lawyer faces a potential conflict. If the information is relevant or material to the other client, the failure to disclose it would compromise the lawyer's duties of loyalty (D.C. Rules 1.3(b) & 1.7(b)), diligence (D.C. Rule 1.3(c)), and communication (D.C. Rule 1.4) to that other client. On the other hand, sharing the information would compromise the communicating client's expectations of confidentiality and risk impairing that client's trust in the lawyer. *See generally Restatement of the Law Governing Lawyers* § 60, cmt. *l* (2000) ("*Restatement*") (discussing the lawyer's "dilemma"). Because the lawyer simply cannot continue in the representation without compromising either the duty of communication to the non-disclosing client or the expectation of confidentiality of the disclosing client, the lawyer must ordinarily eliminate the conflict by withdrawing.[5]

> In a comment to its Model Rule 1.7, the ABA makes this point expressly:
>
> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. *See* Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7, Comment [31].

At least one jurisdiction has recognized that a lawyer under such circumstances has broad discretion to disclose confidential information before withdrawing. In *A. v. B.*, 726 A. 2d 924 (N. J. 1999), the New Jersey Supreme Court considered whether a law firm, which jointly represented a husband and wife in drafting wills in which they devised their respective estates to each other, may disclose to the wife the fact that the husband had recently fathered an illegitimate child. The law firm's retainer letter explained that information provided by one spouse could become available to the other. "Although the letter did not contain an express waiver of the confidentiality of any such information, each spouse consented to and waived any conflicts arising from the firm's joint representation." *Id.* at 925. The information was clearly relevant to the wife because, as the court explained, "[t]he wife's will leaves her residuary estate to her husband, creating the possibility that her property ultimately may pass" to his illegitimate child. *Id.* at 926.

The law firm became aware of the husband's illegitimate child after the wills were executed.[6] The law firm wrote to the husband that it believed it had an ethical obligation to disclose to the wife the existence (but not the identity) of the child on the grounds that it needed to inform the wife that her current estate plan might devise a portion of her assets through her spouse to that child. The law firm urged the husband to inform his wife and that, if he did not, the law firm would do so. The husband refused and obtained an injunction from the appellate division to prevent the law firm from disclosing to the wife the existence of the child.

The Supreme Court reversed. New Jersey's Rule 1.6 "permits, but does not

[3] Whether the lawyer must withdraw from representing all clients or only from clients other than the disclosing client depends (at least in part) on whether the lawyer's retainer agreement permits the lawyer to continue to represent only one or some of the parties. *See, generally,* D.C. Ethics Ops. 317 & 296. In the inquirer's case, the retainer agreement permitted the prior firm to continue to represent the client whose confidential information precipitated the conflict: "A judgment by us that you or one of the Other Individuals should seek separate counsel would be a judgment solely within our discretion, and the party who in our sole determination should seek separate counsel waives any objection to our continuing representation of the other party or parties in any matter including the one presenting the conflict, and for any purpose, including in connection with asserting position on behalf of our continuing client(s) that are or may be directly adverse to the individual seeking separate counsel."

[4] We are assuming in this opinion that the information that caused the prior firm to withdraw constituted, in fact, a client "confidence" or "secret. " If the information prompting the withdrawal were not a confidence or secret, there would clearly be nothing to balance against the prior firm's duty of loyalty to the non-disclosing clients and its duty to keep those clients "reasonably informed about the status of [the] matter." D.C. Rule 1.4(a); *see also* D.C. Rule 1.16, Comment [10] (upon withdrawal, "a lawyer must take all reasonable steps to mitigate the consequences to the client"). We are also assuming that the confidence or secret is relevant or material to the representation of the other clients. If the information were not relevant or material to the prior firm's representation of the other clients, then there would be no duty under D.C. Rule 1.4 to disclose such information to the other clients.

[5] Typically, our rules require a lawyer withdrawing under such circumstances simply to give "notice of withdrawal, without elaboration," D. C. Rule 1.6, Comment [19]. However, there is an exception permitting a lawyer, upon withdrawing, to "retract or disaffirm any opinion, document, affirmation or the like that contains a material misrepresentation by the lawyer that the lawyer reasonably believes *will be relied* upon by others to their detriment." *Id.* (emphasis added). The language of the comment makes clear that this requirement is not mandatory: "[A]fter withdrawal under either Rule 1. 16(a)(1) or Rule 1.16(b)(1) or (2), the lawyer *may* retract or disaffirm any opinion, document [etc. ] . . . ." D. C. Rule 1.6 Comment [19] (emphasis added). We made clear in Opinion No. 296, however, that such a "noisy" withdrawal disaffirming earlier written statements is permissible only "if there is a reasonable basis to expect that future harm may occur without such disavowal." D. C. Ethics Op. 296. In the absence of such a reasonable basis, the most the lawyer may do is "to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose." *Restatement* § 60, cmt. *l.*

[6] The law firm learned of the husband's paternity because the mother of the illegitimate child had coincidentally retained the same law firm to pursue a paternity action against the husband. As a result of a clerical error, the law firm did not become aware of the conflict until discovery had commenced in the paternity suit. Upon learning of the conflict, the law firm immediately withdrew from representing the mother, informing her that the law firm was representing both the husband and wife in an unrelated matter.

require, a lawyer to reveal confidential information to the extent the lawyer reasonably believes necessary 'to rectify the consequences of a client's criminal, illegal *or fraudulent act* in furtherance of which the lawyer's services had been used.'" *Id.* at 927 (quoting NJ RPC 1. 6(c)) (emphasis added).[7] The court construed the term "fraudulent act" to apply in this situation: "[T]he husband's deliberate omission of the existence of his illegitimate child constitutes a fraud on his wife. When discussing their respective estates with the firm, the husband and wife reasonably could expect that each would disclose information material to the distribution of their estates, including the existence of children who are contingent residuary beneficiaries. The husband breached that duty." *Id.* Under New Jersey law, therefore, the law firm was permitted to disclose the confidential information.[8]

The court considered and then distinguished two decisions from other jurisdictions that had prohibited disclosure to co-clients. The Florida State Bar Association's Committee on Professional Ethics had considered a factual situation similar to the one in New Jersey: Lawyer had prepared wills for both Husband and Wife and then subsequently learned from Husband that he had executed a codicil that made substantial beneficial disposition of his estate to a woman with whom he had been having an extramarital relationship. *See* Florida Formal Op. 95-4 (1997). Lawyer had never discussed with Husband and Wife whether confidential information learned from the one would be shared with other. Under these circumstances, the Florida Bar concluded that not only is Lawyer "not ethically required to disclose the information to Wife" but "Lawyer's ethical obligation of confidentiality to Husband *precludes* Lawyer from disclosing the information to Wife." *Id.* at 3. Indeed, the Florida Bar expressly rejected the discretionary approach favored in the *Restatement*.

> Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

*Id.* at 5-6

The New York State Bar Association's Committee on Professional Ethics came to the same conclusion. According to the Committee, a lawyer representing a two-person partnership may not inform one of the partners that the other had, in a conversation that was expressly deemed to be "in confidence," advised the lawyer that he was actively breaching the partnership agreement.[9] The Committee concluded that, in the absence of prior consent by the clients to the sharing of all confidential communications—and because the disclosing client had "specifically in advance designated his communication as confidential" and the lawyer did not indicate that any information would be shared with the other client—the lawyer may not disclose to the co-client the communicating client's statement. *See* New York State Bar Op. 555, at 6 (1984).[10]

The New Jersey Supreme Court distinguished both of these prior decisions on the ground that "the New York and Florida disciplinary rules, unlike [New Jersey's] RPC 1.6, do not except disclosure needed 'to rectify the consequences of a client's . . . fraudulent act in the furtherance of which the lawyer's services had been sued.'" *A. v. B.* 726 A.2d at 931. Moreover, the husband and wife in the New Jersey case, "unlike the co-clients considered by the New York and Florida Committees, signed an agreement suggesting their intent to share all information with each other." *Id.*[11]

We have already approved of the approach of the New York and Florida committees. See D.C. Ethics Op. 296. And, unlike New Jersey's version of Rule 1.6 and the current Model Rule—which permit the disclosure of client confidences to rectify the consequences of a client's fraudulent act—the D.C. Rule includes far narrower exceptions: to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or to prevent bribery or intimidation of persons involved in proceedings before a tribunal. *See* D.C. Rule 1.6(c).

In addition, of course, D.C. Rule 1.6 permits a lawyer to use or reveal a client confidence or secret with the consent of the client, after full disclosure. *See* D.C. Rule 1.6(d)(1). As we made clear in Opinion No. 296, a lawyer needs "to obtain written consent from both clients that the lawyer may divulge to each client all confidences received during the course of the retention that relate to the representation. " D.C. Ethics Op. 296, at 175. According to the inquiry, the prior firm had made clear to each of its clients that information provided in connection with the representation "may be shared" with co-clients.

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[7] *A. v. B.* was decided in 1999. At that time, the ABA's Model Rule 1.6 permitted a lawyer to reveal confidential information to the extent that the lawyer reasonably believed necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or to the extent necessary to allow lawyers to defend themselves against charges of misconduct or malpractice lodged by clients or former clients. Model Rule 1.6 has since been amended twice. First, in 2002, the rule was changed to allow lawyers to reveal confidential information when they, themselves, are seeking legal advice about their compliance with the rules and when necessary to comply with other law or court order. Second, in 2003, Model Rule 1.6 was amended to recognize that confidential information may be revealed to prevent future fraud or harm from past fraud. Under the current version of Model Rule 1.6, lawyers may reveal confidential information to the extent they reasonably believe necessary "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;" and "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services. " ABA Model Rule 1.6(b)(2), (3) (2003). As a result of these amendments, Model Rule 1.6 now closely resembles New Jersey's Rule 1.6. D.C. Rule 1.6, however, has not been amended, so it does not recognize any of the fraud exceptions found in the New Jersey rule or in the current version of the Model Rule.

[8] The court also relied on the *Restatement*, which "reposes the resolution of the lawyer's competing duties within the lawyer's discretion." *Id.* at 929; *Restatement* § 60, cmt. *l* ("after consideration of all relevant circumstances, [the lawyer] has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy").

[9] The Committee determined that, given the size of the partnership, it was reasonable to view "the particular situation here presented as one where the partners are joint clients of the lawyer." NY State Bar Ass'n, Comm. on Prof. Ethics Op. 555, at 2.

[10] *See also* NY City Bar Ass'n, Formal Op. 1999-07 (1999) (holding that lawyer's duties of confidentiality and loyalty mandate that lawyer refuse to provide information to one former client to the detriment of the other former client).

[11] *See also* Philadelphia Bar Ass'n, Op. No. 94-8 (1994) (concluding that, where circumstances support the conclusion that clients impliedly authorized lawyer to disclose confidential information to one another, the lawyer is not prohibited from disclosing such information). The New Jersey Supreme Court recognized a third basis for distinguishing its case from the prior two—namely, that the law firm learned of the husband's paternity from a third party, not from the husband himself, so "the husband did not communicate anything to the law firm with the expectation that the communication would be kept confidential." *A. v. B.*, 726 A. 2d at 931.

We believe that this constitutes consent, authorizing the prior firm to disclose confidential information learned during the course of the representation that may be relevant or material to its representation of another client in the same matter.[12]

The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter,[13] the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. Our rules provide that a "lawyer *shall* keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." D.C. Rule 1.4(a) (emphasis added). Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance.[14]

It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. Under such circumstances, the lawyer can generally withdraw from representing the disclosing client and continue to represent the other clients. Here, by contrast, the prior firm apparently received information that it knew the disclosing client did not wish revealed to the other clients.[15] Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients.

Finally, we wish to emphasize that this inquiry raises anew the concerns we have expressed elsewhere about the hazards of representing multiple clients in the same matter. *See, e.g.*, D.C. Ethics Ops. 217, 232, 265 & 301. By agreeing to undertake the representation of multiple clients and by obtaining a limited waiver of confidentiality, lawyers may expose themselves to significant risks. As we have concluded here, a lawyer violates the D.C. Rules of Professional Conduct when her or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure.

Inquiry No. 04-04-16
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[12] We are mindful of the concerns we expressed in Opinion No. 309 about the "considerable potential for mischief" when advance waivers of confidentiality are read too broadly. However, we do not treat the waiver of confidentiality at issue here as an "advance waiver" because a confidentiality waiver given as part of an agreement for representation by a single lawyer of multiple clients is more in the nature of a *current*, rather than an advance, waiver. *See* D.C. Ethics Op. 309, nn. 3 & 10.

[13] Disclosure of client confidences is permissible not only when the client expressly consents but also "when the lawyer has reasonable grounds for believing that a client has impliedly authorized disclosure of a confidence or secret in order to carry out the representation." D.C. Rule 1. 6(d)(4).

[14] It is worth emphasizing that our opinion turns on the specific circumstances created by the prior firm's retainer agreement. If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the "default" rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. *See* D.C. Ethics Op. 296. But by contracting around this "default" rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstances—where the disclosing client has effectively consented to the disclosure—an attorney's subsequent refusal to share such information with the other clients violates the *D.C. Rules of Professional Conduct*.

[15] It appears that the lawyer described in the New York State Bar Association's Opinion No. 55 acted similarly when he represented a two-person partnership yet entered into a conversation expressly deemed to be "in confidence" with only one of the partners.

*Opinion No.328*

**Personal Representation of Constituents of an Organization, Including Individuals Who Participate in an Organization's Governance**

• An attorney representing a constituent of an organization personally, should make clear at the outset of the representation when he or she does not represent the organization as an entity. The lawyer should ensure that the client, as well as non-client constituents of the organization with whom the lawyer may interact, understand the lawyer's role.

Further, in view of the pervasive nature of confidential information of the organization to which such a lawyer is likely to be exposed, in determining whether it is permissible to subsequently undertake matters that are adverse to the corporation, the lawyer must consider whether the organization is a "*de facto* client" for purposes of assessing potential conflicts of interest. The analysis is similar to that where a lawyer represents a subsidiary or other affiliate of a corporation.

Ideally, the lawyer should expressly address these issues with the client at the outset of the representation and incorporate the understanding in the retainer agreement.

**Applicable Rules**

• Rule 1.7 (Conflict of Interest: General Rule)
• Rule 1.8(e) (Conflict of Interest: Prohibited Transactions)
• Rule 1.9 (Conflict of Interest: Former Client)
• Rule 1.13 (Organizations as Clients)

*Inquiry*

With the recent heightened scrutiny and increasing accountability of persons who participate in corporate governance, and the resulting concerns among such persons as to their potential personal liability or other exposure to legal risk, such individuals may choose with greater frequency than in the past to retain independent counsel to protect their personal interests. Such persons could include board members, corporate officers, or groups of persons who serve on audit committees of the board of directors or other "special committees" of the board set up to ensure compliance with the directives of the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201. These personal representations must be distinguished from those in which

the lawyer has an organization as a client and, in carrying out that role, assists constituents of the organization in meeting their duties to the entity.[1]

We address here only personal representations in which individual organizational constituents may have interests which are potentially diverse from the interests of the organization as an entity.[2] The inquiry is how such a lawyer should interact with the organization, both with regard to carrying out that representation and in assessing conflicts of interest in accepting new matters that may be adverse to the organization.

*Discussion*

*I. Establishing the Representation*

Obviously, representation of an organization qua organization and representation of a constituent of an organization personally are not the same thing. Under Rule 1.13, when a lawyer represents an organization, the lawyer-client relationship is with the organization as an entity and not its constituents. Comment 13 to Rule 1.7 states in part: "As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or 'other constituents.'" Conversely, when a lawyer represents a constituent personally, that will typically arise because of a perceived potential disparity of interest with the organization, and the representation will be of the constituent only.[3]

A lawyer's failure to give sufficient consideration to the distinction between these two types of representation can by itself unwittingly cause a change in how the representation will be treated. For example, a lawyer's receipt of sensitive information from an unwary constituent can result in a *de facto* representation of the constituent where that had not been intended by the lawyer. Comment 14 to Rule 1.7 states:

> [T]here may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client. See generally ABA Formal Opinion 92-365.

At the outset of a representation, therefore, the lawyer must determine which of these two types of representation he is being asked to undertake and then fully inform the prospective client of the distinction. The lawyer and prospective client should then reach a clear understanding as to which type of representation is desired.[4] Failure to address this at the beginning of the representation can impair the lawyer's ability to carry out the client's goal. Having decided which type of representation to undertake, the lawyer's conduct should then be consistent with that decision.

*II. Carrying Out a Personal Representation*

This Committee has previously addressed issues related to the implications of a lawyer's representation of an entity for his or her obligations to related entities and persons. *See* D.C. Ethics Opinion 216 (1991) (Representation of Closely Held Corporation in Action Against Corporate Shareholder); D.C. Ethics Opinion 269 (1997) (Obligation of Lawyer for Corporation to Clarify Role in Internal Corporate Investigation); D.C. Ethics Opinion 305 (2001) (Ethical Considerations Arising From Representation of Trade Association).

In Opinion No. 269, we addressed a corporate lawyer's obligations when conducting an internal investigation of a corporation. In a portion of that opinion, we also discussed the lawyer's obligation when he or she represents a constituent of the corporation, but not the corporation itself:

> Where such representation is of the constituent alone, that person is the lawyer's sole client, just as the lawyer representing the corporation has that entity as his sole client. The lawyer has no attorney-client relationship with the person paying the lawyer's fees, and the lawyer must take care that his activities on behalf of his client are not influenced by that person. *Id.* And as regards attorney-client confidentiality, that obligation is owed to the constituent-client only, and not to the person paying the lawyer's fees. *Id.*

Thus, when representing a constituent who participates in an organization's management, a lawyer should be sensitive to the false impression that because he has been welcomed into the inner sanctum of an organization, he is a "safe" person for non-client constituents to speak with and that his loyalty to the organization can be assumed. It is incumbent upon an attorney in that situation to make clear to other organization constituents who are not his client, before being asked to convey information that may constitute corporate confidences or secrets, that the lawyer's interests may be separate from those of the entity.

All this does not mean, however, that a client-constituent's potential adversity to an entity will always be as harsh or direct as the adversity of an outsider, for the adversity may be tempered by the constituent's legal obligations to the entity. Thus, the lawyer, as the client's agent, should bear in mind the hazards of assisting a client in violating any of the client's obligations to the entity because that could increase, rather than lessen, the client's potential liability. The client's obligations may include, depending on various circumstances and applicable law, a duty to maintain trade secrets or other confidential information. "Whistle-blower" laws may or may not apply to various organizations and various circumstances. Thus, a lawyer for a constituent may carry some obligation to protect the interests of the organization because his client may have such obligations.

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[1] That the corporation or other entity is responsible for the payment of the lawyer's fee is not determinative. Rule 1.8(e) provides as follows with respect to payment of fees from someone other than the client:

> (e) a lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client consents after consultation;
>
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information relating to representation of a client is protected as required by Rule 1.6.

[2] Thus, we do not address circumstances in which a lawyer represents an organization, and in doing so, assists a constituent whose interests are identical to those of the organization.

[3] On occasion, however, dual representation of an organization and a constituent can take place. Specifically, Rule 1.13(c) states:

> 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.

[4] As noted above, in rare instances a dual representation may be appropriately intended and effectuated. These representations should similarly be defined in scope.

The lawyer should consider these factors and chart a course that is consistent with his client's interests and the client's legal duties to the organization.

*III. Undertaking New Matters Adverse to the Organization*

Finally, we address the extent to which a lawyer who represents, or has represented, an organization's constituent on a personal basis properly can undertake new matters that are potentially adverse to the organization. In other words, we now discuss whether, for conflict of interest purposes, the lawyer should consider the organization as the client, even though the lawyer represented only the constituent.

Rule 1.7(b)(1) provides:

> Except as permitted by paragraph (c) below, [related to consent] a lawyer shall not represent a client with respect to a matter if:
>
> (1) That matter involves a specific party or parties, and a position to be taken by that client in that matter is adverse to a position taken or to be taken *by another client* in the same matter, even though that client is unrepresented or represented by a different lawyer. (Emphasis added.)

As discussed above, if the lawyer represents an organization's constituent *personally* then the entity itself is not "another client" under Rule 1.7(b)(1) in a literal or automatic sense. The inquiry, however, must go deeper and examine the *de facto* relationships that arise out of the representation. Indeed, there are many apt analogies in converse situations, in which a lawyer's representation of a large entity has been deemed to impact potential conflicts with constituents of the entity. We believe these situations are pertinent to an analysis of the present inquiry.

In addition, apart from the potential existence of a direct conflict under Rule 1.7(b)(1), a lawyer representing a constituent, and considering a new representation adverse to the organization, should also consider whether his or her representation creates a conflict under Rule 1.7(b)(2), 1.7(b)(3) or 1.7(b)(4).[5] Comment 14 to Rule 1.7 frames the issue well:

> The propriety of [undertaking a new] representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs(b)(2) through (b)(4) of this rule. Thus, absent consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:
>
> (a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client.
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or
>
> (c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

Similarly, in Opinion No. 305, this Committee stated that representation of a trade association does not *per se* create an attorney-client relationship with all members of the trade association, but also does not *per se* preclude it. Instead, the surrounding circumstances, including the existence of disclosures of confidential information to the lawyer, must be assessed:

> [D]etermining whether and to what extent the individual member has become a client requires careful examination of all of the circumstances of the firm's relationship to and representation of the trade association." ABA Ethics Op. No. 92-365. An attorney-client relationship may be formed in the absence of an express agreement, and is "not dependent on the payment of fees [or] . . . upon the execution of a formal contract." *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1317 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978). What is most important is whether the member of the trade association disclosed confidential information to the association's lawyer, and the surrounding circumstances and expectations. ABA Ethics Op. No. 92-365. *See also Westinghouse*, 580 F.2d at 1319-1320; *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d. Cir. 1981).

In ABA Formal Opinion No. 95-390, "Conflicts of Interest in the Corporate Family Context," the ABA stated:

> [W]hen a lawyer is considering whether he can assume the representation adverse to a corporate affiliate of a client, he must consider not merely the terms of his engagement to that client but in addition whether the circumstances are such, that the affiliate has reason to believe, on the basis of the lawyer's dealings with it, that it has a client-lawyer relationship with the lawyer.

When the constituent is a high-level official in the organization, it is significant that he may be embedded in the highest level of the decision-making process. Accordingly, it is likely that a lawyer representing such a constituent will be privy to information as to the organization as a whole and its finances, and may acquire knowledge of matters that are of great sensitivity to the organization.

Accordingly, in applying the test of accessibility to confidential client information, a lawyer representing such a constituent may find himself or herself privy to such knowledge. Given the cross-fertilization with upper management and the sensitivity of the issues likely to be encountered in such a representation, the organization may have a reasonable expectation that the lawyer will not be adverse to it in another matter. While again, the determination will be fact-dependent, the lawyer representing a highly placed constituent should be sensitive to such potential conflicts.

Finally, once the constituent represented personally has become a former client rather than a current client, Rule 1.9, rather than Rule 1.7, will apply.[6] Here again, the test for whether the organization should be deemed a "former client" for purposes of this rule should be the same as for Rule 1.7 discussed above. In the case of a former representation, however, there will be the additional factor of

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[5] Those portions of the rule provide:

> Except as permitted by paragraph (c) below, [related to consent] a lawyer shall not represent a client with respect to a matter if: . . .
>
> (2) Such representation will be or is likely to be adversely affected by representation of another client;
>
> (3) Representation of another client will be or is likely to be adversely affected by such representation; or
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

[6] Rule 1.9 provides as follows:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

whether the new matter is "substantially related" to the prior matter. *See* Comment 2 to Rule 1.9.

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*Opinion 329*

**Non-Profit Organization Fee Arrangement With an Attorney to Whom It Refers Matters**

• An arrangement by a non-profit organization to pay an attorney an annual $10,000 retainer fee for handling small compensation claims for day laborers on a contingent fee basis and then receive back the first $10,000 the attorney receives each year in fees to cover the organization's costs does not violate Rule 5.4(a) so long as the reimbursements are restricted to recouping out of pocket expenses and are not tied to the amount of fees collected by the attorney in the representation of a particular client or clients.

**Applicable Rules**

• Rule 5.4(a) (Lawyer May Not Share Legal Fees With a Non-Lawyer)
• Rule 7.1(b)(5) (Consideration May be Paid by a Lawyer to an Intermediary for the Referral of Legal Business)

*Inquiry*

The inquirer, a District of Columbia non-profit entity, would like to assist day laborers in pursuing small workers' compensation claims. The non-profit has learned from experience that the day laborers have a difficult time finding competent counsel who are willing to provide representation in these types of cases. To help facilitate adequate representation, the non-profit proposes to pay a qualified attorney a $10,000 annual retainer for handling these matters; allow the attorney to take a 10 percent contingency fee from client awards; and then require the attorney to pay the non-profit the first $10,000 he receives in contingent fees each year to permit it to recoup its out-of-pocket retainer costs. Other than recouping out-of-pocket costs, the financial arrangement the non-profit has with the attorney is not in any way tied to the amount of fees collected by the attorney in the representation of a particular client. The non-profit has asked the Committee to opine whether this arrangement complies with the DC Rules of Professional Conduct. The Committee concludes that it does for the reasons set forth below.[1]

*Discussion*

Rule 5.4(a) of the DC Rules states that "a lawyer or law firm shall not share legal fees with a non-lawyer" except in certain narrow circumstances not pertinent to this inquiry. This provision could be interpreted to preclude a lawyer from ever sharing a portion of the fees that the lawyer receives from a client with an organization that made the referral. DC Rule 7.1(b)(5), however, indicates otherwise. It specifies that referral fees arrangements with intermediaries can be proper if the lawyer "takes reasonable steps to ensure that the potential client is informed of: a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and b) the effect, if any, of the payment to the intermediary on the total fee to be charged." In addition, Comment 6 to Rule 7.1 notes that "a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs."

There appears to be an inherent conflict, therefore, between the flat prohibition on fee-sharing between lawyers and non-lawyers found in Rule 5.4 and the implied acceptance of sharing fees with non-lawyers found in Rule 7.1. Numerous ethics opinions here and in other jurisdictions have examined this conflict to determine whether fee-sharing arrangements are permitted under certain circumstances. Generally, these opinions have looked to the public policies that underlie Rule 5.4 and have determined that the arrangements are permissible if they comply with them. In reaching this conclusion, the ethics opinions, including one by this Committee, have focused on two of the policy considerations: 1) whether a proposed arrangement would interfere with a lawyer's independent judgment; and 2) whether refusing to permit the arrangement would result in fewer legal resources being available for those in need of them.

This Committee opined in 2001 that a lawyer may "participate in a federal government referral service that negotiates contracts to provide legal services to federal agencies where that program requires the lawyer to submit one percent of the legal fees received through the service to the government office in order to fund the program." D.C. Legal Ethics Comm., Op. 307 (2001). The Committee concluded that the arrangement was acceptable even though it would involve fee-sharing between lawyers and non-lawyers because of the policy considerations underlying the rule. *Id.* The Committee noted that Comment 6 to Rule 7.1 "suggests that the drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely on them for business referrals to influence those lawyers' 'professional independence of judgment.'" *Id.* (citing Rule 5.4 cmt. 1). The Committee then concluded that the proposed arrangement obviated this concern because the inquiring organization presented "no risks of interfering with participating lawyers' independent professional judgment." *Id.*[2] In addition, the Committee pointed out that the referring organization "is a non-profit service aimed at achieving important public policy objectives, including holding down the cost to taxpayers of legal services provided to government agencies." *Id.*[3]

Opinion 307 cited several opinions from other jurisdictions that have also permitted fee-sharing between lawyers and non-lawyer non-profits. For example, it referred to a Michigan decision that held that "a not-for-profit lawyer

[1] For the purposes of this Opinion, the Committee is assuming that the non-profit is not otherwise profiting from its relationship with the attorney. Under § 32-1530 of the D.C. Code, it is unlawful for a person to make it a "business" to solicit employment for a lawyer in respect of any claims or award for workmen's compensation. The arrangement as described to the Committee would not be proscribed by this Code provision.

[2] D.C. Legal Ethics Comm., Op. 233 also addresses the policies behind the ban on fee-sharing: "The bans on fee-sharing and partnerships with nonlawyers have long been a feature of codes of legal ethics. They were motivated by a number of concerns, chiefly that nonlawyers might through such arrangements engage in the unauthorized practice of law, that client confidences might be compromised, and that nonlawyers might control the activities of lawyers and interfere with the lawyers' independent professional judgment." In the opinion, payments of "success" fees to non-lawyer consultants were acceptable even though the payments were passed through a law firm because the payment procedure was "a formality of no consequence." D.C. Legal Ethics Op. 233 (1993).

[3] *See also* D.C. Legal Ethics Comm., Op. 253 (1994) (holding that a referral arrangement between an insurance company and a law firm that involved payments made for each referred case "would not run afoul" of rules 5.4 and 7.1 even though the referral fee "would be paid by the firm from its percentage contingency fee," but that the arrangement could fail if there are potential conflict of interest problems under rules 1.7 and 1.3).

referral service registered with the state bar may charge as a referral fee a percent of the fee collected by the referred." Mich. State Bar Comm. on Prof. and Judicial Ethics, Op. RI-75 (1991). In rendering its opinion, the Michigan committee pointed to the same policy reasons for its decision, noting that so long as the referral service takes measures to protect against undue influence on the lawyers, "the professional judgment of the lawyer is not interfered with and the rule against fee-splitting with nonlawyers is not violated." *Id.*

Opinion 307 also referred to Pennsylvania, Arkansas and Virginia opinions which concluded that lawyer referral services operated by local bar associations may accept a percentage of fees earned by lawyers from referred clients. *See* Pa. Bar Ass'n Ethics Op. 93-162 (1993); Ark. Bar Assoc., Op. 95-01 (1995); and Va. Legal Ethics Comm. Op. 1744 (2001). These opinions noted that a number of jurisdictions help fund their legal referral services through the return of fees from referred lawyers. The Arkansas Bar Association further stated that "the increase in revenue produced for the Bar Association will help maintain this public service." Ark. Op. 95-01. The Virginia opinion also provides support for the idea that fee-sharing is permissible when the arrangement would not interfere with a lawyer's professional judgment and furthers the public policy of providing legal services to those in need of them. It concluded that a private practitioner who received pro bono work from a non-profit association could return court-awarded attorney's fees to the association. Va. Legal Ethics Comm. Op. 1744 (2001). In reaching this conclusion, the committee pointed out that "a legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding." *Id.*[4]

The American Bar Association has indicated on at least three occasions that similar fee sharing arrangements did not violate its earlier Code of Professional Responsibility. In Formal Opinion 291, the ABA determined that "a bar association may require members of a lawyer referral panel to help finance the service either by a flat charge or a percentage of fees collected." ABA Formal Op. No. 291 (1956). In addition, the ABA concluded that it was "ethically proper" for a lawyer referral service to require attorneys to return all or part of consultation fees, as well as a percentage of fees earned, to the service. ABA Informal Op. 1076 (1966). Finally, Formal Opinion 93-374 noted that a lawyer may perform pro bono litigation services and then share a portion of any court awarded fees with the non-profit organization that referred the lawyer to the client. ABA Formal Op. 93-374 (1993).

The Restatement of the Law Governing Lawyers reflects the same view that concerns about fee-sharing are not present when fees are shared with a referring non-profit organization. The Restatement contains a provision similar to Rule 5.4(a) of the D.C. Rules. *See* Restatement (Third) of The Law Governing Lawyers § 10(3) (1998) ("a lawyer or law firm may not share legal fees with a person not admitted to practice as a lawyer," except in certain irrelevant circumstances). Comments to Section 10 indicate that the fee-sharing prohibition should only be interpreted strictly where policy concerns warrant a narrow interpretation. Comment b notes, for example, that "this section should be construed so as to prevent non-lawyer control over lawyers' services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that non-lawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons." *Id.* § 10 cmt. b. In addition, the comments note that although fee-sharing gives power to the non-lawyer referrer, "that incentive is not present when the referral comes from a nonprofit referral service." *Id.* at cmt. d.[5]

Case law provides further support for the view that sharing fees between a lawyer and a referral service is acceptable under the various rules of professional conduct. In *Emmons v. State Bar of California*, 6 Cal. App. 3d 565 (1970), for example, a California court denied the plaintiff's request for a declaratory judgment that would allow the plaintiff to avoid paying a one-third referral fee to the bar association's lawyer referral service.[6] *See Id.* Similar to the opinions issued by the various states' ethics committees, the court in *Emmons* relied on policy reasons for permitting this fee-splitting. The court noted that "there are wide differences—in motivation, technique, and social impact—between the lawyer reference service of the bar association and the discreditable fee-splitting" prohibited by the rules. *Id.* at 573. Fee-splitting that should not be allowed "carries with it the danger of competitive solicitation; poses the possibility of control by the lay person, interested in his own profit rather than the client's fate; facilitates the lay intermediary's tendency to select the most generous, not the most competent, attorney." *Id.* at 573-74. On the other hand, fee-splitting with the bar association's lawyer reference service was permissible because "the bar association seeks not individual profit but the fulfillment of public and professional objectives. It has a legitimate, nonprofit interest in making legal services more readily available to the public." *Id.* at 574.[7]

While these opinions, court decisions, and standards suggest strong support for the proposed arrangement, there is one aspect, namely the fact that the attorney will be representing the day laborers on a contingent fee basis, that requires further analysis. In an opinion rendered in 1998, this Committee determined that Rule 5.4 precluded a lawyer from making payments to a referral service if the payments are "contingent upon, and tied to, the lawyer's receipt of revenue from the referred legal business and is tied to the amount of those fees." D.C. Legal Ethics Comm., Op. 286 (1998). According to this Opinion, the only departure from the ban on fee-sharing that Rule 7.1 permits is the authorization of payments to referring organizations when the payments are non-contingent and "paid regardless of the success or outcome" because that

[4] *See also* Va. Legal Ethics Comm. Op. 1751 (2001) (noting that many jurisdictions accept arrangements permitting a referral service to receive a percentage fee from referred attorneys, and stating that this widespread acceptance "indicates a strong support by the various bars for increasing public access to legal services").

[5] Other provisions of the Restatement that address fees similarly indicate concern with arrangements that might compromise a lawyer's independence. *See e.g. id.* § 47 cmt. b ("the traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than the lawyer's qualifications"); *id.* § 134 cmt. c (noting that a lawyer's loyalty to a client must not be compromised by a third party source of payment).

[6] This case has been widely cited by ethics committee opinions. *See, e.g.,* D.C. Legal Ethics Comm., Op. 307; Va. Op. 1751; Ark. Op. 95-01; Pa. Op. 93-162; Mich. Op. RI-75.

[7] *Kean v. Stone*, 966 F.2d 119 (3rd Cir. 1992), also supports the idea that fee-splitting between a lawyer referral service and a lawyer may be permissible. *Kean* holds that a union may "benefit indirectly from the proceeds of law practice" where litigation fees are "paid into a separate account used solely by lawyers for litigation purposes." 966 F.2d at 123.

does not represent a division of legal fees. *Id.*[8] A later opinion from this Committee relating to soliciting plaintiffs for class action lawsuits or obtaining legal work through Internet-based web pages expressed approval of this interpretation of the rules. *See* D.C. Legal Ethics, Op. 302 (2000) (agreeing with the view that "any fee a law firm pays to a service provider [on the internet] cannot be linked to or contingent on the amount of legal fees the lawyers obtain from a posted project. . . since such an arrangement would violate D.C. Rule 5.4's prohibition against lawyers sharing legal fees with non-lawyers").

These two opinions could be interpreted to preclude *any* fee-sharing arrangement where the fees are contingent upon a lawyer's receipt of revenue from a referred client. But the opinions are narrower than that and do not address whether a non-profit that refers its clients to lawyers may recoup its out-of-pocket costs in situations where the lawyer collects sufficient funds to pay them from the various contingent fees he or she receives.[9] This fee arrangement is different from the one precluded in Opinion 286 and referred to in Opinion 302 because it is not tied to the amount of fees collected by the lawyer in his or her representation of a particular client. In addition, both of these opinions pre-dated Opinion 307 which supports a fee-splitting arrangement which is far more analogous to our situation than those referred to in Opinions 286 or 302.

This Opinion, however, is limited to the specific facts of this Inquiry and should not be interpreted as a deviation from previously-expressed concerns about contingent fee-sharing arrangements which are explicitly linked to the amounts of fees collected by an attorney in the representation of a specific client or specific clients.

It is the opinion of the Committee that Rule 5.4's prohibition on fee-sharing does not preclude a non-profit from recouping its out-of-pocket expenses by requiring a lawyer to whom cases are referred to repay the expenses if sufficient funds are received from contingent fees obtained from various representations. Opinion 307 makes it clear that:

> [T]he drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely upon them for business referrals to influence those lawyers' professional independence of judgment.

D.C. Rule 5.4, Comment [1].

Because the particular structure of the relationship between the non-profit and the lawyer here is comparable to that which normally exists with a lawyer and a non-profit referral service, the Committee concludes that the Committee's rationale for its Opinion 307 applies equally to this type of arrangement because it: 1) does not interfere with the lawyer's independent judgment;[10] and 2) will benefit the public by facilitating the provision of legal services to those who are in need of them.[11] As pointed out in the Committee's Opinion 225, which concluded that a prepaid legal services plan complied with the Rules of Professional Conduct:

> Nothing in the Rules of Professional Responsibility purports to limit or discourage the use of innovative ways of providing legal services. . . . "Innovative approaches and fresh ideas in this area may result in the availability of necessary low-cost legal services to individuals who could not previously afford to employ an attorney."

As part of the arrangement, however, the inquiring non-profit and the attorney providing the services, must comply with the notice provisions set forth in Rule 7.1(b)(5).

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*Opinion No. 330*

**Unbundling Legal Services**

• The provision of legal services through unbundled legal service arrangements is permissible under D.C. Rule 1.2, provided the client is fully informed of the limits on the scope of the representation and those limits do not bar the provision of competent service. Not only the duty of competence, but all the duties that generally attach to lawyer-client relationships will apply to such arrangements, including diligence, loyalty, communication, confidentiality and avoidance of conflicts of interest. Opposing counsel who is dealing with a party who is proceeding *pro se* should treat that party as unrepresented unless and until the party or a lawyer for the party provides reasonable notice that the party has obtained legal representation. The D.C. Rules of Professional Conduct do not articulate any requirement that attorneys must identify themselves to the court if they provide assistance to a *pro se* litigant in the preparation of documents to be filed in

[8] This opinion relied in part on an opinion issued by the Florida Bar Professional Ethics Committee, which held that "a nonlawyer hired to engage in permissible marketing activities on behalf of a lawyer may be paid a straight salary," but that "if commissions would be tied to legal fees derived from business brought to the firm by the nonlawyer's efforts, payment of those commissions would constitute a violation of [the Florida rule that] forbids a lawyer to divide a legal fee with a nonlawyer." Fla. Bar Prof. Ethics Comm., Op. 89-4 (1989).

[9] The Committee does not address the question whether the attorney must return any portion of the retainer that is not utilized to provide legal services to day laborer clients. The situations in which all or a portion of the retainer needs to be returned are governed by the Committee's Opinion 264. It is our understanding that this is a retainer to ensure availability which is explicitly permitted in that Opinion.

[10] That the non-profit in question does not appear to be affiliated with any bar association should not affect the non-profit's ability to receive a portion of fees from referred lawyers. *See* Prof. Ethics Comm. of the State Bar of Tex., Op. 502 (1994) (holding that a non-profit service that was not established by a bar association may refer clients to a lawyer and then receive a portion of the fee collected by the lawyer in part because Texas public policy supports the establishment of lawyer referral services, and the fees received through this arrangement would benefit this policy).

[11] It should also be noted that both ethics committees and courts have indicated that if an attorney were to raise a client's fee to cover the cost of returning some of the funds to a referral service, the arrangement would be ethically unacceptable. *See, e.g.*, Cal. State Bar Ethics Op. 1983-70 (1983) (holding that a lawyer referral service may require attorneys to return to the service a percentage of all fees above a minimum threshold that the attorney receives from referred clients, but that the attorney may not raise the legal fees to cover the amount paid to the service, as "such arrangements should be structured in order to avoid the risk of increased costs to the clients"); *Alpers v. Hunt*, 86 Cal. 78, 88 (Cal. 1890) (holding that a contract made with a non-lawyer through a third party who would receive one third of any recovered funds was invalid in part because "such a practice would tend to increase the amounts demanded for professional services. In such a case an attorney would be induced to demand a larger sum for his services, as he would have to divide such sum with a third person"). In addition, The D.C. Rules of Professional Conduct require that any fee charged to a client be reasonable. *See* D.C. Rules of Prof'l Conduct R. 1.5. *See also* American Bar Association Formal Op. 00-420 (2000); *Blum v. Stenson*, 465 U.S. 886 (1984). However, by allowing an attorney only a 10% contingency fee and by requiring the attorney to return only the $10,000 that had been advanced, the proposed arrangement avoids offending these fee-based concerns.

court, but attorneys who provide such assistance to *pro se* litigants should check whether any other source of law in the relevant jurisdiction imposes a disclosure requirement.

**Applicable Rules**

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality)
- Rule 1.7, 1.9 (Rules on Conflict of Interest)
- Rule 3.3 (Candor toward the Tribunal)
- Rule 4.2 (Communication between Lawyer and Opposing Parties)
- Rule 4.3 (Dealing with Unrepresented Person)

*Inquiry*

In this opinion we join the ethics committees of many other jurisdictions in examining the practice of "unbundling" legal services. "Unbundling" refers to the separation of the tasks full service lawyers typically conduct into their discrete components, only some of which the client contracts with the lawyer to provide.[1] Examples of unbundled service arrangements include a lawyer who drafts a complaint or an appellate brief for a client to file *pro se*, counsels a client through an uncontested divorce without filing a notice of appearance in the case, or advises a small business about how to institute debt collection procedures or drafts a contract for it. *See* ABA Bar Association Section of Litigation, Report of the Modest Means Task Force, Handbook on Limited Scope Legal Assistance 16-46 (2003) [hereinafter ABA Task Force] (giving numerous examples). Advocates argue that such arrangements offer creative means of addressing the current crisis in the provision of legal services to persons of modest means. *Id.* at 8 (noting a finding that at least one party is unrepresented in 90% of domestic relations cases in the District of Columbia). By paying for only some of the services a full service lawyer would provide, clients may save considerable sums. Even more importantly, clients of modest means may be able to afford to obtain legal services that otherwise would be inaccessible to them. For example, a client might not be able to enter into a full service representation arrangement that required up-front payment of a retainer of several thousand dollars, but could afford to pay a lawyer at the same billing rate for selected services on a pay-as-you-go basis.

As all commentators who have addressed the increasing popularity of unbundling arrangements have noted, however, such practices raise significant ethics issues. We therefore write to provide guidance on questions the unbundling of legal services may raise under the D.C. Rules of Professional Conduct.

*Discussion*

The first question is whether the unbundling of legal services is permissible at all under the D.C. Rules. We are convinced that it is. In so concluding, we join all the ethics committees and judicial opinions of other jurisdictions of which we are aware in reasoning that a client may, if fully informed and freely consenting, contract for limited service arrangements with a legal services provider.[2] This conclusion rests on the express language of D.C. Rule 1.2(c), which states that "a lawyer may limit the objectives of the representation if the client consents after consultation." Unbundling legal services is simply a limiting of the objectives of a lawyer-client relationship. In this sense it is neither particularly novel nor particularly troubling.[3]

It is likewise clear, however, that the provision of legal services through unbundling arrangements cannot sweep away the applicable rules of professional conduct. We recently considered similar issues in Opinion 316, in which we examined the provision of legal information by lawyers through internet chat room communications. As we noted there, once the provision of even limited legal services gives rise to a client-attorney relationship, all the usual duties of the D.C. Rules of Professional Conduct attach to that relationship.[4] D.C. Ethics Op. 316 at 231. These duties include competence, diligence, communication, confidentiality and the avoidance of conflicts of interest. *Id.*

*Competence*

D.C. Rule 1.1 provides that lawyers must provide competent representation to their clients, and the unbundling of legal services in no way obviates lawyers' duties of competence. In other words, the scope of the services may be limited but their quality may not. When hired to diagnose legal problems, an attorney providing services under an unbundling arrangement must be as thorough in identifying legal issues as an attorney who intends to continue with a case through its conclusion. *See* D.C. Rule 1.1 comment [2] ("Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve"). An attorney who discovers that a client has a legal problem that falls outside the scope of the limited service agreement should inform her client of the problem, the fact that she is not representing the client regarding it, and that the client should consider seeking independent legal representation. *See* Los Angeles County Bar Assoc. Ethics Op. 502, at 1 (Nov. 4, 1999) (attorney in limited scope arrangement "has a duty to alert the client to legal problems which

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[1] One leading proponent has explained unbundling as follows:

> [L]awyers generally offer a full service package of discrete tasks that encompass traditional legal representation. More specifically, the lawyer implicitly or explicitly undertakes the following services on behalf of a client: (1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court.
>
> When a client hires a lawyer, generally both client and lawyer assume that the lawyer will perform these services in a full-service package. . . . Unbundling these various services means that the client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly.

Forrest S. Mosten, "Unbundling of Legal Services and the Family Lawyer," 28 *Fam. L. Q.* 421 (1994). A recent symposium also considers the ethical issues involved in unbundling arrangements. *See* Symposium Issue, *The Professional Lawyer*, 2004, at 59-106.

[2] A sampling of such opinions includes *Lerner v. Laufer*, 359 N.J. Super. 201, 217, 819 A.2d 471, 482 (N.J. Super. Ct. App. Div. 2003) ("the law has never foreclosed the right of competent, informed citizens to resolve their own disputes in whatever way may suit them"); Alaska Bar Assoc. Ethics Op. No. 93-1 (May 25, 1993) (lawyer may ethically limit the scope of his representation but must notify client clearly of the limitations on the representation and the potential risks the client is taking by not having full representation); Arizona State Bar Assoc. Ethics Op. No. 91-03, at 4 (Jan. 15, 1991) (lawyer may agree to represent a client on a limited basis as long as the client consents after consultation and representation is not so limited in scope as to violate ethics rules); ABA Informal Op. 1414 (June 6, 1978) (lawyer may give advice and assist in the preparation of pleadings for litigants who are otherwise proceeding *pro se*).

[3] *See, e.g.*, Colo. Bar Ass'n Ethics Comm., Formal Op. 101, at 2 (Jan. 17, 1998) (noting examples of "commonplace and traditional" arrangements under which clients ask their lawyers "to provide discrete legal services, rather than handle all aspects of the total project").

[4] *See also* ABA Task Force, at 7 (lawyers who provide limited service assistance "create attorney-client relationships with the people whom they help").

are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation").[5]

Another consideration is whether a matter can be handled competently through a limited service arrangement. Because of the limits short term or limited purpose arrangements may place on a lawyer's ability to assist the client with complex legal problems, some cases may not be appropriate for unbundling. The ABA Ethics 2000 Commission revision to Model Rule 1.2(c) thus provides that a lawyer may limit the scope of representation only "if the limitation is reasonable under the circumstances," and in accompanying comment [6] gives the following explanatory example:

> 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.

The ABA Task Force gives the following additional advice: "Lawyers should consider several factors in determining whether limited representation is appropriate, including the capacities of the client, the nature and importance of the legal problem, the degree of discretion that decision-makers exercise in resolving the problem, the type of dispute-resolution mechanism, and the availability (or not) to the client of other self-help resources." ABA Task Force at 59.[6]

Also important is the client's understanding of the scope of the services to be provided under an unbundling arrangement. Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement. The D.C. Rules generally require only a written statement of the basis of an attorney's fee, but not individualized written retainers or representation agreements. *See* D.C. Rule 1.5(b) & comment [2]. Particularly in the context of limited-representation agreements, however, a writing clearly explaining what is and is not encompassed within the agreement to provide services will be helpful in ensuring the parties' mutual understanding. *See* D.C. Ethics Op. 238 (1993) (requiring attorney to state in writing how additional consultation time would be charged to a client).

### *Conflicts of Interest*

There are few precedents considering conflicts of interest issues in the limited service representation context, but a recent opinion of the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("Committee") provides helpful preliminary guidance. In Opinion 2005-01, the Committee considered two bar association pro bono programs under which large firm commercial lawyers provide initial legal consultations, and sometimes some additional representation, to individuals seeking to file Chapter 7 bankruptcy petitions. The inquirer explained that it would be infeasible for the pro bono lawyers to conduct a complete conflicts check prior to every consultation to see if any creditor of the prospective client was a client of the pro bono lawyer's firm. In considering this issue, the Committee examined evidence about how often Chapter 7 debtors end up in contested proceedings in which a creditor objects to the discharge of the debt. The statistics showed that such contested Chapter 7 proceedings are rare. The Committee therefore concluded that lawyers participating in the pro bono programs have a duty to avoid conflicts arising from representing a client adverse to an existing client of their firm, but that they can generally satisfy this duty by determining, in their initial interview with the debtor, whether any unusual facts suggest direct adversity with a particular creditor so as to require further investigation into whether the creditor is the firm's client. Moreover, the Committee observed, in the rare case in which a client creditor does object to the discharge of a debt or otherwise takes action adverse to the Chapter 7 debtor, the pro bono lawyer cannot represent the debtor unless both clients consent to the dual representation after full disclosure. In other words, the low likelihood of adversity with another client under the particular facts presented lessens the extent of the conflicts investigation required in connection with an initial consultation. Where such a conflict is more likely, however, the rules do not change simply because the representation of the second client involves a limited service arrangement.

In short, attorneys participating in unbundled service arrangements owe the duties of diligence, promptness, loyalty, and communication within the defined scope of the representation as does any lawyer under D.C. Rules 1.3 and 1.4, along with the duties of confidentiality and avoidance of conflicts of interest under D.C. Rules 1.6, 1.7, and 1.9.[7] *See* D.C. Ethics Op. 316 (attorney providing tailored legal advice rather than general legal information over the internet may create an attorney-client relationship and, in doing so, incurs the same duties of confidentiality and avoidance of conflicts as an attorney providing face-to-face legal counseling).

### *Communication with Opposing Party*

With respect to some issues, however, attorneys' duties in the context of unbundled service arrangements are less clear. One such issue concerns communications with an opposing party. When an attorney is assisting a client for some purposes but not for others, the question may arise as to whether that client is "represented" for purposes of D.C. Rule 4.2, which forbids lawyers to communicate directly with persons "about the subject of the representation with a party known to be represented by another lawyer in the matter" without the prior consent of the lawyer representing such person. D.C. Rule 4.2(a).

When a lawyer provides only limited or behind-the-scenes assistance to a litigant who has filed *pro se*, opposing counsel cannot be expected to be aware of the lawyer's involvement. In such a situation, opposing counsel acts reasonably in

[5] *See also* ABA Task Force, at 25 ("although representation may be limited to an interview and advice, the interview must be at least as thorough as full-service representation").

[6] *See also* New York City Bar Ass'n Op. 2005-01 ("lawyer should independently evaluate whether the complexities of the case or the limitations of the client make it unlikely that the client could effectively proceed *pro se*").

[7] We also note that under a currently proposed revision to D.C. Rule 6.5, D.C. Rules 1.7 and 1.9 will apply to lawyers who provide "short-term limited legal services" to a client "under the auspices of a program sponsored by a nonprofit organization or court" only if "the lawyer knows that the representation of the client involves a conflict of interest," and D.C. Rule 1.10 will apply "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 with respect to the matter." *See* District of Columbia Bar Rules of Professional Conduct Review Committee, Proposed Amendments to the District of Columbia Rules of Professional Conduct: Report and Recommendations 179 (Jan. 31, 2005).

proceeding as if the opposing party is not represented, at least until informed otherwise.[8] Even if the lawyer has reason to know that the *pro se* litigant is receiving some behind-the-scenes legal help, it would be unduly onerous to place the burden on that lawyer to ascertain the scope and nature of that involvement. We therefore believe that the most reasonable course for an attorney dealing with a party who is proceeding *pro se* is to treat the party as not having legal representation, unless and until the party or a lawyer for the party provides reasonable notice that the party has obtained legal representation.

*Disclosure of Involvement*

The issue on which courts and ethics committees evaluating practices related to the unbundling of legal services have had the most difficulty agreeing concerns the extent to which lawyers must disclose their involvement when they have provided substantial assistance to a litigant in drafting documents that are to be filed in court. Some opinions have concluded that attorneys need not disclose their involvement in preparing court-filed documents;[9] others have concluded that attorneys should disclose their involvement.[10]

After carefully examining the D.C. Rules and opinions from various jurisdictions, we conclude that nothing in the D.C. Rules of Professional Conduct requires attorneys who assist *pro se* litigants in preparing court papers to place their names on these documents or otherwise disclose their involvement. Attorneys who provide limited-service assistance typically will not see the preparation of documents through to the end and thus cannot control what is in the final document filed by the *pro se* litigant. *See* ABA Task Force at 75 (listing this and other concerns identified in a lawyer focus-group study). Some opponents of the practice of "ghostwriting" court documents, as it is frequently called, argue that the chief sin of this practice is that it misleads the court into thinking a litigant is proceeding without legal assistance and thus granting special solicitude to the litigant. This, however, is an issue for the courts to identify if they perceive a problem with the practice. Some jurisdictions have undertaken specific rule modifications to address lawyers' obligations in the context of providing limited drafting assistance to otherwise *pro se* litigants,[11] but, in the absence of any such directives in the D.C. Rules, we decline to read into them an obligation concerning disclosure of limited assistance.

In sum, in our opinion the provision of legal services through unbundled legal service arrangements is permissible under D.C. Rule 1.2, provided the client is fully informed of the limits on the scope of the representation and these limits do not prevent the provision of competent service. The duties that generally attach to lawyer-client relationships, including those of competence, diligence, loyalty, communication, confidentiality and avoidance of conflicts of interest, apply to such relationships. If a party is proceeding *pro se*, opposing counsel should treat that party as unrepresented unless and until that counsel receives reasonable notice of representation from the party or her lawyer. Attorneys who provide substantial assistance in the preparation of documents to be filed in court or other tribunal should check the rules of the relevant forum to determine the extent of their disclosure obligations; the D.C. Rules of Professional Conduct do not address this question.

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*Opinion 331*

**Contact With In-House Counsel of a Represented Entity**

• In general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity's other counsel.

**Applicable Rule**

• Rule 4.2 (Communication Between Lawyer and Opposing Parties)

Ethics rules generally prohibit lawyers from communicating with a person about the subject of the representation with a person the lawyer knows is represented by another lawyer with respect to that matter.[1] Several members of the committee have encountered questions from members of the bar about whether the D.C. version of this prohibition, Rule 4.2 of the D.C. Rules of Professional Conduct, would bar a lawyer from communicating with an organization's in-house counsel about a matter when that organization is represented by outside counsel on the same matter. While no formal inquiry has been made to the committee, we believe that the issue comes up sufficiently frequently to warrant an opinion.

[8] Some jurisdictions have modified their rules in order to more directly address the issue of attorney communication with a party receiving limited legal assistance. *See, e.g.*, Colo. RPC 4.2 comment ("a *pro se* party to whom limited representation has been provided . . . is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary"); Colo. RPC 4.3 comment ("*pro se* parties to whom limited representation has been provided . . . are considered to be unrepresented for purposes of this Rule"); Me. Bar. R. 3.6 (f) (party being provided with limited representation "is considered to be unrepresented" except to extent the limited-representation attorney provides written notice to opposing counsel of the time period in which counsel should communicate only with the limited-representation attorney); Wash. RPC 4.2 (b); 4.3 (b) (similar to Maine).

[9] *See, e.g.*, Los Angeles County Bar Ass'n Ethics Op. 502 (1999) (attorneys assisting *pro se* litigants need not disclose their involvement); Professional Ethics Commission, Op. No. 89 (2003) (attorney did not act unethically in drafting complaint for litigant to file and proceed with *pro se*).

[10] *See, e.g.*, *Duran v. Carris*, 238 F.3d 1268 (10th Cir. 2001) (participation by attorney in drafting *pro se* appellate brief must be acknowledged by signature); *Lerner*, *supra*, 819 A.2d at 483 n.2 (suggesting that "any party's consent to limit the attorney's scope of representation . . . should be fully disclosed to the court"); *Ricotta v. State*, 4 F. Supp. 2d 961, 986-88 (S.D. Calif. 1998) (failure of attorney to reveal her extensive role in drafting *pro se* litigant's lengthy oppositions to defendants' motions to dismiss was improper, but court would not hold counsel in contempt because rules of professional conduct and court rules failed to provide clear guidance); New York State Bar Ethics Op. 613, at 5 (April 1990) (lawyer who assists *pro se* litigant in preparation of documents to be filed in court must disclose her name); Del. Bar Ass'n Ethics Op. 1994-2, at 2 (May 6, 1994) (if an organization prepares documents other than initial pleadings, the extent of the organization's participation should be disclosed by means of a letter to opposing counsel and the court); Kentucky Bar Assoc., Ethics Op. E-343 (Jan. 1991) (counsel may limit representation of a *pro se* litigant to preparation of initial pleadings, and "the better and majority view appears to be that counsel's name should appear somewhere on the pleading").

[11] The State of Washington, for example, has adopted rules that authorize lawyers to help otherwise self-represented persons to draft pleadings, motions and documents to be filed in court and to rely on the otherwise self-represented person's representation of facts "unless the attorney has reason to believe that such representations are false or materially insufficient." Wash. Super. Ct. R. 11(b). Colorado requires attorneys to "advise the *pro se* party that a pleading or paper for which the attorney has provided drafting assistance must include the attorney's name, address, telephone number and registration number," but provides that this disclosure does not "constitute entry of appearance by the attorney." Colo. R. Civ. P. 11(b).

[1] *Restatement of the Governing Lawyers* § 99 (*Restatement*); Rule 4.2 of the ABA Model Rules of Professional Conduct.

The goal of Rule 4.2 is clear. In explaining it to the Court of Appeals when proposing the present version, the D.C. Bar Board of Governors said that its "basic purpose. . . is to prevent a client, who on the one hand is presumed to be relatively unsophisticated legally but who on the other hand has ultimate substantive control over the matter, from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel." *Proposed Rules of Professional Conduct and Related Comments* 187 (Nov. 19, 1986) (*"Jordan Committee Report"*); *see also Restatement,* § 99, comment b.

We start by noting that the foregoing rationale for the anti-contact rule does not apply where a lawyer desires to contact an organization's in-house counsel. Such a communication would be lawyer to lawyer, and concerns about protecting the organization from overreaching and deception by the lawyer initiating the communication should not apply. Nor is it likely that in-house counsel would inadvertently make disclosures harmful to the organization, as a non-lawyer might do.[2] Therefore, if the Rule forbids contact with those in-house counsel who are representing their client on the matter in question, that would be an unintended result. And we do not believe that the text of the Rule compels that result.

The structure of the D.C. version of rule 4.2 is more elaborate than the ABA Model Rule 4.2, which has only one sentence. The D.C. version has four subparagraphs, of which the first three are pertinent here. Subparagraph (a), which is similar to ABA Model Rule 4.2, generally prohibits a lawyer from communicating about the subject of the representation with "a party known to be represented by another lawyer in the matter," unless the lawyer has the prior consent of that other lawyer or is authorized by law to make the communication. The significance of the other party being "known to be represented by another lawyer" within the meaning of subparagraph (a) is quite clearly that a lawyer's communication should be with that other lawyer rather than directly with the party—because, as just mentioned, the purpose of the Rule is to avoid situations in which a lawyer may take advantage of a non-lawyer by directly communicating with that person. When a party is represented by in-house counsel there would not seem to be any reason why a lawyer could not communicate with that counsel.

Subparagraphs (b) and (c) then deal with specific issues surrounding parties that are organizations. Subparagraph (b) provides that a lawyer may communicate on the subject of the representation with "a nonparty employee of the opposing party" without obtaining the consent of the opposing party's lawyer.[3] A non-party employee is one who does not have the authority to speak for, and bind, the organization with respect to the representation in question; thus, a non-party employee cannot make the kind of unwise or pressured decisions for the organization that the Rule is designed to prevent. See Comment [3] to Rule 4.2.[4] Subparagraph (c) then defines an organization "party" as including "any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates." Thus, it is the ability of an organization employee to bind the party organization as to the representation itself that is critical in defining "party."

As just noted, considering subparagraph (a) and the purpose of the Rule, it would seem that an opposing lawyer could communicate with in-house counsel who was representing the other party. Based on language in subparagraph (c) (defining "party" as any employee "who has the authority to bind a party organization as to the representation to which the communication relates"), an argument could be made that the in-house counsel who are representing their client in that matter may fall under that definition of "party" because, by virtue of that very representation, they can to some extent speak for and bind their client, and that a lawyer could not communicate with in-house counsel without the consent of outside counsel. We find this argument unpersuasive because it ignores the drafters' clear intentions expressed in the text of subparagraph (a), it would create a restriction on communication that is inconsistent with and counterproductive to the Rule's purpose, it would not seem to have any perceptible purpose, and it would lead to peculiar and unworkable results.

Most importantly, such an interpretation would run counter to the text of subparagraph (a). As we have noted, the critical point under subparagraph (a) is the fact that the party is "represented by another lawyer," and the clear requirement of subparagraph (a) is that a lawyer must communicate with a party, if at all, by communicating with that party's lawyer. Where it is in-house counsel who is representing a party, it is the clear import of subparagraph (a) that the lawyer should communicate with that counsel.

It is true that subparagraph (a) does not expressly say that the communication must be made to the lawyer representing the opposing party where there is such a lawyer. Nonetheless that is its clear implication—where the Rule forbids communication with a represented party there is no one else, other than counsel providing that representation, to communicate with.[5] To the extent it might be argued that subparagraph (a) is not fully or sufficiently explicit to counter a literalistic reading of subparagraph (c) with respect to in house counsel, we recur to the fact that Scope note [1] instructs us that these Rules are to be read as rules of reason that "should be interpreted with reference to the purposes of legal representation and of the law itself." Reading Rule 4.2(c) to define an in-house lawyer as the "party" simply because (as is likely the only real distinction in many circumstances) house counsel get paid a salary while outside counsel

[2] It is possible that an organization's outside counsel may complain that, by bypassing outside counsel to discuss a matter with in-house counsel, the lawyer has interfered with the outside counsel's relationship with the organization. However, D.C. Rule 4.2 does not address those considerations, and we do not believe that they raise any issue under the D.C. Rules of Professional Conduct.

[3] But subparagraph (b) further provides that before a lawyer may talk to such a non-party employee, the lawyer must disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the non-party employee's employer.

[4] Indeed, comment [3] explains that an opposing lawyer may talk to an organization's employee who has "the authority to bind the organization with respect to matters underlying the representation" without the consent of the organization's counsel "if [the employee does] not also have authority to make binding decisions regarding the representation itself." See Comment [3], Rule 4.2.

[5] Subparagraph (c) does as a practical matter require communication with the opposing party's lawyer. If the lawyer seeking communication must communicate with the opposing party, cannot communicate with the party because of Rule 4.2, and may communicate with the counsel representing the party, then the lawyer must communicate with counsel. "A lawyer representing a client in a matter usually may not deal directly with others who have their own counsel in the matter. *The lawyer must communicate through their counsel exclusively.*" ABA/BNA Lawyer's Manual on Professional Conduct at 71:301 (2004) (emphasis added). Effectively forcing one goal by making other courses impossible is a well-known legal mechanism. *Cf. Lumley v. Wagner*, 42 Eng. Rep. 687 (1852) (even though court believed it could not require a singer to perform for a company to which the singer was contractually bound, court could, and did, enjoin her from performing for anyone else during the relevant period).

are paid fees would serve no discernable purpose, is foreign to the purposes for which the Rule was written, and would bring about peculiar and clearly unintended results, to such an extent that we could not interpret the Rule reasonably to bring about that result.

It is not possible to discern any sensible policy that would support a reading of subparagraph (c) as forbidding communication with house counsel while allowing it for outside counsel. The fact that in-house counsel may have the power to bind the party does not distinguish in-house counsel from outside counsel: as the Restatement shows, any lawyer representing a party, whether in-house or not, will have at least some power to speak for, or bind, that party within the scope of a representation Restatement at §§ 26, 27. Otherwise, communication with a party's lawyer would be useless because what the lawyer said would not be reliable; indeed it is precisely because a party's counsel can reliably speak for the party that Rule 4.2(a) can require a lawyer to speak to a party's lawyer rather than to the party itself. It does not appear that there was any reason why the term "authority to bind a party organization" was included in the Rule's definition of "party" except in order to deal with the familiar issue of which natural persons can in particular instances make decisions that will bind an artificial person—an organization—within its sphere of operation. That is the only issue discussed in the pertinent comments to D.C. Rule 4.2 (comments [2] and [3]). It is the only issue discussed in the pertinent sections of the Board of Governors' recommendations to the D.C. Court of Appeals.[6] *See Jordan Committee Report* at 187 & 189–91.

Moreover, if Rule 4.2(c) were read to forbid a lawyer to contact in-house counsel representing an opponent, that would lead to an absurd result whenever (as frequently occurs) the organization had decided not to hire outside counsel. If in-house counsel were considered to be the "party," then under this interpretation opposing counsel could not communicate with the organization at all; subparagraph (a) would prevent the lawyer from speaking directly to senior management of the organization because the organization is clearly being represented by in-house counsel, yet subparagraph (c) would bar the lawyer from talking to in-house counsel because, as one who could "bind" the organization as to the representation, the in-house counsel would be considered to be the "party." It could hardly be contended that this was an intended result, and it would certainly be an unworkable result.[7]

It might be argued that a distinction can be drawn between the activities of in-house and outside counsel because counsel who are employees might be more likely to be given powers by their employers that extend beyond strictly counsel functions. For example, in-house counsel might be given the power to settle cases without referring to others in the organization. There are several reasons why such an approach based on such a perceived distinction would not be warranted. First, given the purpose of the Rule, which is to prevent lawyers from communicating directly with parties who are nonlawyers where those parties are represented by counsel, this distinction, even if it exists, is irrelevant. That an in-house lawyer may have some additional functions does not alter the fact that it is *that* lawyer who is representing the party. Second, it is not clear that the distinction does exist—a client may give any lawyer, in-house or outside, functions that lawyers do not usually have and that are usually exercised by a party, such as authority to settle a dispute. *See Restatement* § 22 comments c and e, § 27 comment d. It is not at all clear whether it is more or less common to find such authority in the hands of counsel who are employees as opposed to those who are not.

Similarly it might be claimed that allowing an opposing counsel to pick and choose the lawyer with whom to communicate among in-house and outside counsel representing the other party allows the lawyer leeway that might be abused. For example a lawyer might call opposing lawyer A to ask for an extension while knowing that opposing lawyer B would likely reject it for a reason that A may not be aware of. But this is not a problem that Rule 4.2 is aimed at or is suited to solve. The Rule is aimed at the problems that may flow when a lawyer communicates directly with a party even though that party is represented by counsel. The problem of one lawyer trying to take advantage of the fact that an opponent may have multiple lawyers with varying degrees of knowledge or involvement is a different issue—and should not be addressed in a haphazardly incomplete fashion by declaring one of the opposing lawyers to be the party, which, as we have discussed, has nothing to do with the purpose of the Rule and creates other difficulties.[8]

In sum, we conclude that a lawyer who is also an employee of a client organization represents that client; the in-house counsel is not also the "party" within the meaning of D.C. Rule 4.2(c). The fact that in-house counsel represent their client in a matter does not mean that Rule 4.2 prohibits opposing counsel from communicating with them, even when the client has also retained outside counsel on the same matter.[9]

[6] The significance of this point appears with more than usual clarity in these circumstances. As noted above, the ABA Model Rule 4.2 contains only a single sentence with approximately the language of D.C. Rule 4.2(a). The Jordan Committee added subparagraphs (b) and (c) and explained its reasons for doing so at length; the portion of this discussion pertaining to non-governmental parties is at pages 189–191 of the *Jordan Committee Report*. Nothing in this discussion even remotely addresses any concern over communications with counsel depending on whether they are in house or outside. It is obvious from a reading of this portion of the Committee's report that any effect of constricting a lawyer's ability to communicate with in-house counsel representing an opponent would be unintended by the drafters.

[7] The phrase "represented by another lawyer" in subparagraph (a) clearly refers only to counsel other than the lawyer seeking to make the contact; it cannot be read to refer to in-house counsel when no outside counsel has been hired yet not to refer to in-house counsel when outside counsel has been hired.

[8] This "solution" of regarding in-house counsel as the "party" would be incomplete and in some cases counterproductive. The same kind of attempt to pick and choose whom to call can occur when this interpretation of the Rule would have no effect, such as when are multiple law firms (for example where one serves as local counsel) and no house counsel involved in the representation. Similarly the opponent is often represented only by in-house counsel with more than one in-house lawyer is involved in the representation. Finally, it not infrequently occurs that day-to-day representation is provided by house counsel but a law firm is also involved on a more strategic or coordinating level. Here an opposing lawyer might seek to avoid calling house counsel and might call a lawyer in the firm to make a request because of that lawyer's lack of familiarity with day-to-day developments. In such situations deeming in house counsel to be the party and forcing communications to be with the law firm would constitute a distinct disadvantage to the party.

[9] The D.C. Bar Rules of Professional Conduct Review Committee has recommended adding a comment to Rule 4.2 that would expressly conclude that "Because this Rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization." Proposed Amendments to the D.C. Rules of Professional Conduct: Report and Recommendations, at 151 (January 31, 2005). Since comments to the Rules explain and illustrate them rather than providing new substance (see Scope note [6] to the Rules), the Rules Review Committee's recommendation of this new comment means that that Committee interprets Rule 4.2 consistently with this opinion.

This result is consistent with the authorities that have considered the issue under versions of the Rule that are similar to the Model Rule and do not include subparagraphs (b) or (c), providing further reason to interpret the D.C. Rule to avoid any conclusion that a contrary result was an unstated purpose of our rule. The *Restatement* (§ 100, comment c) concludes that an opposing lawyer's contact with in-house counsel of a corporation is generally not barred by the anti-contact rules that apply in the United States. The same result was reached by the District of Connecticut in *In re Grievance Proceeding*, 2002 WL 31106389 (D. Conn. 2002). That court concluded that in those circumstances an in-house lawyer "does not fall within the plain meaning of 'party' for purposes of [Connecticut's version of Rule 4.2]." *Id.* at *3.[10] The District Court noted that the purpose of Rule 4.2 is "to protect the lawyer-client relationship by preventing opposing counsel from taking advantage of a non-lawyer's relative unfamiliarity with the law or prompting a non-lawyer's inadvertent disclosure of information against interest." *Id.* The court added that communication with a general counsel generally will not raise the same concerns as communication with a non-lawyer employee. In holding that Rule 4.2 does not prohibit the communication, the court noted that hiring an outside counsel generally will not transform the general counsel from attorney to party for purposes of Rule 4.2.

We agree with the result reached by the authorities cited above and conclude that, in the District of Columbia, a lawyer generally is not proscribed by D.C. Rule 4.2 from contacting in-house counsel even though the entity is represented by outside counsel.[11] Of course, if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel's personal lawyer.

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[10] § 100, Comment c. A similar result was reached in *In re James Finkelstein*, 901 F.2d 1560 (11 th Cir. 1990).

[11] The Committee notes, however, that even though this opinion concludes that a lawyer may generally initiate contact with in-house counsel, in-house counsel is not obligated to engage in the communication and may direct the lawyer to communicate only with the organization's outside counsel.

*Opinion 332*

**Firm Names for Solo Practitioners**

- A lawyer who opens a solo practice may conduct his or her business under any trade name that does not constitute a false or misleading communication about the lawyer or the lawyer's services. The use of the word "firm" in the firm name does not inherently constitute a misleading representation about a solo practitioner. A solo practitioner must take care, however, to insure that clients and potential clients are not misled as to the nature of his or her practice.

**Applicable Rules**

- Rule 7.5 (Firm Names and Letterheads)
- Rule 7.1 (Communications Concerning a Lawyer's Services)

*Inquiry*

The Committee has received an inquiry regarding the permissible firm names that may be adopted by a solo practitioner. We have been asked to provide guidance on the nature of acceptable firm names that comport with the Rules of Professional Conduct. In particular, we are asked, may Jane Doe, a solo practitioner without employees, practice under the name "The Doe Law Firm" or "The Advocacy Law Firm?"

*Background*

Rule 7.5(a) generally provides that: "A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." D.C. Rule 7.5. Rule 7.1(a), in turn, prohibits lawyers from making a "false or misleading communication" concerning the lawyer or the lawyer's services. A statement is false or misleading if it: contains a material misrepresentation of fact; omits a fact necessary to make the statement considered as a whole not materially misleading; or contains an assertion about the lawyer or the lawyer's services that cannot be sustained. *Id.* § 7.1(a).

This general prohibition on materially misleading representations is applied to law firm names, in part, through Rule 7.5(d), which provides: "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." Thus, for example, lawyers who share office facilities but who are not, in fact, partners may not denominate themselves as, say, "Smith and Jones" because that title suggests a partnership in the practice of law that does not in fact exist. D.C. Rule 7.5, Comment [2]. More broadly, one may not use the name of a particular lawyer as part of the firm's name if the lawyer is not associated with the firm or is not a predecessor of the firm. *Id.* at Comment [1].

Courts and other Bars have applied this Rule and its commentary in a manner that furthers the general prohibition on a misleading firm name. Thus, it is commonplace that a firm name must reflect accurately the nature of the entity that bears it and the nature of the relationship of the lawyers who are affiliated with it. A law firm, for example, may only call itself "Medical Malpractice Trial Attorneys, Inc." if it, in fact, handles malpractice cases through trial. *See* Phila. Ethics Op. 98-17 (1998); *see also In re Shannon*, 638 P.2d 482 (Or. 1982) ("Shannon and Johnson's Hollywood Law Center" trade name is permissible because it has no tendency to mislead). For this using the word "advocacy" in a firm name is acceptable, so long as the firm in fact does advocacy (as most do) and does not limit its practice to, say, serving as a neutral third-party arbiter.

The possibility for confusion is particularly acute in the context of firm names that misrepresent the nature of the connection between and amongst the members of the entity so named. It is, for example, misleading to state that one is a member of a "Professional Services Group" of attorneys and accountants, where the group has no formal existence. *See In re Schneider*, 710 N.E.2d 178 (Ind. 1999). Conversely, if two lawyers who share offices maintain a continuing relationship akin to that of "of-counsel" association, they may hold themselves out as such, though they may not take the next step of misleadingly practicing under a trade name such as "Law Offices at X Square" which implies a unitary relationship. *See* N.Y. City Ethics Op. 1995-8 (1995); *see also* ABA Informal Op. 85-1511 (1985) (firm may name itself "The X Partnership" where X is a retired former partner).

Our own Court of Appeals added a further gloss when it construed Rule 7.5 in *In re Karr*, 722 A.2d 16, 22-26 (1998), reading the Rule broadly to permit identification of "partnerships" that were less than "full-fledged" ones. Karr had operated his law firm under a trade name that included the last name of William McLain (*e.g.* "Karr and McLain"). McLain, however, was not an equity partner in the firm, but rather functioned,

apparently, as a non-equity partner. The Court concluded that the purpose of Rule 7.5(d) is for "partners [to be] accurately identified as such . . . so that the public is not misled." *Karr* 722 A.2d at 25. Given that the Rules might be read to permit the identification of partnerships taking any of a number of forms recognized under law, the Court concluded that Karr's use of McLain's name did not constitute a "false or misleading" communication that McLain was a "partner" in the firm. *Id.* at 26.

*Discussion*

With this background in mind we turn to the question presented, which may be restated as follows: is an implicit statement that one practices in a partnership or multi-member organization made when a solo practitioner styles his or her law office as "The Doe Law Firm" or "The Advocacy Firm" or similar names?

In our view, this question is really comprised of two distinct components—first, whether the use of the word "firm" by a solo practitioner is always and inherently misleading because it necessarily contains a material misrepresentation or omits a fact that renders the statement materially misleading. In other words, we believe the first stage of our inquiry is to ask whether the use of the word "firm" is such that we may conclude that it is likely to be misleading in all or nearly all applications because it necessarily is inconsistent with solo practice. The second component of the inquiry asks whether the use of the word "firm" to describe a solo practitioner is sufficiently clear and unambiguous that it may never be deemed misleading, whatever the context.

As we discuss below, in our view neither absolute conclusion is warranted. As a general matter, the use of the word "firm" by a solo practitioner is not presumptively misleading. But practitioners electing to use this naming convention must exercise caution to avoid its use in contexts where it is misleading or is likely to be so.

*Is the use of the word "Firm" inherently false or misleading?*

Though we have found no law or opinions addressing this question directly, in our judgment, the use of a name such as "The Jane Doe Firm" is not inherently misleading. It does not, in our view, convey to a reasonable observer that the lawyer *necessarily* practices with other lawyers. Rather, in our view the use of the term 'firm' may also be used to distinguish between the lawyer in her individual capacity, as opposed to her business or professional capacity. For example, a telephone listing for The Jane Doe Law Firm distinguishes the telephone number from Jane Doe's residential number. The recipient of a letter from The Jane Doe Law Firm knows that a lawyer as opposed to a layperson has written to him.

To begin with, we recognize that the common usage of the word "firm" in the English language is sometimes ambiguous. People use the term both to mean "a business enterprise" and to mean "a group of more than one person in a business." Reflecting that ambiguity, the Oxford English Dictionary first defines "firm" as: "The 'style' or name under which the business of a commercial house is transacted"—that is a definition that applies irrespective of the number of participants in the firm. However, the OED then offers, as a second definition of "firm" the following: "A partnership of two or more persons carrying on a business"—a definition which, of course, connotes more than one participant.[1]

Furthermore, the Terminology section of our own Rules explicitly recognizes that the word "firm," as used in the Rules, does not *necessarily* suggest the presence of other legal staff. Thus, the Rules define "firm" or "law firm" to mean " a *lawyer* or lawyers in a private firm . . ." D.C Rules, Terminology [4] (emphasis supplied). This specific definition is, at least implicitly, a recognition that firms may consist of many lawyers or only a single practitioner.[2]

Where the question is whether a particular form of firm name might mislead members of the public, the public's actual confusion (or lack thereof) seems germane to our inquiry. It is, therefore, worth asking whether the public is actually confused by the fact that a solo practitioner uses the word "firm" to describe her law practice.

The answer appears to be: "no." A cursory review of the local Yellow Pages reveals dozens of legal offices styled in the form "Doe Law Firm" comprised, from all appearances, of only a single practitioner. Moreover, when we informally inquired of the Office of Bar Counsel regarding the nature of any complaints they might have received concerning misleading law firm names, we were advised that Bar Counsel had no recollection of having received a complaint about a firm name of the form "Doe Law Firm" in the past quarter century. Though the absence of evidence can never be conclusive evidence of absence of a problem, we think the apparent lack of public confusion significant. At a minimum it buttresses our conclusion that, in the real world, the use of the word "firm" is not necessarily misleading when applied to a solo practitioner. For example, notwithstanding a name such as "Doe Law Firm" clients are unlikely to be misled into thinking they are dealing with a multi-lawyer organization when the practitioner operates out of a home or one-room office.

We can, of course, readily imagine names that one might adopt for which this analysis would not be true—where the name clearly implies that which is not true and is therefore inherently misleading in all circumstances. For example, Bar Counsel does report that they have received complaints regarding the use of names of the form "Doe & Associates". It is useful to reiterate that, as we said in Opinion No. 189 (decided under the former Code of Professional Responsibility), a solo practitioner may not practice under the name "John Doe & Associates" for the use of the word "associates" would naturally be read to necessarily imply the existence of other legal staff in the practice. *See* D.C. Ethics Op. 189 (1988). This prohibition remains in effect today under Rule 7.5(d) of the Rules of Professional Conduct. *Cf. Disciplinary Counsel v. Furth*, 754 N.E.2d 219 (Ohio 2001) (solo practitioner may not practice under his name followed by "Associates, Attorneys and Counselors at Law"); *cf., Medina County Bar Ass'n v. Grieselhuber*, 678 N.E.2d 535 (Ohio 1977) (solo practitioner may not style his firm "and Affiliates" or hold himself out as "Body Injury Legal Centers"). Similarly a solo lawyer using the title "Senior Attorney and Director of Services" misleads because the lawyer implies the existence of other staff. *Oklahoma Bar Ass'n v. Leigh*, 914 P.2s 661 (Okla. 1996).

Finally, as our Rules make clear, *see* Rule 7.5, comment [1], any analysis of the "Doe Law Firm" naming convention should take into account broader constitu-

[1] Other dictionaries reflect similar ambiguity. Webster's Tenth Collegiate, for example, defines a firm as: "1. the name or title under which a company transacts business; 2. a partnership of two or more persons that is not recognized as a legal person distinct from the members composing it; [or] 3. a business unit or enterprise." Nor does the word "company" necessarily imply multiple components. Webster's, for example, defines it as both "a chartered commercial organization" and an "association with another."

[2] Our analysis is limited, of course, to the Rules of Professional Conduct. Independent provisions of Federal or District law might otherwise provide authorization for or limitations on the trade names that a solo practitioner or other law firms may adopt and must, of course, be complied with. See, e.g., D.C. Ethics Op. 254 (1995) (authorizing use by lawyers in District of abbreviations such as "LLP," "LLC," and "PLLC" in light of statutory authorization for formation of such organizations by District law), revising D.C. Ethics Op. 235 (1993) (pre-statute prohibition on such abbreviations).

tional considerations. The Supreme Court has held that the First Amendment protects commercial speech and that the public, generally, has a right to receive truthful and non-deceptive information. *See Bates v. State Bar*, 433 U.S. 350 (1977) (commercial speech serves individual and societal interests in assuring informed and reliable decision-making). To be sure, a state may regulate trade names where their use is deceptive, *see Friedman v. Rogers*, 440 U.S. 1 (1979), but the First Amendment clearly prohibits the regulation of lawyer speech where such regulation is based merely on speculative harms. *E.g. In re RMJ*, 455 U.S. 191 (1982) (rejecting restriction on listing expertise); *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91 (1990) (rejecting restriction on advertisement as trial specialist); *Ibanez v. Florida Dept. of Business and Prof. Regulation*, 512 U.S. 136 (1994) (rejecting listing of CPA qualification). As the Supreme Court has said: "[T]he States may not place an absolute prohibition on certain types of potentially misleading information. . . if the information also may be presented in a way that is not deceptive." *In re RMJ*, 455 U.S. at 203.

Thus, at a minimum, we believe that, in interpreting the Rules of Professional Conduct, we should err on the side of permitting lawyers to choose their own trade names unless there is a clear indication that the name is deceptive or misleading. For this reason, in our view, the naming convention "Doe Law Firm" is not *per se* impermissible.

*The use of "firm" may be misleading in certain contexts*

Our conclusion that the use of "firm" as a naming convention by a solo practitioner is not inherently misleading or false does not, however, end the inquiry. For we can readily imagine that, under particular circumstances, the use of the term could be misleading or confusing. Thus, solo practitioners who practice under a name such as the "Jane Doe Firm" must exercise caution in the conduct of their practice and, when faced with circumstances in which a client may reasonably be confused, are under an affirmative obligation to avoid any misunderstanding.

Cases and opinions on lawyer's speech make clear that context matters. Thus, for example, while the phrase "legal clinic" is not inherently misleading, *see Bates v. State Bar*, 433 U.S. 350 (1977); *Jacoby v. State Bar*, 562 P.2d 1326 (Cal. 1977), it can be misleading in context when it implies the existence of a separate entity where none exits, *see In re Shapiro*, 656 N.Y.S.2d 80 (App. Div. 1996) (listing as "Accident Legal Clinic of Shapiro and Shapiro" misleading because clinic not separate from law firm and firm handled more than accident claims). Similarly, two firms may reflect their association with each other—but only in a manner that contextually makes clear the nature of their relationship. *E.g.*, ABA Formal Op. 94-388 (1994) (firms may designate themselves as "Allied" or in a "Network" provided additional disclosure regarding nature of relationship between the firms is also made to prevent misleading client); ABA Formal Op. 84-351 (1984) (law firms may list themselves as "Affiliated" or "Associated," so long as communications regarding the nature of the firms' relationship are clear and not misleading).

Our own opinions on related matters offer similar, cautionary advice about the need for contextual analysis. For example, in D.C. Ethics Op. 224, we wrote: "A lawyer, all of whose partners die, retire, or otherwise leave the partnership is not precluded from continuing to use the former partnership name, absent reason to believe that clients or potential clients are led by the firm name to believe that the lawyer practices in a partnership or with other lawyers." Thus, the rule there (as here) was that the firm name was not presumptively misleading (even though the lawyer named was no longer practicing in the firm), but that a lawyer who knew or reasonably should have known of any confusion on the part of clients or potential clients was obliged to correct the misimpression.

A lawyer's obligation is not limited, however, to affirmatively correcting clients who are actually misled. As Rule 7.5(d) comment [1] makes clear, in some situations efforts must be made to avoid deception by "avoid[ing] a misleading implication." We can imagine contexts where the use of the name "Jane Doe Firm" would give rise to such a misleading implication.

One such circumstance that comes readily to mind would be a solo practitioner using the firm naming convention who shares office space and staff with other lawyers. As we noted in Opinion 303, office-sharing arrangements are rife with the potential for confusion. *See* D.C. Ethics Op. 303 ("Office-sharing arrangements. . . create a risk of public confusion."). That potential would seem to be magnified by the use of a potentially confusing firm name. In such a case, the unwary client might reasonably suppose that the other professionals present are also members of the practitioner's firm, and the prudent practitioner must take steps, through affirmative representations and through language in any engagement agreement, for example, to insure that confusion does not arise. *See id.* (Noting that "[i]f a potential client appears confused about the relationship among the attorneys in such an arrangement, the attorney should take steps to resolve this confusion" and requiring attorney to make an affirmative disclaimer of any affiliation with the other attorneys in the shared office space).

It bears emphasis: Our discussion of the solo practitioner sharing office space is meant to be illustrative only. There are certainly other situations where the use of the word "firm" may be misleading. The solo practitioner who elects to practice under the "Law Firm" name should do so ever mindful of the context in which his or her actions will be viewed.

*Conclusion*

For the foregoing reasons, we believe that a solo practitioner may practice under a trade name that uses the term "firm" or "law firm" without violating the Rules of Professional Conduct. In doing so, practitioners should exercise caution to insure that the manner in which they conduct their practice does not, in context, mislead clients or potential clients. Practitioners are also affirmatively obliged to correct any misimpression that might arise whenever they know or reasonably should know that a client may be confused.[3]

Inquiry No: 05-03-01
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[3] One member of the Committee is not satisfied with the reasoning on which this opinion relies. Although he has chosen not to file a dissenting opinion, he has requested that his disagreement with the opinion as written be formally noted.

*Opinion 333*

**Surrendering Entire Client File Upon Termination of Representation**

• Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire "file" containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer.

**Applicable Rules**

• Rule 1.8(i) (Imposing lien on attorney work product)
• Rule 1.16(d) (Surrendering files upon termination of representation)

*Inquiry*

A law firm previously represented a bank in a variety of matters. After the firm's representation in those matters ended, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver for the bank. The FDIC's outside counsel has requested access to all of the firm's files regarding the bank. The firm has provided access to all client files with the exception of a small folder containing individual attorney handwritten notes and several internal memoranda reflecting attorneys' thoughts, impressions and strategy ideas. Outside counsel for the FDIC claims to be entitled to all of the bank's files—including the firm's opinion work product—by virtue of the FDIC's statutory assumption of all rights, titles, powers and privileges of the insured depository institution. The FDIC's counsel has never articulated why the particular material that the firm is withholding is necessary for its investigation of the bank's failure. Instead, it argues simply that the FDIC, as the bank's successor in interest, is entitled to these documents.

*Discussion*

D.C. Rule 1.16 provides that "[i]n connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i)." D.C. Rule 1.16(d). D.C. Rule 1.8(i) creates a narrow exception to the general rule that clients are entitled to their files by allowing a lawyer to secure unpaid fees or expenses by placing a lien "upon the lawyer's own work product, and then only to the extent that the work product has not been paid for." D.C. Rule 1.8(i).[1] The Comment to D.C. Rule 1.8 states, "if the client has paid for the work product, the client is entitled to receive it, even if the client has not previously seen or received a copy of the work product." D.C. Rule 1.8, Comment [9].

The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly. *See* D.C. Ethics Op. 250 (1994); D.C. Ethics Op. 230 (1992). Work product "immunity" is a doctrine of evidence law, which may shield attorney work product from discovery by opposing counsel; it does not shield that same attorney work product from the attorney's own client.

Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the "end-product" approach of some jurisdictions[2]—where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work—in favor of the majority, "entire file" approach, "which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for." D.C. Ethics Op. 283 n.3 (1988); *see also* D.C. Ethics Op. 168 (1986) (for purposes of determining what needs to be turned over to a former client or substitute counsel, the "entire contents of a client's file" includes "all notes, memoranda and correspondence constituting 'work product'"); *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 91 N.Y.2d 30, 34, 689 N.E.2d 879, 666 N.Y.S.2d 985 (N.Y. 1997).

D.C.'s approach has been embraced by the Restatement (Third) of *The Law Governing Lawyers* (2000), which states that, "On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse." *Id.* at § 46(2). An attorney must surrender all papers and property *to which the client is entitled*. This requires the attorney to consider carefully the contents of the "file," ensuring that it contains all material that the client or another attorney would reasonably need to take over the representation of the matter, material substantively related to the representation, and material reasonably necessary to protect or defend the client's interests. An attorney would not be required to surrender material that relates solely to the prior management of the case (such as material concerning which of the firm's lawyers were assigned particular research projects) or to matters that are completely unrelated to the substance of the representation.

*Conclusion*

For these reasons, at least so far as the D.C. Rules of Professional Conduct are concerned, nothing in the matter at hand would justify withholding the relevant file from counsel for the FDIC.[3]

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*Opinion 334*

**Agreement Between Lawyer and Media Representatives**

• Rule 1.8(c) does not apply to an agreement between a lawyer representing a client and representatives of the media who are interested in obtaining the lawyer's story.

[1] Although not relevant here, D.C. Rule 1.8(i) also provides that, even when payment has *not* been made, work product cannot be withheld (i) when the client has become unable to pay, or (ii) when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

[2] A minority of courts and state bar legal ethics authorities distinguish between the "end product" of an attorney's services—e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses—and the attorney's "work product" leading to the creation of those end product documents, which remains the property of the attorney (*see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, *aff'd in part and rev'd in part on other grounds*, 128 F.R.D. 182 (S.D. Miss. 1989); *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).

[3] This assumes, of course, that the FDIC, is, as a matter of federal law, in effect the "client" and is entitled to any property or files to which the bank would be entitled if it were still the firm's client .

But Rule 1.7(b)(4) does apply in such circumstances, and the lawyer must be vigilant to determine those circumstances where an agreement with media representatives gives the lawyer a personal interest in the matter that may be at odds with the lawyer's obligation to the client.

Obtaining valid consent of the client under Rule 1.7(c) to a conflict arising in such circumstances is difficult because it requires the client to anticipate future aspects of the representation to assess their potential impact on the lawyer's ability to represent the client. In such circumstances either the client should have independent counsel or the lawyer should consult independent counsel to assure that the lawyer will obtain an objective view of whether the representation can proceed with consent.

*Applicable Rules*

- Rule 1.8(c) (Conflict of Interest—Acquiring Media Rights from Client)
- Rule 1.7(b)(4) (Conflict of Interest—Lawyer's Personal Interests)
- Rule 1.7(c) (Conflict of Interest—Client's Consent to Conflict)
- Scope Comment [5] (Interpretation of Specific versus General Rules)

*Inquiry*

A question posed by an inquirer raises important issues concerning Rules 1.7 and 1.8, as well as more general issues concerning how to interpret the D.C. Rules when more than one might apply to the same situation.

The inquirer is a lawyer who represents a pro bono client in litigation. Under their agreement, the client pays nothing for the legal representation and is not required to reimburse the lawyer for expenses of the litigation. The litigation had drawn the interest of the press, and the inquirer finds it necessary to speak to media representatives in the course of the representation. The inquirer has been approached by reporters for newspapers and magazines who are contemplating writing books, and "perhaps" producing motion pictures, about the litigation. The inquirer states that the primary interest of these media representatives is in the lawyers who are conducting the litigation rather than the client. The media representatives would like to discuss an arrangement under which the inquirer would receive compensation from them for the inquirer's cooperation and the rights to the inquirer's story; the client, while not the primary focus of the media's interest, would also receive compensation "for his life rights." The inquirer would not divulge any confidential information protected by Rule 1.6 (that is to say, the inquirer will disclose neither "confidences" nor "secrets" under that Rule) about the client without the client's consent. The inquirer asks whether the arrangement sought by the media representatives would violate Rule 1.8(c), which provides:

> 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.

In particular, the inquirer notes, this Rule expressly applies only to an agreement giving the lawyer literary or media rights of the client while, by contrast, in the situation at hand the media, not the lawyer, seek the client's and the lawyer's literary and media rights.

We conclude that (1) Rule 1.8(c) does not apply to the facts as presented but (2) Rule 1.7(b)(4) does, and the inquirer cannot proceed to negotiate with the media representatives without full disclosure to the client and an appropriate waiver under Rule 1.7(c), if such a waiver is possible.

*1. Rule 1.8(c).*

This Rule, quoted above, deals with a specific and defined conflict of interest: it arises when a lawyer acquires literary or media rights concerning the lawyer's representation of a client where that representation is ongoing at the time of the acquisition and where the lawyer generally has the intention to exercise those rights later on, for example by writing a book about the matter. The existence of those media rights in the lawyer's hands may influence choices made by the lawyer in the representation because the media rights may be worth more if some steps are taken by the lawyer rather than others. If, for example, the lawyer had acquired the right to popularize the client's story, acceptance of an early settlement might diminish the value of that right, so that the lawyer would then have a personal financial interest in maximizing the value of the media rights that might negatively influence the lawyer's ability to make the best decisions for the client.

> The policy served by the Rule is obvious. A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choices of tactics and by the recommendations he makes to the client (not to plead guilty to a lesser charge, for example). Thus the risk that the lawyer will succumb to these temptations and *actually* provide less than vigorous representation is not trivial.
>
> 1 Hazard and Hodes, The Law of Lawyering, §12.10 at 12-28 (Third Edition, 2004 Supplement). The Rule therefore forbids the acquisition of such rights by the lawyer while the representation is ongoing and the lawyer's decisions for the client still may be so influenced, and there is no provision therein for waiver by the client.

There is an exception to this rule where the lawyer represents the client only in seeking to sell the client's literary rights and has a contingent fee arrangement with the client such that the more value the lawyer secures for the client, the greater the fee to the lawyer. *See* D.C. Rule 1.8, Comment [4]. The clear rationale for the exception is that in such a case the lawyer is induced by the contingent fee to seek the most advantage for the client in the matter at hand, as both are interested in maximizing the value of the literary rights. By contrast, where the subject matter of the lawyer's representation of the client is other than protecting and enhancing the literary rights of the client, the publicity value of steps taken or not taken in the representation could make the lawyer's interest in the literary rights conflict with the client's best interest.

*2. Would the sale of the inquirer's story that is the subject of the inquiry be barred by Rule 1.8(c)?*

The inquirer states that media representatives have approached him regarding a book or possibly a movie about the representation. The representatives apparently also have approached, or intend to approach, his client and apparently have offered to compensate both.

We do not believe that the present situation triggers Rule 1.8(c).[1] That provision prohibits a lawyer from "mak[ing] or negotiat[ing] *an agreement giving the lawyer literary or media rights* to a portrayal or account" based on the representation (emphasis added). We believe the rule prohibits a lawyer from acquiring media rights from the client or otherwise;

[1] As we make clear later, this situation most assuredly falls within the scope of Rule 1.7(b). We discuss the conflicts under Rule 1.7 in full detail later on in this opinion.

it does not, however, prohibit the lawyer from making an agreement with media representatives with respect to his own media rights.

The predecessor provision in the Code of Professional Responsibility, DR 5-104(B), made this clear by providing:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client . . . by which he acquires an interest in publication rights with respect to the subject matter of his employment . . .

This provision thus simply barred the lawyer from acquiring literary rights from the client. The modified version in the present Rule 1.8(c) maintains the focus on barring the acquisition by a lawyer of literary rights, but broadens this bar so that it is not just the client, but anyone, from whom the lawyer is barred from acquiring such rights.

When the D.C. Bar Board of Governors recommended adoption of the Rules of Professional Conduct, it observed only that the new Rule 1.8(c) was "substantially similar" to the Code provision, noting only that the term "publication" rights had been changed to "literary or media" rights, "a more generally inclusive term." Proposed Rules of Professional Conduct and Related Comments at 75 (November 19, 1986) ("The Jordan Committee Report").[2] The Board of Governors did not mention that the text had also been changed to bar the acquisition of media rights by the lawyer not only from the client, but from others (for example, a client's spouse or relative). But, as noted, with these changes the focus of the prohibition remained on the lawyer acquiring media rights that could later be sold to media representatives.

The transaction contemplated by the inquirer would involve a sale of media rights by the inquirer to media representatives, not the acquisition by the inquirer of someone else's rights, and specifically, not the unconsented use by the inquirer of confidences or secrets of the inquirer's client.[3] This difference takes the inquirer's proposed transaction outside of the language of Rule 1.8(c). Equally as important, this factual difference is significant in that in some circumstances such a distinction diminishes the potential for evil that the Rule was designed to address. In a situation of the type prohibited by the Rule, the lawyer obtains media rights, say from the client, and holds those rights while continuing to conduct the representation, while intending to make a media deal involving those rights at some later time. Thus the lawyer acquires and holds an asset (the media rights) whose value may fluctuate as events occur in the representation. This gives the lawyer a financial interest in handling the representation so as to maximize the later value of the media rights, but that course might well not coincide with the course that is best for the client. As succinctly stated in comment [4] to Rule 1.8, "Measures that might otherwise be taken in the representation of the client may detract from the publication value of an account of the representation." This interest is so likely to conflict with the lawyer's interest in procuring the best result for the client that the prohibition of Rule 1.8(c) is absolute; as we have noted, D.C. Rule 1.8(c) does not allow for the possibility of waiver in any circumstances.

In the situation posed by the inquirer, by contrast, the lawyer does not seek to acquire literary rights that may be the subject of a later arrangement by the lawyer with a media representative, but instead seeks to make an arrangement now with such a representative, based on the lawyer's story. As we have suggested above, there are many such situations that could create serious conflicts of interest, depending on the particular circumstances. But there are also circumstances that would not necessarily raise any such conflict. For example, a lawyer might give an "account" of the matter by writing an article or delivering a lecture for a fee that was fixed and could not vary with later developments in the representation. In such a situation the lawyer's later activity in the case would not subsequently be influenced by any financial interest in what that fee would be, as it would be fixed and unchangeable by later developments.

Indeed there are at least some familiar transactions that are similar to the inquirer's in concept but do not appear ever to have been thought to involve a violation of Rule 1.8(c). The most prominent example would be a situation in which a lawyer writes an article for a publication about the legal profession, or makes a speech or appears at a seminar, where the subject matter includes giving an "account" of current and uncompleted client matters. Such events are extremely common. Some such instances have raised other issues such as the possibility that they would constitute ex parte communications with a court (D.C. Bar Legal Ethics Committee Opinion No. 5, April 23, 1975) or inappropriate advertising

[2] In Opinion No. 202, we also pointed out that Rule 1.8(c) is "substantially similar" to the prior Code version and also noted that the newer provision "closely parallels" the former. In that opinion we considered a situation in which a lawyer represented a client in litigation that had attracted the attention of the public; during the course of that litigation, the client approached the lawyer also to negotiate the sale of the literary rights to the client's story, with the lawyer's fee for that representation to be a portion of the value of those rights. We opined that while it was normally acceptable for a lawyer to accept a share of the client's literary rights as a contingent fee in a matter involving negotiation of those rights with a publisher, the lawyer's negotiating the value of those rights while also representing the client in litigation was barred by the Rule until that litigation was over.

[3] As noted above, while the inquirer states that the inquirer will not reveal confidences or secrets of the client to the media without the client's valid consent, he also states that the reporters may seek to make an agreement with the client seeking such consent. This itself raises potential issues under both Rule 1.7(b)(4) and 1.8(c) if the inquirer were to participate in such a waiver process.

First, we caution that for the lawyer to seek to represent the client in such a transaction with the media representatives would itself involve the lawyer in a further conflict of interest because the lawyer would have an interest in having a deal favorable to the lawyer go forward and so would not be in a position to advise the client as to whether the deal was in the client's best interest. (As our Opinion 202 concludes, the final sentence in comment [4] to Rule 1.8 does not necessarily apply where representation in the marketing of literary rights occurs simultaneously with other representation of the client that might be impacted by, or have an impact on, the representation about sale of rights. See footnote 2, supra.)

Second, a transaction in which it could be argued that the lawyer effectively assisted the media representatives in obtaining media rights from the client might itself constitute at least the substantial equivalent of a transaction that violated Rule 1.8(c). It would be a violation of the lawyer's legal duty for the lawyer to use client confidences or secrets protected by Rule 1.6 for the lawyer's benefit rather than the client's. Thus, the lawyer's obtaining a waiver of the confidentiality obligation from the client could amount to the lawyer's obtaining the client's agreement to relinquish the client's right to restrict publication of the material by the lawyer—arguably the equivalent of a lawyer's making "an agreement [with the client] giving the lawyer literary or media rights" within the meaning of Rule 1.8(c). It appears that this was the situation in *Harrison v. Mississippi Bar*, 637 So. 2d 204 (Miss. 1994). There the Mississippi Supreme Court upheld the disbarment of a lawyer in part because the lawyer had violated Mississippi's equivalent of D.C. Rule 1.8(c). The lawyer argued that the story she sold to a publisher was only the lawyer's story, not the client's, but the Court noted that the contract with the publisher required the lawyer to obtain the consent of the client to use of information about the client matter being handled by the lawyer, and further pointed out that despite the lawyer's claim to the contrary the lawyer still represented the client's estate at the time the contract was signed. It was explicitly on that basis that the Court held that the conduct in question violated the Rule. 637 So. 2d at 224.

(cf. Opinion No. 41, November 22, 1977), but they have never been considered to constitute the acquisition of literary rights so as to trigger Rule 1.8(c) or its predecessor, so far as we are aware. These types of transactions do not fall under the language of Rule 1.8(c), and especially since Rule 1.7 is present and would apply to any such arrangement that constituted a conflict of interest, there is no reason to strain the language of Rule 1.8(c) to cover them.

That conclusion is all the more justified because there are other benefits that may flow from some kinds of public attention to "accounts" of ongoing legal matters—as long as that can be done without violating Rule 1.7 (a subject to which we turn below). In addition to education of the bar, as suggested in the previous examples, there can also be benefit to clients whose causes may be assisted by better public understanding, and to the public at large from better understanding of legal issues that may affect it. Thus there would, in at least some circumstances, be good policy grounds to avoid overextension of the reach of Rule 1.8(c).

*3. The application of Rule 1.7(b)(4).*

The situation described by the inquirer raises a serious issue under D.C. Rule 1.7(b)(4). Rule 1.7(b)(4) generally provides that a lawyer may not represent a client with respect to a matter where:

> the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

This subparagraph clearly covers the very wide range of interests or responsibilities that a lawyer may have that do not involve representation of a different client (conflicts created by differing interests of multiple clients are handled by subparagraphs (b)(1), (2), and (3)) that will or reasonably may affect the lawyer's ability to represent the client. Obvious examples would be such matters as personal investments of a lawyer in company X that might influence the lawyer's ability to pursue a claim against X on behalf of a client; a friendship with an officer of company X that might reasonably be thought to affect the lawyer's ability to represent a client in pursuing a large claim against X; or the lawyer's guardianship of a person who appears to have played a role in activity that the client wants to challenge. The broadly worded scope of subparagraph (b)(4) shows that any kind of interest or obligation of the lawyer can trigger the applicability of the subparagraph if the presence of that interest could reasonably adversely affect the lawyer's ability to represent a client in a matter.

The inquirer's situation clearly creates a potential for a conflict under Rule 1.7(b)(4). The inquirer proposes to make an agreement with representatives who cover the litigation the lawyer is engaged in for various media companies and who are considering writing books or possibly producing a motion picture about that litigation. The situation as presented in the inquiry sounds as though the media representatives' plans are not fixed; for example it is not clear whether they will seek only to write a book or whether they will attempt to produce a motion picture. Thus it sounds as though whatever financial arrangement the media representative would make would have some contingent features, which would depend upon whether, say, merely a book, or perhaps a movie, may be made out of the story of the litigation. Further, the inquirer states that while the primary focus of the media representatives is on the litigation and the lawyer, the lawyer's client "would also receive compensation for his life rights." No confidential information would be used without the client's consent.

We first observe that even if the inquirer's action would not violate Rule 1.8(c) because the lawyer is not seeking to acquire the literary or media rights of another, nonetheless something similar (at least) to the concerns underlying Rule 1.8(c) may well be present in some situations. In the situation posed by the inquirer, it seems possible that because the media's plans as to how to present the story are not fixed, the inquirer might well face a conflict between, on the one hand, obligations to do the best possible thing for the client, and, on the other, a personal interest in having the case be the kind of story that would enhance its interest to the media and the public. Such a situation would present a serious conflict of interest, in our view. Indeed, any agreement made by a lawyer with media representatives presents a conflict of interest if, as a practical matter, its value to the lawyer might fluctuate depending on later events in a related matter in which the lawyer is representing a client.

By contrast, a transaction with media representatives in which any financial compensation was immediately fixed and would not change regardless of what later happened in the case would be less objectionable because the inquirer's later steps in the case would not as obviously be influenced by the possibility that some steps might tend to increase the value of the media contract available. There still could be features requiring attention under Rule 1.7(b)(4). For example, the publicity value of the agreement might still fluctuate in a meaningful way to the lawyer, depending on certain choices that are made in the course of the litigation; or the negotiations over the terms of any agreement might take place during a period in which the lawyer's actions in the litigation might well be influenced by the negotiations themselves. The inquirer should also be extremely circumspect in describing, in any negotiations, those later events in the case that the inquirer expects to occur and should not make any representations about the future of the case where there is any doubt at all that such eventualities might occur.

The question of how, and even whether, a client may consent to the conflict under Rule 1.7(c) is highly important. Valid consent may be obtained only after consultation with the client, which the Rules define as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." D.C. Rules, Terminology [3]. In situations involved here, the question is whether the lawyer's judgment on how to conduct the representation for the client might be adversely affected by the lawyer's pecuniary or publicity interest. There are two impediments to a clear appreciation by the client of what is at stake—first, future developments in the representation involve possibilities that may well not be presently understood, so that an appreciation of them currently might be difficult or impossible. Second, questions of the impact on the lawyer's judgment in carrying out the representation involve issues peculiarly within the knowledge of lawyers but nor of clients.

As to the first of these problems, our Opinion No. 309 comprehensively examines the question of the degree to which consent can be valid where it is given in advance of events that affect the scope of the conflict. We there concluded that a valid advance consent can be given only where full consultation as described in the Rules can be had, and a client has the ability to give fully informed consent, in advance. We note that the situation presented here—where a conflict that arises under Rule 1.7(b)(4) is sought to be waived in advance—was not specifically treated in that opinion, but it is clear that

a large part of obtaining a valid waiver of any conflict caused by the lawyer's negotiation of a contract with media representatives would involve the explanation to the client in detail of the kinds of choices that the lawyer is put to in litigation and the possible impacts on those choices that are the result of having the media contract. This is likely to be more difficult than explaining the usual conflict caused by potential loyalty to another client that arises under Rule 1.7(b)(2). Loyalty, and the ability to act despite somewhat divided loyalties, is a relatively simple concept to understand. But the impact of the lawyer's personal interests on the lawyer's ability to make tactical and strategic decisions for a client, which is presented in a conflict arising under Rule 1.7(b)(4), requires the lawyer to explain, and the client to understand, the significance to the client of influences on the lawyer's handling of specific issues. In these circumstances, it would be highly advisable for the client to have the benefit of independent counsel to offer advice on the scope of any adverse impact on the lawyer's ability to provide adequate representation despite whatever influence the media arrangement may have. If that is for some reason not possible, the lawyer should likely obtain independent legal advice to provide the most objective view possible of the lawyer's ability to act adequately for the client in the circumstances.

Actually the problems involved in this situation are more common than might be supposed. Although it might be rare to encounter a media arrangement in which a lawyer is paid money for participating in a story about the lawyer's ongoing representation, many lawyers know that working on particular matters might draw attention and publicity that could be valuable to them. Moreover, it is quite possible that, without having had any contact with the media concerning a particular representation, a lawyer might know or at least anticipate attention from the media concerning a matter on which the lawyer is working. It may also be true that such media attention is more likely if one issue predominates (say a widely anticipated one arising from a newly enacted statute) than another (say an older issue that may render the newer one irrelevant). A lawyer should always be alive to the possibility of potential influence on the lawyer's judgment and ability to pursue the best course for the lawyer's client. We do not mean to suggest that such instances regularly, or even often, create conflicts of interest. Our purpose is to show that there is a wide range of issues involving actual or potential media attention that could raise questions under Rule 1.7(b)(4) but do not raise issues under Rule 1.8(c).

*4. The "principle of priority" under Scope Comment [5].*

We have concluded above that while Rule 1.8(c) does not extend to the situation presented by the inquirer, Rule 1.7(b)(4) does. This situation—in which we essentially conclude that Rule 1.8(c) constitutes a special case of what would otherwise be a conflict under Rule 1.7(b)(4), and that the latter may apply even where Rule 1.8(c) does not—raises a significant question of which Rule takes precedence over the other that is the subject of Scope Comment [5].

Scope Comment [5] enunciates an important rule of interpretation. It states, in its entirety:

> In interpreting these Rules, the specific shall control the general in the sense that any rule that specifically addresses conduct shall control the disposition of matters and the outcome of such matters shall not turn upon the application of a more general rule that arguably also applies to the conduct in question. In a number of instances, there are specific rules that address specific types of conduct. The rule of interpretation expressed here is meant to make it clear that the general rule does not supplant, amend, enlarge, or extend the specific rule. So, for instance, the general terms of Rule 1.3 are not intended to govern conflicts of interest, which are particularly discussed in Rules 1.7, 1.8, and 1.9. Thus, conduct that is proper under the specific conflicts rules is not improper under the more general rule of Rule 1.3. Except where the principle of priority stated here is applicable, however, compliance with one rule does not generally excuse compliance with other rules. Accordingly, once a lawyer has analyzed the ethical considerations under a given rule, the lawyer must generally extend the analysis to ensure compliance with all other applicable rules.

Scope Comment [5] makes clear that where conduct is proper, either explicitly or implicitly, under a specific rule dealing with that type of conduct, a more general rule should not be used to render that conduct improper. Thus, for example, if lawyer A moves from partnership in firm X to partnership in firm Y, and firm Y is adverse to firm X on a heated matter, which, however, lawyer A has had nothing to do with and has learned nothing of, Rule 1.10(b) provides, as a result of the balance struck in that Rule, that firm Y does not have a conflict of interest despite the fact that A used to be a partner in firm X. Scope Comment [5] provides that no general rule, such as Rule 1.3 (which requires that a lawyer represent a client "zealously and diligently"), should be cited to upset this balance. The reason is that the conflict of interest rules exist, ultimately, to assure that no such conflict should impede a lawyer from acting "zealously and diligently" for a client. Thus, when Rule 1.10(b) was written, it took into account, and balanced, the considerations behind Rule 1.3. Citing Rule 1.3 in a particular case to invalidate some activity permissible under Rule 1.10(b) would upset that balance written into the Rule and disserve the other considerations.[4]

None of this pattern is present in considering Rules 1.8(c) and 1.7(b)(4). First, this is a case where the inquirer's situation does not fall precisely under the terms of the specific Rule—1.8(c). There is no indication at all, from the purpose, terms, or history of Rule 1.8(c), that it struck any kind of a balance or was in any other way intended to exonerate behavior that was similar to, but fell outside of, the

[4] Note that even though Rule 1.10(b) implicitly, rather than explicitly, provides that a firm is not disqualified where a lawyer has moved to it from another firm, and at the first firm the lawyer had not worked on the matter at issue or had acquired no information protected by Rule 1.6 concerning that matter, it clearly intends that result. First, comments [10] and [11] to that Rule are quite explicit as to the balance of competing interests that is expressed in that Rule. Second, subparagraph (b) states a rule for lawyers moving between firms that is materially narrower than the rule stated in subparagraph (a); it is inescapable from the order of these paragraphs that the drafters intended subparagraph (b) to extend only as far as it does rather than intending that other Rules could supplement it so that it would extend as far as subparagraph (a) does. There is nothing about Rule 1.8(c) that indicates that the drafters wanted similarly to immunize conduct that fell outside of the particular circumstances covered by that Rule. Similarly, Rule 1.7(d) allows a lawyer to continue representation of a client despite the presence of a conflict of interest arising under Rule 1.7(b) (1) and the refusal of the client asserting the conflict to waive it, where the conflict was "thrust upon" the first client and lawyer because it had not been reasonably foreseeable at the outset of the representation and arose only after the representation had commenced. See our Opinion No. 292 (1999). And the proviso to Rule 1.10 (a) creates an exception to the general rule requiring all lawyers in the firm to be disqualified where one would be. The exception does not require disqualification of an entire firm where a firm lawyer is disqualified because the lawyer was consulted by a potential client who did not become a client. See also comment [7] to Rule 1.10. This accommodation encourages full consultation between prospective clients and lawyers. See Proposed Amendments to the District of Columbia Rules of Professional Conduct (as adopted by the Board of Governors, March 8, 1994) at 36-37.

defined scope of behavior that it covers. Instead, Rule 1.8 simply mandates particular treatment of a specific fact situation and says nothing, explicitly or implicitly, about other situations that might be similar. This is in keeping with the general character of Rule 1.8, which "deal[s] with a series of specific situations in which the lawyer's own interests—often her financial interests—may conflict with the interests of a client. Many of the conflicts of interest that are *per se* prohibited are catalogued in this rule." 1 Hazard & Hodes, The Law of Lawyering, §10.4 at p. 10–14. (3d ed 2004 Supp.)[5]

> Some situations are so fraught with danger of serious impropriety . . . that a *per se* rule of disqualification is imposed—a prophylactic ban that sometimes is not waivable, even by a sophisticated and well-counseled client. In these situations, (some of which are catalogued in Rule 1.8) the public interest in maintaining public confidence in the legal system outweighs the interests of individual lawyers and clients in freely contracting with each other.

*Id.*, §10.4, at 10-12. Thus, as we have concluded, Rule 1.8(c) creates a special class of per se rules covering situations as to which the drafters concluded that the level of potential impropriety and adverse impact on the lawyer's ability to represent the client properly is so great that such a specific rule is warranted.[6] But that alone does not mean that where a situation is presented that does not fall under the strict Rule 1.8(c) formula it should, by virtue of Scope Comment [5], escape any consideration under Rule 1.7(b)(4). This situation accordingly falls under the more general doctrine expressed in that comment: "Except where the principle of priority stated here is applicable, however, compliance with one rule does not generally excuse compliance with other rules."

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*Opinion 335*

**Whether a Lawyer May, as Part of a Settlement Agreement, Prohibit the Other Party's Lawyer From Disclosing Publicly Available Information About the Case**

A settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled. Such conditions have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases. By diminishing the opportunity for the lawyer to represent future clients in similar matters, such conditions violates D.C. Rule 5.6(b), which prohibits lawyers from offering or making a settlement agreement that restricts a lawyer's right to practice. A settlement agreement may provide that the terms of the settlement and other nonpublic information may be kept confidential, but it may not require that public information be confidential.

**Applicable Rules**

- Rule 1.2—Scope of Representation
- Rule 1.6—Confidentiality
- Rule 5.6—Restrictions On Right To Practice
- Rule 7.1—Communications Concerning a Lawyer's Services

*Inquiry*

A defendant wishes to settle the claim of the inquirer's client conditioned on an agreement that the inquirer will keep confidential not only the terms of the settlement but also the fact of the settlement, the identity of the defendant, and the allegations of the complaint. The complaint has been filed and is not under seal. Moreover, the complaint has received substantial media attention. The inquirer's law firm has reported developments in the litigation on its website, we assume with the consent of his client. Discussions about the firm's experience on its website are part of the firm's effort to attract new clients. The inquirer asks whether the defendant can include in a settlement agreement a provision requiring him to remove information about the case from the firm's website and not to disclose further on the website or in other promotional materials, otherwise public information such as the defendant's name, the allegations of the complaint, and the fact (but not the terms) of settlement.

*Discussion*

Settlements are frequently conditioned on the confidentiality of their terms. The rationale for this practice is that the terms of a settlement constitute non-public information learned by a lawyer in the course of the representation, which, if the client requests be held inviolate, are "secrets" within the definition of D.C. Rule 1.6(b). Subject to certain exceptions, a lawyer is not permitted to reveal his client's secrets. D.C. Rule 1.6(a).[1] In most instances, we suspect, a plaintiff's request that the terms of a settlement remain confidential results from the defendant's insistence and the plaintiff's indifference. Nonetheless, there are undoubtedly circumstances in which a plaintiff has her own motives for wishing settlement terms to remain confidential, such as preventing other persons from learning precisely how much (or little) she has recovered.

[5] Other such provisions in Rule 1.8 include at least subparagraphs (a) (special rules limiting lawyer's ability to enter into a business transaction with a client); (b) (lawyer may not prepare an instrument that gives the lawyer or a relative a substantial gift from the client, except where the lawyer is related to the client), (d) limits lawyer's ability to provide financial assistance to a client in litigation or administrative proceedings),and (e) (limits on the lawyer's ability to receive fees from someone other than the client). In each such situation, just as with subparagraph 1.8(c), in the absence of these provisions the activity in question would involve Rule 1.7(b)(4). But, rather than taking into account policies or considerations foreign to those applicable under Rule 1.7, these Rule 1.8 provisions dictate precisely and uniformly how to apply the conditions underlying Rule 1.7(b)(4).

[6] In certain circumstances, unlike subparagraph (c), Rule 1.8 does go further and affirmatively provide a safe haven for particular conduct. Examples include the observation in comment [1] that the severe restrictions on lawyers contracting with their clients do not include "standard commercial transactions", and Rule 1.8(d)(1) and (2), which explicitly allow lawyers to advance or guarantee certain types of financial assistance to clients. In at least these instances, portions of Rule 1.8 themselves reflect balances, which, under Scope Comment [5], should not be set at naught by other, more general Rules. To illustrate, we consider a hypothetical situation where a lawyer has a client that is an automobile dealership, from which the lawyer buys automobiles for personal use, getting a discount. In response to a challenge of this practice as taking undue advantage of the client, the lawyer seeks to establish that the prices the lawyer paid for the automobiles were such that the deals constituted "standard commercial transactions" within the meaning of comment [1] to Rule 1.8 and thus outside the scope of Rule 1.8(a). A conclusion that regardless of whether the deals viewed objectively were "standard" and thus proper under Rule 1.8(a), the practice still violated Rule 1.7(b)(4) would violate the doctrine established by Scope Comment [5].

[1] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000); Colo. Bar Ethics Comm., Formal Op. 92 (1993); N.M. Bar Ethics Adv. Op. Comm., Adv. Op. No. 1985-5 (1985).

The Inquiry, however, goes beyond the confidentiality of the settlement terms, and raises the question whether, as part of the settlement, one lawyer may prohibit another from further disclosure of already public information, including the name of the defendant and the allegations of the complaint, as well as information that can readily be inferred from the public record, such as the fact that the litigation settled. Once the complaint was filed in court, the name of the defendant and the plaintiff's allegations against it are available to the public. While terms of a settlement are frequently confidential, the fact of settlement rarely is. If a settlement is not announced by the parties, the public record may not actually disclose that it has occurred, although in cases where settlements require court approval, it will. But the voluntary dismissal will alert most knowledgeable persons that there has almost certainly been a settlement, and in most instances, a number of people will become aware that the case has settled.[2]

Nevertheless, a lawyer has a duty to abide by his client's decision whether to accept an offer of settlement. D.C. Rule 1.2(a). This is so even if the lawyer believes the decision to be unwise. D.C. Rule 5.6(b), however, prohibits lawyers from including certain types of terms in settlement agreements: A lawyer may not participate in offering or making "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between parties." This is generally understood to mean an explicit agreement as part of the settlement prohibiting plaintiff's counsel from representing other persons.[3] Thus, for example, a settlement of a case brought on behalf of consumers against the manufacturer of a product may not be conditioned on plaintiffs' counsel agreeing not to represent other consumers of the product against the settling manufacturer.[4] This same rule, or a similar version, also has been interpreted to prohibit an agreement not to use information learned in the course of the case in a future representation against the same party. Enforcement of such an agreement might effectively prevent the lawyer from representing future clients since the only way for the lawyer to ensure that he does not use information that he has learned is to decline to represent anyone else in a similar case.[5] Other jurisdictions also have prohibited similar clauses in settlement agreements restricting "plaintiff or plaintiff's counsel from using case information to assist other litigants or claimants;"[6] requiring plaintiff's counsel to turn over her entire file, including her work product, to defense counsel to be sealed;[7] "barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party;"[8] or forbidding disclosure of "the business or operations of the defendant corporation"[9] An underlying rationale for all these opinions is that the prohibited provisions restrict the lawyer's right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party.

Underlying each of the opinions disapproving restrictions on the future conduct of lawyers, under the rule equivalent to D.C. Rule 5.6, is the intent to preserve the public's access to lawyers who, because of their background and experience, might be the best available talent to represent future litigants in similar cases, perhaps against the same opponent.[10] A similar rationale underlies the interpretation of D.C. Rule 5.6(a), forbidding restrictions on lawyers moving from one firm to another.[11] We believe that the purpose and effect of the proposed condition on the inquirer and his firm[12] is to prevent other potential clients from identifying lawyers with the relevant experience and expertise to bring similar actions. While it places no direct restrictions on the inquirer's ability to bring such an action, even against the same defendant if he is retained to do so, it does restrict his ability to inform potential clients of his experience. As such, it interferes with the basic principle that D.C. Rule 5.6 serves to protect: that clients should have the opportunity to retain the best lawyers they can employ to represent them. Were clauses such as these to be regularly incorporated in settlement agreements, lawyers would be prevented from disclosing their relevant experience, and clients would be hampered in identifying experienced lawyers.

There was a time, of course, before the advent of websites and marketing departments and lawyer advertising, when public disclosures of relevant expertise were frowned upon, if not outright prohibited. Those days are gone.[13] But even then, if asked, a lawyer was able to disclose public information about cases that he had handled if a potential client inquired as to his experience. If the conditions proposed by the defendant could be part of a settlement agreement, why could the defendant not propose that the lawyer never speak of the case again unless compelled to do so by formal process? This would bring about a situation where a lawyer could not reveal to a potential client public record information that would demonstrate his experience and ability. The only restrictions on lawyer advertising in the District of Columbia are that all claims must be truthful and subject to substantiation. D.C. Rule 7.1.[14] The implication of this liberal rule permitting advertising is that the consumers of legal services—like the consumers of other products and services—benefit from the dissemination of accurate information in choosing legal representation. Given that policy, we believe confidentiality provisions in set-

[2] For example, when a case settles, the prospective witnesses are informed. If the case draws media attention, as this one has, the media becomes aware of the settlement when the case is dismissed.

[3] *See* D.C. Rule 5.6, Comment [2].

[4] *In re Hager*, 812 A.2d 904, 918-19 (D.C. 2002). *See generally* D.C. Ethics Op. 35 (1977).

[5] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000).

[6] Tenn. Bd. of Prof'l Resp., Formal Op. 98-F-141 (1998).

[7] N.M. Bar Ethics Adv. Op. Comm., Adv. Op. 1985-5 (1985). This opinion says, cryptically, such a restriction may in some, but not necessarily all, cases inhibit the representation of future clients.

[8] Colo. Bar Ethics Comm., Formal Op. 92 (1993).

[9] N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000).

[10] *E.g.*, N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000).

[11] D.C. Ethics Op. 325 (2004). *See Neuman v. Akman*, 715 A.2d 127, 131 (D.C. 1998). The court in *Newman* interpreted D.C. Rule 5.6(a), which prohibits employment agreements restricting a lawyer's right to practice after termination, to apply to a part nership agreement that denied certain financial benefits to departing partners. Such provisions might deter lawyers from joining new firms, which would limit their ability to offer clients their services in an organizational setting that might better serve the clients.

[12] Lawyers are generally not parties to settlement agreements, but they must adhere to the confidentiality provisions either because their clients implicitly instruct them to keep matters confidential, with which request the lawyers must comply pursuant to D.C. Rule 1.6, or because violating the confidentiality provision would undo the settlement and damage their clients, in violation of D.C. Rules 1.2 and 1.3(b).

[13] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[14] *See* D.C. Ethics Op. 249 (1994).

tlement agreements that prohibit a lawyer from disclosing such public information as the name of the defendant, the public allegations, and the fact of settlement would violate D.C. Rule 5.6(b). Such provisions restrict a lawyer's right to practice by interfering with his ability to inform future potential clients of his relevant experience and expertise.

If a client withholds permission for her lawyer to disclose public information, we agree that the lawyer must keep the information secret and that D.C. Rule 1.6 applies.[15] A plaintiff settling a sexual harassment claim, for example, may wish to protect her privacy by not allowing her lawyer to publicize further any information about her case. A settlement agreement may require a lawyer to keep non-public information confidential. It is well established that non-public information, such as the terms of a settlement, may remain confidential.[16] In addition to settlement terms, other non-public matters can be kept confidential, such as disputes that are never made public but which are decided through confidential arbitration procedures. The line that we draw is that the confidentiality of otherwise public information cannot be part of a settlement agreement even if the lawyer's client agrees that such a provision be included. Once the matter is public, a settlement agreement may not impose confidentiality on otherwise public matters without violating D.C. Rule 5.6(b). A lawyer may not propose or agree to such a confidentiality provision. In drawing this line we are striking a balance consistent with the rationale of the Rules and with widely accepted practices. While it might be argued that a lawyer would be better able to market his services, and a client better able to identify a qualified representative, if no information about any case, including the terms of settlement, could be kept confidential, such a decision is contrary to long-standing accepted practices with respect to settlement agreements. On the other hand, if the parties can agree to keep all public information about all cases confidential, clients' ability to identify qualified lawyers would be greatly restricted. A reasonable resolution is to draw a line between information that is public at the time of settlement and information that remains confidential. New York seems to have taken a similar approach.[17] This balance between the well-accepted practice of keeping non-public settlements confidential, with the concomitant effect on the willingness of parties to settle, and allowing clients to identify experienced counsel by prohibiting confidentiality clauses in settlement agreements of otherwise public information, strikes us as a reasonable application of Rule 5.6(b). It also has the virtue of offering clear guidance to practitioners.

Our broad reading of D.C. Rule 5.6(b) is consistent with the Court of Appeals' equally broad interpretation of Rule 5.6(a). Almost any financial disincentive to a lawyer's changing firms has been determined to be an impediment that violates Rule 5.6(a) because it interferes with clients' ability to choose lawyers.[18] A similar approach leads to the conclusion that the proposed settlement provision, by inhibiting a lawyer's ability to attract clients, interferes with clients' ability to obtain the most competent representation.

We acknowledge that confidentiality provisions, such as the one at issue, might have value that the client can trade in order to get better terms from the other side. If a lawyer may not agree to such a provision, he deprives his client of that value. Yet an agreement that the lawyer will not represent future clients against the settling defendant also has value that his client could trade. In most cases, we suspect the value of the lawyer's agreement not to sue again exceeds the value of the prohibition on further disclosing public information. Yet the Rules of Professional Conduct prohibit such agreements not to sue as part of settlements. This is a policy choice that the value to future clients of the ability to choose the best lawyer to represent them exceeds the harm to the current client of not being able to trade for consideration her lawyer's ability to sue the settling defendant in the future. Moreover, when such settlement terms are taken off the table because they are prohibited, clients are not harmed. If all parties are prohibited from agreeing to such provisions, they have no value. It seems improbable that if such confidentiality clauses are prohibited to all litigants, there would be any measurable effect on the number of settlements or on the value of those settlements.

We emphasize, however, that if a client withholds permission for her lawyer to disclose public information, the lawyer should comply with his client's wishes. D.C. Rule 5.6(b) concerns only settlement agreements. If a client wishes her lawyer not to disclose further public information, she does not need the mechanism of a settlement agreement to enforce her instructions. The only reason to make confidentiality a provision of the settlement agreement is to give the opposing party a mechanism to enforce confidentiality. We believe such opponent-driven secrecy clauses are restrictions on the lawyer's right to practice in violation of Rule 5.6(b).

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*Opinion 336*

## A Lawyer's Fiduciary Role as a Court-Appointed Guardian of an Incapacitated Individual

• A lawyer who has been appointed as a guardian of an incapacitated individual (but who is not acting as an attorney for the incapacitated individual) must not knowingly make a false statement of material fact or law to a tribunal or otherwise engage in conduct involving dishonesty or misrepresentation. A lawyer acting as a guardian who assists the incapacitated individual in obtaining government benefits, but then subsequently learns that the incapacitated individual's true identity is not as it has been represented may well be required under applicable law to disclose the correct information. Moreover, a lawyer who receives information clearly establishing that a fraud has been perpetrated on a tribunal must reveal the fraud; there is no duty of confidentiality imposed by the Rules of Professional Conduct that would prevent the lawyer acting solely as a guardian from making such a disclosure.

**Applicable Rules**

• Rule 3.3—Candor Toward the Tribunal
• Rule 8.4—Misconduct

*Inquiry*

The inquirer, a member of the District of Columbia Bar, has been appointed by

[15] *Cf. Sealed Party v. Sealed Party*, 2006 U.S. Dist. LEXIS 28392 (S.D. Tex. 2006) (Under Texas law, a lawyer violates his fiduciary duty to a former client by revealing public information about a case without obtaining the client's consent).

[16] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-417 (2000); Colo. Bar Ethics Comm., Formal Op. 92 (1993); N.M. Bar Ethics Adv. Op. Comm., Adv. Op. 1985-5 (1985).

[17] A settlement agreement may not impose on a lawyer a higher degree of confidentiality than the lawyer owes his own client. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 730 (2000).

[18] *See Neuman v. Akman*, note 11 *supra*; D.C. Ethics Op. 241 (1993); D.C. Ethics Op. 325 (2004).

the Probate Division of the Superior Court of the District of Columbia to serve as a "permanent general guardian[]" of an incapacitated individual, with the powers and duties set forth in D.C. Code § 21-2047.[1] He has asked the Committee for guidance on how to proceed on the following set of facts. Prior to the inquirer's appointment as guardian of the incapacitated individual, the incapacitated individual had suffered a stroke that left him partially paralyzed and required that he be hospitalized. He presented a name and social security number at the time of admission to the hospital. The Court acted on the assumption that the name and social security number were legitimate. The inquirer has determined categorically that the incapacitated individual's identity is false, but he has no way of determining the incapacitated individual's true identity. The incapacitated individual is an immigrant, but the inquirer has been unable to determine his status or to locate any family members. He is presumed to be homeless, is gravely ill, and cannot care for himself. He is totally nonverbal and is unable to write or comprehend communications.

Before learning that the individual's identity was false, the inquirer used the social security number and other identifying information the incapacitated individual provided to obtain Medicaid and social security benefits and to place the incapacitated individual in a nursing home.[2] Pursuant to D.C. Code § 21-2047, the inquirer, as guardian, has responsibility for the care, custody, and control of the incapacitated individual, including, among other responsibilities, discretion to take appropriate action to compel performance by any person of a duty to support the incapacitated individual and pay sums for his welfare; an obligation to maintain sufficient contact with the incapacitated individual to know the incapacitated individual's capacities, limitations, needs, opportunities, and physical and mental health; an obligation to take care of the incapacitated individual's personal effects; and an obligation to conserve any excess money for the incapacitated individual's future needs. (In this case, the only funds at issue are those that the incapacitated individual has received from government assistance programs). The inquirer has determined that the incapacitated individual cannot be safely discharged from the nursing home.

The inquirer seeks guidance on how to resolve an apparent conflict between his duties under the District of Columbia Rules of Professional Conduct ("Rules") and the District of Columbia guardianship statute. In particular, the inquirer wants to know whether he may continue to use the name that the incapacitated individual has been using; whether he has any affirmative duty to disclose information about the incapacitated individual's false identity to third parties; and whether he must follow the District of Columbia guardianship laws or the Rules whenever a conflict between them arises.

*Discussion*

As we understand the facts of the inquiry, the inquirer is not serving as counsel to the incapacitated individual. Rather, the inquirer has the statutory powers and duties enumerated in the guardianship statute under which he was appointed.[3] Moreover, the inquirer has given no indication that an attorney-client relationship existed prior to the individual's incapacity.

We believe the fact that the incapacitated individual has never had the ability to communicate with the inquirer or participate in decisions about his welfare supports the conclusion that no lawyer-client relationship has been formed. As noted by the ABA Standing Committee on Ethics and Professional Responsibility, a "client-lawyer relationship presumes that there can be effective communication between client and lawyer, and that the client, after consultation with the lawyer, can make considered decisions about the objectives of the representation and the means of achieving those objectives." ABA Formal Op. 96-404 (1996); *see also* NC Bar Formal Ethics Op. 11 (2005) (A lawyer appointed as a guardian *ad litem* for a parent with diminished capacity in a Termination of Parental Rights action does not have a lawyer-client relationship with the parent). Absent information that would indicate such a relationship ever existed between the inquirer and the incapacitated individual, we believe that it is reasonable to conclude that no such relationship exists.

Certain Rules of Professional Conduct are applicable to the inquirer's conduct notwithstanding the fact that the inquirer is not acting as the incapacitated individual's counsel. Although some Rules apply only if a client-lawyer relationship has been formed, *see, e.g.*, Rules 1.2; 1.6; 1.16, others apply to members of the bar regardless of whether they are engaged in professional activities. Specifically, D.C. Rules 3.3(a)(1), 3.3(d), and 8.4(c) govern the inquirer's conduct, even though he is not functioning as counsel to the incapacitated individual.

Rule 3.3(a)(1), which mandates candor to a tribunal, provides that "a lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal." Comment [2] to Rule 3.3 provides that, "[t]here may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." Rule 3.3(d) provides in pertinent part that "[a] lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly reveal the fraud to the tribunal unless compliance with this duty would require disclosure of information otherwise protected by Rule 1.6, in which case the lawyer shall promptly call upon the client to rectify the fraud."[4] Rule 8.4(c) provides that "it is professional misconduct for a lawyer to . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Rules define "tribunal" broadly to include regulatory agencies that render decisions of a judicial or quasi-judicial nature, regardless of the degree of formality or informality of the proceedings.

[1] Letter of Guardianship Issued Pursuant to Original Order of Appointment under Guardianship and Protective Proceeding Act of 1986, Effective September 30, 1989.

[2] It is not clear from the inquiry to whom the incapacitated individual initially provided this information. The inquirer says he presumed the individual had "borrowed" the identifying information.

[3] Appointment of a lawyer as guardian for an incapacitated individual does not create an attorney-client relationship where none existed previously, and a guardian under the District of Columbia statute is not required to be a lawyer. *See* D.C. Code § 21-2043, which provides that "any qualified person may be appointed guardian of an incapacitated individual." The statute also lists as priority for consideration for guardianship appointment qualified spouses, adult children, parents, and relatives of the incapacitated individual; it does include a prerequisite that a guardian be qualified to serve as counsel for the incapacitated individual or any requirement that a guardian *serve* as counsel. This is different from the situation where a lawyer is appointed as a guardian *ad litem*. In D.C. Ethics Op. 295 (2000), we concluded that a lawyer appointed as a guardian *ad litem* in a child abuse and neglect proceeding is properly considered to be the child's lawyer.

[4] Whether or not the incapacitated individual committed fraud when originally presenting his false identity—a question that we have no occasion to address here—the inquirer has received "information clearly establishing that a fraud has been perpetrated upon the tribunal," and must, therefore, reveal the fraud to the tribunal unless revealing it would violate Rule 1.6. However, as we explain above, Rule 1.6 does not apply here because the incapacitated individual is not the inquirer's client.

D.C. Rules, Terminology. Accordingly, if the inquirer, in performing his duties as guardian, finds it necessary to appear at a hearing before an agency that determines entitlement to benefits, Rule 3.3(a)(1) would apply to the inquirer's conduct before that tribunal.

The inquirer is obligated under the guardianship statute to "report in writing the condition of the ward and of the incapacitated individual's estate . . . at least semi-annually." D.C. Code § 21-2047. Even though there has been no finding that the incapacitated individual has the requisite state of mind to have committed fraud or a crime, the inquirer has obtained "conclusive" evidence that the incapacitated individual is not who he purports to be. Accordingly, the inquirer has an affirmative duty to "reveal the fraud to the tribunal." D.C. Rule 3.3(d). Indeed, withholding the fact that the incapacitated individual had obtained benefits using a false name and social security number would likely constitute a "circumstance[] where the failure to make a disclosure is the equivalent of an affirmative misrepresentation." D.C. Rule 3.3, Comment [2].

Whether appearing before a tribunal, completing paperwork to continue benefits, attesting to guardianship of the incapacitated individual, or cashing the incapacitated individual's benefit checks, the inquirer must, at all times, comply with the requirements of Rule 8.4(c), which prohibits conduct involving dishonesty, fraud, deceit, or misrepresentation. Virtually any conduct by the inquirer that relies on or otherwise uses information the inquirer knows to be false would constitute dishonesty, deceit, or misrepresentation, even if the conduct is not legally fraudulent.

*Conclusion*

The inquirer may not continue to use the name that the incapacitated individual is using; we believe that failure to disclose the false identity would be the equivalent of misrepresentation. This matter presents no conflict between District of Columbia guardianship law and the Rules of Professional Conduct.

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*Opinion 337*

**Lawyer as Expert Witness**

A lawyer serving as an expert witness to testify on behalf of a party does not thereby establish an attorney-client relationship with that party. Therefore, D.C. Rule 1.9 governing conflicts of interest with former clients would not apply to prohibit a lawyer from subsequently taking an adverse position to the party for whom the lawyer testified as an expert witness, even where the matter for which the lawyer testified and the matter involved in the subsequent representation are substantially related to one another. However, any firm that hires a lawyer as an expert witness should assure that the lawyer's role as expert witness is made clear and should obtain the client's informed consent if the expert's role changes to that of co-counsel.

**Applicable Rules**

- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 8.4 (Misconduct)

*Inquiry*

We have received an inquiry concerning the obligations of a lawyer who acts as an expert witness. The Inquirer is an attorney who has served as an expert witness in litigation involving bank regulatory and supervisory matters. She has been asked to provide expert testimony on behalf of an individual plaintiff who borrowed money from a savings bank that was placed in federal receivership and had its assets (including the loan at issue) sold to another financial institution.

The defendant bank's attorney has objected to the Inquirer's serving as an expert witness because one or both of the law firms with whom the Inquirer was formerly employed did legal work for the defendant bank in prior years. For the purposes of this Opinion, we have been asked to assume that the D.C. Rules apply and that the prior representation of the defendant bank by the Inquirer's former law firms involved neither the plaintiff in the current lawsuit (for whom the Inquirer wishes to testify) nor the plaintiff's loan, which is the sole subject of the suit. The Inquirer has never worked on any previous matter for the defendant bank, and neither has the law firm with which she is currently employed.

*Discussion*

*A. A Lawyer Serving Solely as an Expert Witness Does Not Thereby Create an Attorney-Client Relationship*

A lawyer specializing in a particular legal subject may be engaged to serve as an expert witness who is expected to testify at a trial or hearing. As a general matter, a client-lawyer relationship can come into being as a result of reasonable expectations of the client and a failure of the lawyer to dispel these expectations. See D.C. Bar Ethics Op. 316 (2002) (recognizing that what conduct gives rise to an attorney-client relationship is one of substantive law in the relevant jurisdiction but that "[m]any courts look to the reasonable expectations and reliance of the putative client"); see also ABA Formal Op. 95-390 at 8. Clients can reasonably expect that lawyers whom they consult to perform legal services for them are bound by certain basic professional obligations, including the duties of confidentiality, see D.C. Rule 1.6, and the avoidance of conflicts of interest, see D.C. Rule 1.7. Effective February 1, 2007, a lawyer shall also be subject to the D.C. Rules of Professional Conduct with respect to the provision of "law-related services," which are defined as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services." D.C. Rule 5.7(b) (eff. Feb. 1, 2007).

We believe, however, that if a lawyer serves solely as an expert witness on behalf of another law firm's client,[1] and the law firm explains this role to the client at the outset, then the expert witness would not typically have an attorney-client relationship with the party for whom she may be called to testify. A lawyer who is employed to testify about requirements of law or standards of legal practice, for example, acts like any non-

[1] This question is distinct from a consultant providing expert legal advice to a firm and/or its client. A legal consultant may act as a lawyer representing the client, rather than as a witness. The lawyer as expert consultant may act in the role of co-counsel in the matter as to the area upon which she is consulted and as such is subject to all of the D.C. Rules of Professional Conduct. There are a wide variety of circumstances in which a lawyer acts as a consultant and may thereby be undertaking a representation. *See also* D.C. Rule 1.6(e)(6) (eff. Feb. 1, 2007) (permitting a lawyer who consults with another lawyer to use or reveal client confidences and secrets "to the extent reasonably necessary to secure legal advice").

lawyer expert witness. The expert provides evidence that lies within her special area of knowledge by reason of training and experience and has a duty to provide the court, on behalf of the other law firm and its client, truthful and accurate information. Towards this end, the lawyer serving as an expert witness may review selected discovery materials, suggest factual support for her expected testimony, and exchange legal authority applicable to her testimony with the law firm. The testifying expert also may help the law firm to define potential areas for further inquiry.

She nevertheless is presented as an objective witness and must even provide opinions adverse to the party for whom she expects to testify if frankness so dictates. A duty to advance a client's objectives diligently through all lawful measures, which is inherent in a client-lawyer relationship, *see* D.C. Rule 1.3, is inconsistent with the role of an expert witness. Moreover, if an expert may testify at trial and her name has been provided to opposing counsel under procedural rules, she may be deposed by the opposing party. Communications between the expert and the retaining law firm or its client used by the expert in preparing her testimony ordinarily are discoverable.

The ABA has issued an opinion consistent with this conclusion. *See* ABA Formal Op. 97-407. Similarly, most state bar ethics committees that have considered the issue have rendered opinions that support the conclusion that a lawyer employed as an expert witness does not form a client-lawyer relationship with the party for whom she is engaged to testify. *See, e.g.,* Virginia State Bar Ethics Op. 1884 (1989) (noting that if an attorney serves purely as an expert witness, the Code of Professional Responsibility is inapplicable and does not preclude service as an expert witness on different issues for both parties of an action); State Bar of S.D., Ethics Comm. Op. 91-22 (1992) (lawyer serving as expert witness for insurance company A defending a bad faith claim brought by insurance company B may represent an insured of insurance company B in an unrelated claim against a third party, in part because insurance company A is not the expert witness's client); Phila. (Pa.) Bar Ass'n, Prof. Guidance Comm. Op. 88-34 (1988) (it is permissible under Pennsylvania's Rules for a lawyer to serve as an expert witness for a party while at the same time serving as anexpert witness for the party's opponent in another unrelated suit).

D.C. Rule 1.9 states that "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 consents after consultation." *Id.* As we have already discussed, a client-lawyer relationship will not exist by virtue of the Inquirer's serving as an expert witness. Therefore, Rule 1.9 is not triggered by this Inquiry.[2]

*B. Clarifying the Lawyer/Expert's Role*

The law firm that hires a lawyer as an expert witness should take care to avoid confusion in the mind of its client as to the different role a lawyer plays as an expert witness. In order to avoid any misunderstanding about whether a client-lawyer relationship is created, the law firm should make the expert's role clear at the outset of the engagement—for example, through a written engagement letter defining the relationship, including its scope and limitations, and the responsibilities of the expert witness. It is also the responsibility of the law firm that has engaged the expert witness to assure that its client is fully informed as to the nature of the expert's role, see D.C. Rule 1.4, especially because any communications between the client and lawyer expert are likely to be discoverable.[3]

In actual practice, the distinction between the role of a lawyer acting as an expert witness and a lawyer acting in a representational capacity can become blurred. The simplest situation, which we have already discussed above, is when the lawyer is hired as an expert witness and the lawyer expert forms no attorney-client relationship with either the hiring law firm or the law firm's client.

A more complicated situation can arise when a lawyer serving as co-counsel in the case becomes an expert witness. Under this scenario, the Rules of Professional Conduct clearly apply, and the client needs to provide informed consent to the lawyer's changing roles. For example, if a lawyer in the case becomes an expert witness, the client needs to understand that whatever confidences and secrets may have been revealed to the lawyer may be subject to discovery now that the lawyer has become a witness. D.C. Rule 1.6(e)(1) requires a client's informed consent before any such confidences or secretes may be used or revealed.

A third scenario—where a lawyer originally hired as an expert witness is asked to become a consultant or co-counsel on a different aspect of the case—raises some additional complications. Where an expert witness morphs into a co-counsel role, the expert witness must exercise special care to assure that the law firm and the client are fully informed and expressly consent to the lawyer's continuing to serve as an expert witness with respect to some issues in the case. *See* D.C. Rule 1.2(c) (stating that a "lawyer may limit the objectives of the representation if the client consents after consultation.") The lawyer serving as a consultant or co-counsel is clearly bound by the D.C. Rules of Professional Conduct relating to conflicts of interest and imputed disqualification with respect to such service.

*C. Additional Considerations*

Even though the lawyer's role as an expert witness does not form a client-lawyer relationship with the party on whose behalf she is to be called, the lawyer who serves as an expert witness is still subject to the D.C. Rules of Professional Conduct that govern lawyers generally. For example, were the expert witness to testify falsely, discipline under D.C. Rule 8.4 would be warranted. See generally ABA Formal Op. 336 (1974); ABA Formal Op. 97-407.

Moreover, D.C. Rule 1.7(b)(4) may impose certain limitations upon the lawyer and her law firm as a result of her serving as an expert witness. For example, if she were asked to represent a client in a matter adverse to the party for whom she currently is serving as an expert, her responsibilities to that party, as well as her own financial, business, or personal interests might preclude the representation

[2] We note that, even if the Inquirer's serving as an expert witness on behalf of a particular party constituted a "representation" of that party sufficient to trigger the obligations of D.C. Rule 1.9, neither she nor her new law firm would be disqualified under the facts as presented here. The Inquirer never personally represented the defendant bank while working at her prior law firms, and her new firm has never represented the defendant bank. Because the defendant bank is not a client "about whom the [Inquirer] has in fact acquired information protected by Rule 1.6 that is material to the matter," there is no conflict of interest that would be imputed to the new law firm. *See* D.C. Rule 1.10(b).

[3] In 1993, Fed. R. Civ. P. 26 was amended to make information "considered" by an expert witness discoverable (previously, it was a narrower "reliance" standard). The comments to this amendment state that its disclosure requirements were intended to overcome privilege claims, and every federal court to decide the issue has so held. *See Fidelity Nat'l Title Ins. Co. v. Intercountry Nat'l Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005); *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001). Therefore, the traditional protection afforded by the opinion work product and attorney-client privileges has largely given way to a policy favoring mandatory disclosure of information provided to expert witnesses.

altogether.[4] And if she were asked to represent a client after the conclusion of her service as an expert witness, she might be bound by a confidentiality agreement with the party for whom she testified that could preclude her from zealously representing the new client. *See* D.C. Rule 1.7(c)(2) (eff. Feb. 1, 2007) (even with the client's informed consent, a lawyer may only represent a client if she "reasonably believes that [she] will be able to provide competent and diligent representation to each affected client").

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*Opinion 338*

**Whether A Law Firm May Retain the Name of a Partner Who Becomes Both "Of Counsel" to that Law Firm and a Partner in a Different Law Firm Also Bearing His Name**

A lawyer may have an "of counsel" relationship with one firm and be a partner in a different firm, so long as the lawyer's "of counsel" association with the first firm is regular and continuing and the lawyer is generally available personally to render legal services to that firm's clients; and the two firms are treated as one for conflicts of interest purposes. When a former partner continues to render legal services to the firm's clients, that firm may retain the former partner's name in the firm name, even though the former partner also practices in a new firm with a name that also includes his name.

**Applicable Rules**

- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 7.1 (Communications Concerning a Lawyer's Services)
- Rule 7.5 (Firm Names and Letterheads)

*Inquiry*

A partner[1] of a firm bearing his name ("X") is withdrawing from the partnership and becoming "of counsel." He is the only lawyer in the firm practicing in the area in which he specializes. X intends to form a new firm in which he will be a partner, and that new firm will also include his name. This new firm will specialize principally in the area in which X specializes. The parties have agreed that each firm will redirect to the other any misdirected telephone calls, correspondence, or other communications and that the firms will have a unified conflict of interest policy.

*Discussion*

This inquiry raises the following questions: (1) whether X may be "of counsel" in one firm and a partner in another; and (2) whether the law firm may continue to include X's name in the firm name after he withdraws as a partner and continues to practice with the firm in an "of counsel" relationship and whether, at the same time, X may have his name included in that of the new law firm that he will form and in which he also will practice law.

*A. Practicing in More Than One Firm*

D.C. Bar Legal Ethics Opinion 247 (1994) recognizes that a lawyer may have an "of counsel" relationship with a firm with respect to specific matters, while at the same time maintaining a separate practice with other lawyers in shared office space. Nevertheless, whether a former partner of a firm may be "of counsel" in one firm and a partner in another has not been specifically addressed in the District of Columbia. Nor is there any authority in this jurisdiction as to whether a lawyer may be a partner in more than one law firm.

The prevailing view among the various jurisdictions that have considered these issues is that a lawyer is not prohibited from being a partner in more than one firm if the firms are treated as one for imputation of conflicts.[2] The American Bar Association recognized that lawyers may simultaneously work for more than one law firm when it considered the ethical issues associated with the use of temporary lawyers by firms.[3] Later, in ABA Formal Opinion 357 (1990), the ABA concluded that a lawyer could have a regular "of counsel" relationship with more than two firms and that "the lawyer is associated with each firm with which the lawyer is of counsel."[4] For purposes of attribution under Model Rule 1.10(a), the ABA concluded that all disqualifications of each firm will be attributed to the "of counsel" lawyer. In essence, the lawyer's "of counsel" relationship with both firms effectively makes the two firms a single firm for conflict of interest purposes.

Likewise, D.C. Rule 1.10(a) provides that, "[w]hile 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 . . . .[5] In addition, our Opinion 247 concludes that an "of counsel" designation makes that lawyer "associated with the firm" for purposes of our Rule 1.10(a), and that a disqualification of a lawyer of the firm for which he is "of counsel" disqualifies the "of counsel" lawyer who maintained a separate practice even though he had had no involvement in the prior representation.

We conclude, based on the above analysis, that a lawyer may practice in more than one firm—specifically, that X may be "of counsel" in one firm and a partner in another. Because X will be "associated with" each firm for purposes of imputation under D.C. Rule 1.10(a), any disqualification of a lawyer in either firm will be imputed to all lawyers in both firms, unless excepted by Rule 1.10(a)(1) or (2).[6] The firms, however, must be aware that to comply with the

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[4] If the conflict arises only under Rule 1.7(b)(4), then the revised Rules would not necessarily impute that disqualification to her entire firm. *See* D.C. Rule 1.10(a)(1) (eff. Feb. 1, 2007). Just because a lawyer serving as an expert might have a financial, business, property or personal interest in a particular party does not always mean that her entire firm would thereby be precluded from representing a client adverse to that party.

[1] While the term "partner" is used throughout this opinion, the same analysis and conclusions apply to a shareholder in a law firm organized as a professional corporation or professional limited liability company, or a member of an association authorized to practice law. The term "firm" refers to any of the aforementioned entities as well as a sole proprietorship. *See* D.C. Rule 1.0 (c).

[2] *See* Philadelphia Bar Ass'n Ethics Op. 2001-5 (2001); Md. State Bar Ass'n Comm. On Ethics Op. 88-45; Pennsylvania Bar Ass'n Ethics Op. 88-176 (undated); New Jersey Sup. Ct. Advisory Comm. On Prof. Ethics, Op. 637 (1990). The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline disapproved lawyers being partners in more than one firm, *see* Opinion 1999-7 (1999), but in Opinion 2004-11 (2004), it concluded that an Ohio lawyer may practice law in Ohio and be of counsel to another firm in another state; or an out-of-state lawyer, not licensed in Ohio, may become of counsel to an Ohio lawyer or law firm.

[3] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

[4] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990).

[5] Rule 1.10(a), effective 2/1/07. The prior version of this rule is identical to the rule quoted above, except that the prior version contained references to D.C. Rules 1.8(b) and 2.2 which have been deleted. These deletions do not affect the substantive analysis of this opinion.

[6] This, of course, is not an issue here because the parties have agreed to treat both firms as one firm for purposes of conflicts of interest.

requirements of D.C. Rule 1.6, a firm may need to obtain a client or potential client's permission to disclose, with respect to any new matter, sufficient information to the other firm so that both firms may check potential conflicts.[7]

*B. Using the Lawyer's Name in More Than One Firm Name*

The second question presented by this inquiry is in two parts: (i) whether the firm from which X is withdrawing as a partner may continue to use X's name in the firm name, and (ii) whether the firm that X is forming also may use his name in the firm name. In D.C. Bar Legal Ethics Opinion No. 277 (1997), we concluded that a firm may retain the name of a former partner who was severing her relationship with the firm, except where the former partner is practicing law elsewhere. We based our conclusions on D.C. Rules 7.5(a) and 7.1. Rule 7.5(a) provides:

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.

Rule 7.1 states:

> 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:
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

In Opinion No. 277, we noted that ethics opinions in the District of Columbia and elsewhere have long recognized that it is permissible for law firms to use trade names that include the names of deceased or retired partners. That Opinion also referenced ABA Formal Opinion 90-357 in which the ABA concluded that it would not be misleading to "use a retired partner's name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized."[8]

The inquirer in Opinion No. 277 was a founding partner of a law firm bearing her name. She wanted to have her name removed from the firm's name after she withdraws and wanted to know whether the Rules of Professional Conduct would require the law firm to remove her name from the firm name once she departs. In her inquiry, she indicated that she did not know whether she would continue to practice after her withdrawal. We concluded that a law firm may retain in its name the name of a former partner, except where the former partner is practicing law elsewhere or where the firm is prohibited by law from retaining the name. We believed that if the former partner were practicing elsewhere, "the possible identifying value of the firm name as a trade name yields to the greater possibility that the public will be misled by retention of the departed lawyer's name in the firm name." Opinion No. 277 noted that it would be misleading to include in a firm name the name of a lawyer who has ceased practicing with the firm but is, in fact, practicing elsewhere, presumably because it would imply that the lawyer who is practicing elsewhere had a continuing relationship with the firm from which the lawyer has withdrawn.

This inquiry demands a different conclusion than suggested by the proviso in Opinion No. 277—that a withdrawing lawyer's name may be retained in the firm name, unless the lawyer practices elsewhere. First, the facts here are distinguishable from those in that Opinion. Here, unlike the lawyer in that opinion, X will continue to practice with the firm as "of counsel," while at the same time practicing at the second firm. Second, our rules do not prohibit the use of the lawyer's name in the firm names under these the circumstances. More importantly, the District of Columbia Court of Appeals recently adopted new language in the commentary to D.C. Rule 7.5 that makes clear that Opinion No. 277 was focused on the following concern: that it is "misleading to continue to use the name of a lawyer *formerly associated* with the firm who currently is practicing elsewhere."[9] This prohibition clearly does not apply here because the former partner will not be "formerly associated" with the firm. Rather, the lawyer will continue to be associated with the firm.

In D.C. Bar Legal Ethics Opinion 332 (2005), we said that a lawyer may conduct his or her business under any trade name that does not constitute a false or misleading communication under D.C. Rule 7.1 about the lawyer's services.[10] Here, the question is whether including a former partner's name in the old firm name, as well as in the new firm's name will mislead the public. We conclude that if the lawyer has a regular and continuing association with both firms and will be generally available personally to render legal services at each firm that bears his name, using his name in the names of both firms is consistent with D.C. Rule 7.5(a). If, instead, he were to practice with only one of the firms, including his name in both could mislead the public. Under these circumstances, however, while using X's name in both firm names may be unusual, it would not be misleading, so long as he maintains a regular and continuing association with both firms and is generally available personally to render services at each firm. We caution, however, that X must take special care to ensure that each client to whom he renders legal services understands which firm will be delivering legal services and responsible for the client's legal matter.

*Dissent*

We three undersigned non-lawyer members of the Legal Ethics Committee hereby register our dissent to Part B of D.C. Bar Legal Ethics Opinion No. 338.

Rule 7.1(a) states that "[a] communication is false or misleading if it: . . . (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated." According to the Inquiry, an attorney is leaving a firm where his name is in the firm name and setting up a second law practice where he will also be a named partner. It is contended by the inquirer that he will remain "of counsel" to the first firm and therefore, it would not be misleading to allow his name to continue to be used in the firm name, although he will become, in essence, a former partner and current "of counsel" attorney.

As the definitions and actual practices related to lawyers in "of counsel" roles are quite broad, we believe it is likely that allowing the inquirer's name to be continued as part of the name of the firm he has essentially left is, at best, confusing and, at worst, misleading to potential clients. We find that simply designating "of counsel"

[7] Under D.C. Rule 1.6, client consent would be required only if the information is a client confidence or secret.

[8] *See* note 4 *supra*.

[9] D.C. Rule 7.5, Comment [1] (effective 2/1/07); *see* D.C. Ethics Opinion 277 (1997) (Emphasis added).

[10] Opinion 332 addressed the question whether a solo practitioner may use the word "firm" in the firm name.

on the letterhead, business cards, internet advertising, and the like, would be insufficient notice to prospective clients that the lawyer is practicing elsewhere in his own partnership or firm. (Partnership is a commonly understood term.)

As the majority acknowledges, Opinion No. 277 (1997) recognized that it was not improper for a firm to continue to use the name of retired or deceased members in the firm name. That we understand to be a longstanding practice and is acceptable because it identifies an entity that has become known to the public and carries a certain cachet. We believe that is an acceptable practice because it is not designed to fool the public but rather recognizes the distinguished service of superannuated or dead partners.

Opinion No. 277 quotes ABA Formal Opinion No. 357 (1990), which recognized that if a partner in a law firm is retiring to become "of counsel," the lawyer's name may be retained in the law firm's name. According to the majority, we concluded in Opinion No. 277 "that a law firm may retain in its name the name of a former partner, except where the former partner is practicing law elsewhere or where the firm is prohibited by law from retaining the name." The majority further recognized in Opinion 277 that, if the former partner were practicing elsewhere, "the possible identifying value of the firm name as a trade name yields to the greater possibility that the public will be misled by retention of the departed lawyer's name in the firm name." Even disclosing a dual association/relationship in writing to the client at the time of retention would not timely alert the prospective client to ask about the parameters of the lawyer's "of counsel" relationship at the firms. It is, in our view, too little, too late. The client has already walked in the door under a false impression that is not cured by disclosure in a retention letter.

On this basis alone, we dissent.
Joseph Brent, PhD
Steven Ebbin, PhD
Donald Zauderer, PhD

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*Opinion 339*

## Threat of Criminal Referral In Civil Debt Collection Matter

• Lawyers violate D.C. Rule 8.4(g) when they threaten criminal charges for the sole purpose of securing an advantage in a civil matter. In the context of a debt collection action, the mere citation of or reference to a criminal statute during the course of the action does not constitute a per se violation of this Rule. A further reference to the potential for a criminal referral if the debt is knowingly paid with a check drawn on insufficient funds does not violate our Rules unless phrased in a manner that is likely to mislead or confuse the recipient.

**Applicable Rules**

• Rule 4.1 (Truthfulness in Statements to Others)
• Rule 4.3 (Dealing with Unrepresented Person)
• Rule 8.4 (Misconduct)

*Inquiry*

The Committee has received an inquiry on a matter relating to the obligation of an attorney under D.C. Rule 8.4(g). Inquirer is a practitioner who engages in commercial collection work on behalf of clients. We are advised that situations often arise where the alleged debtor responds to a demand for payment by writing a check on an account with insufficient funds.

Under District of Columbia law, if the drafter of a check drawn on insufficient funds (a "bounced check") fails to cure the default within 5 days of having been notified of the insufficiency, that failure constitutes prima facie evidence of a criminal intent to defraud and of knowledge that the account on which the check was drawn had insufficient funds. *See* D.C. Code § 22-1510. In effect, once debtors receive notice that a check has bounced, if they do not fund the check promptly they are at substantial risk of criminal charges and, because of the effect of the District's rules relating to proof, of conviction.

We are asked whether a standard form commercial collection demand letter may explicitly refer to the D.C. Code provisions that criminalize the writing of a check drawn on insufficient funds and the related provisions regarding notice, cure, and the presumption of intent. If it may, we are further asked whether the demand letter may advise the recipient that, in the event a bounced check is not funded, the inquirer may refer the matter to prosecution authorities for their review.

*Discussion*

*A. Basic Principles*

Rule 8.4(g) of the D.C. Rules of Professional Conduct makes it professional misconduct for a lawyer to "seek or threaten to seek criminal charges . . . solely to obtain an advantage in a civil matter."

Notably, this prohibition does not form a part of the Model Rules adopted by the American Bar Association. It was long a part of the Model Code of Professional Responsibility (see DR 7-105(A)), but it was omitted from the newer Model Rules. The differing explanations for that omission from the Model Rules (and conversely, for inclusion of the provision in the District's Rules) point to the two major themes that recur in interpretation of the provision.

Some say that the prohibition in Rule 8.4(g) was omitted from the Model Rules because it was overbroad and prohibited legitimate negotiating tactics. *See Committee on Legal Ethics v. Printz*, 416 S.E.2d 720, 722-23 (1992) (relying on 1 G. Hazard & W. Hodes, *Law of Lawyering* § 4:4:102 (2d ed. 1990)). On this reading, there are situations in which the reference to related criminal charges is considered an appropriate tactic. *E.g.* Alaska Ethics Op. 97-2 (1997) (allowing explicit threat of criminal referral); Mich. Ethics Op. RI-78 (1991) (because Rule 8.4(g) had been omitted, no specific ethical rule prohibits a lawyer from calling to the attention of an opposing party the possible applicability of a penal statute or making reference to specific criminal sanctions or from warning of the possibility of criminal prosecution).

Others, however, argue that the omission of Rule 8.4(g) from the Model Rules was simply because other provisions of the rules already prohibited the making of extortionate, fraudulent, or otherwise abusive threats. *See* ABA Formal Op. 92-363 (1992); Fla. Ethics Op. 89-3 (1989). On this reading, Rule 8.4(g)'s prohibition addresses conduct that is, in nearly all circumstances, improper under other applicable Rules or laws.[1]

[1] As ABA Formal Op. 94-383 makes clear, the use of a threat of a criminal prosecution may also violate Rule 8.4(b) to the extent that the conduct is extortionate under the criminal laws of a jurisdiction. Most notably in the District "A person commits the offense of blackmail if, with intent to obtain property of another or to cause another to do

The principal guidance we have as to the purpose behind the decision of our own Court of Appeals to adopt the Rule is the explanatory language of the District of Columbia Bar Jordan Committee when it first forwarded proposed Rule 8.4 to the Court of Appeals. There the Committee explained that "the conduct prohibited by paragraph (g) . . . is tantamount to common law blackmail [and is] serious enough, and its occurrence frequent enough, that a rule clearly forbidding that conduct [is] needed." *See* D.C. Bar Legal Ethics Op. No. 220 n.1 (quoting Jordan Committee).[2]

One of our prior opinions provides some additional indication of the scope of the rule. In Opinion 220, we considered the circumstances under which a threat to file a disciplinary action against an opposing attorney (conduct also prohibited by Rule 8.4(g)) would violate the Rule.[3] There we identified two salient factors that guided the Committee's analysis.

First, we noted that in situations where an explicit reference to the charges was made "[t]he only question under Rule 8.4(g) is whether the charges were threatened or filed '*solely* to obtain an advantage in a civil matter.'" *Id.* (emphasis in Op. 220) (footnote omitted). Thus, we stressed that the text of the Rule makes the operative question whether civil advantage is the only purpose motivating the threat. This, of course, would tend towards a narrowing construction of the prohibition.

In other jurisdictions, such as Connecticut, where the same prohibition exists, substantial weight also has been given to the use of the phrase "solely." Thus, the Connecticut equivalent of Rule 8.4(g) (Rule 3.4(7) in its numbering system) has not been read as a blanket prohibition on all mention of criminal law. Rather, as Connecticut courts have held, *see Somers v. Statewide Grievance Comm.*, 245 Conn. 277, 292 (1998), the key to interpreting the Rule lies in the use of the word "solely" in the phrase, "solely to obtain an advantage in a civil action." *Somers* makes it clear that there is no *per se* prohibition against simultaneously pursuing a criminal complaint and a civil action against the same party unless the attorney's sole reason for filing a criminal complaint is to seek an advantage in the civil action.

Somers also pointed out that the court will investigate the attorney's motive and intention in filing the criminal complaint as part of its examination as to whether gaining an advantage in the civil action was the attorney's "sole" reason. *See also* Conn. Ethics Op. 99-50 (1999) (attorney may civilly seek restitution on an alleged debt while a criminal matter is pending so long as the complainant does not condition an agreement to drop the prosecution on the settlement of the alleged debt). While this inquiry may protect a lawyer's appropriate acts, it should be emphasized that courts interpreting Rule 8.4(g) seldom mention this single motive limitation, and reliance on a multiple motive defense is risky. *See, e.g., People ex rel. Gallagher v. Hertz*, 608 P.2d 335 (Colo. 1979) (implicitly rejecting a multiple motive defense).

This leads directly to the second aspect of our Opinion 220. Pointing out that the focus on motive precluded a categorical rule, we noted that the "determination of for what purpose or purposes the . . . charges at issue were threatened is a factual question" and thus one that is typically beyond the scope of the Committee's capacity to adjudicate. *Id.*

We agree that each inquiry is fact specific. Thus, it appears as a general rule that if the attorney has at least one other *bona fide* reason to counsel or threaten a criminal prosecution while a civil action is pending or intended, he or she may enjoy the advantage in a civil action without violating the rule. Typically, however, the existence of this "other motive" will be a fact-driven inquiry; notwithstanding the analysis that follows, a cautious practitioner will not place too great a reliance on his or her ability to convince an observer *ex post* of the existence of an *ex ante* justification.[4]

*B. Analysis*

Relying on the forgoing, we might be inclined to offer no firm opinion on the pending inquiry—reasoning that the motive of the inquirer is a fact-specific question as to which we lack adequate information. That course, however, would fail to give Rule 8.4(g) any great effect since the specter of a Bar Counsel inquiry, while daunting, is sufficiently rare as to not be a likely vehicle for the development of a common law of acceptable Rule 8.4(g) practice. Moreover, we consider it significantly more valuable for practitioners in this jurisdiction to have the benefit of our guidance than to be left with the uncertainty of a case-by-case development of the prohibition.

To be sure, some questions cannot be answered in an advisory opinion such as this, because motivations may well be obscured. But, we have concluded that the inquirer's question is sufficiently clear and well-defined that we can offer some guidance while also advancing certain general principles that may apply to other matters.[5]

To provide the context for our discussion, and because we have said that context is critical, we address in this opinion an idealized collection letter of the following form:

Clause 1: Creditor, my client, alleges that you, Debtor, owe him a debt in the amount of $X.

Clause 2: On his behalf I demand payment.

Clause 3: You may settle this demand by writing a check in the amount of $X.

Clause 4: In the District of Columbia, it is a crime to intentionally pay with a "bad check"-that is, one you know will bounce. If, after paying with the check, you are

or refrain from doing any act, that person threatens * * * [t]o accuses any person of a crime." D.C. Code § 22-3252. While the collection letter we consider here is well short of this standard, attorneys should be mindful of the strictures of Rule 8.4(b) and District law. They should also refrain from any effort to exert improper influence over the criminal process or any suggestion of the capacity to exert such influence.

[2] Other jurisdictions couch the analysis in similar fashion: In jurisdictions where Rule 8.4(g) or its equivalent was completely omitted, it has been held that criminal charges may be threatened when the lawyer has a good faith belief that they are warranted by the facts. *See* Utah Ethics Op. 03-04 (2003). Conversely, in jurisdictions where Rule 8.4(g) or its equivalent exists, the limitations on attorney conduct have been read more stringently. *E.g.* Conn. Ethics Op. 00-24 (2000) (forbidding prosecutor from conditioning dismissal of criminal charges on dismissal of civil counter-complaint).

[3] We also addressed Rule 8.4(g) tangentially in Opinion 263. There we concluded that seeking to initiate a criminal contempt proceeding for violation of a Civil Protective Order was not, under District law, seeking to initiate a criminal charge. As a consequence, the attorney's threat to seek criminal contempt fell outside the ambit of Rule 8.4(g)'s prohibition.

[4] We note, as well, that provisions of the D.C. Code place limits on the manner and means by which a debt may be collected. *See e.g.* D.C. Code § 28-3814 (c)(5) (prohibiting "threat that nonpayment of an alleged claim will result in the arrest of any person"). It goes without saying that the practice of an attorney collecting a debt within the District must conform to District law. The question here is whether the Rules of Professional Conduct impose obligations beyond those imposed by generally applicable statutes.

[5] The inquirer also asked about limitations on his ability to instruct his client to proceed independently in a certain course of action whenever a situation to which his instructions might apply arises. Because a lawyer may not advise another to act in a manner that contravenes these Rules any more than he may act himself, our answer to the question of what a lawyer may do independently also controls what he may advise a client to do.

told that you don't have enough money in the bank to cover it, you will have 5 days to deposit sufficient funds. If you fail to do so, that can be used as evidence that you intended to pay with a bad check.

Clause 5: If you attempt to settle this debt with a check drawn on insufficient funds, I may refer this matter to the police for investigation and prosecution.

Clearly, the first three clauses of this idealized letter are nothing more than a typical, permissible demand letter. Our opinion focuses on whether the fourth and fifth clauses may also be included. And as to each clause we ask two distinct questions: Is it a threat? And, if so, is it a threat made solely for the purpose of gaining advantage in a civil matter.

**1. Citation to or Quotation of Applicable Law:** We begin with the fourth clause, in which the writer cites to, or quotes the D.C. Code provisions that relate to bounced checks. We believe that citation and/or quotation of the law, without any characterization of it, is permissible because it is not reasonably construed as a *per se* threat.

To be sure, we recognize that the citation of the criminal provisions of law is intended to have the collateral effect of achieving payment of the alleged outstanding debt through a check drawn on sufficient funds. We recognize as well that the inquirer's desire to call attention to the criminal law is, as we have been told, the result of past experience and an attempt to avoid similar problems in the future.

But having a collateral effect is not, in our view, equivalent to making a "threat" in order to achieve that effect. There are any number of situations in which a lawyer might reasonably cite to applicable law, and we would be reluctant to apply a *per se* rule prohibiting the citation of law. It would be odd, indeed, if a lawyer could not cite a potential sanction or reference a criminal provision in any agreement or discussion with a third party. Citation of underlying fraud law in this context is, in our view, no more a threat than is the routine situation in a discovery deposition where an adversary lawyer advises a deponent of the potential penalties for perjury. We, therefore, are unwilling to assume that the mere citation or quotation of a criminal law, without more, constitutes a threat of prosecution.[6]

Our conclusion that the mere citation of law is not threat is, of course, subject to other limitations contained in our Rules. Under Rule 4.1, a lawyer may not make a misleading statement of fact or law to a third party. And, under Rule 4.3, a lawyer may not provide advice to an unrepresented party. As a general matter, we think that the simple citation of an applicable criminal rule will violate neither prohibition inasmuch as it will, if accurate, not be misleading; furthermore, without any recommendation as to appropriate action, the citation cannot be construed as the provision of "advice." There may, however, be situations in which a lawyer's conduct violates these Rules—as, for example, if a selective quotation omits a relevant portion of the law. Thus, while the context of any citation to the law will always need to be examined, in our view the simple reference to a potentially applicable criminal law does not *per se* fall afoul of D.C. Rule 8.4(g).

**2. Potential Referral to Prosecutor:** We next turn to the question presented by the fifth clause of our notional letter: whether inquirer may go further than citing the applicable law and inform the recipient of the letter that, in addition to, or in lieu of, a suit to collect the alleged debt, the inquirer may bring the matter of any bounced check that is not promptly funded to the attention of the prosecuting authorities who may then independently choose to prosecute any violation.

To begin with, we think it beyond dispute that such a statement is a "threat" under any meaningful construction of that term. To be sure, the statement of one's legal options is also a statement of fact. But by contrast with a simple citation of law, the statement that one may refer a matter to the prosecuting authorities constitutes an explicit suggestion that the inquirer may (or perhaps will) take a particular action—moving the demand letter beyond a citation of law to a threat to take steps to see the law implemented.

We are left then with the question of whether this threat is solely to gain advantage in a civil matter. And here, the rather confused nature of the "threat" involved creates uncertainties in the analysis.

For this is not a threat directly relating to the underlying claim of a debt. The inquirer does not wish to draft a collection letter that says "if you do not pay the debt I may refer the matter to the police." As well he should not, for we would have little trouble in concluding that such a threat tied directly to the alleged debt would contravene our Rules. Here, however, the threat is directed at a future act to be done by the creditor—and one that is not certain to occur. Thus, the threat is a contingent one based upon a yet-to-occur set of facts: "if you pay the debt and if you pay it with a bad check, and then do not fund it after I provide notice that the check is unfunded, then I may refer the matter to the police."

Thus, under one construction, the "threat" (of referral if payment is made by way of an unfunded check) is not connected to the civil action, which has as its objective the collection of the debt and is, at least upon initiation, agnostic as to the means by which the debt is paid – check, money order, cash or, conceivably, in-kind services. And a relatively innocuous reference of the form that might be used (*e.g.* "failure to pay with a check drawn on sufficient funds may result in referral of this matter for prosecution") is quite distant from the threats of "blackmail" or extortion that motivated the Jordan Committee to include Rule 8.4(g) in our Rules.[7]

This construction is buttressed by the requirements of the District Code that make notice and an opportunity to cure effectively a prerequisite for a successful criminal prosecution for paying a debt with a bad check. Thus, the situation here might be analogized to that in other jurisdictions where ethics committees have opined that letters referring to the criminal sanctions imposed for stopping payment on a check were not sent solely for the purpose of gaining an advantage in a civil matter. *See, e.g., Decato's Case*, 379 A.2d 825 (N.H. 1977); Florida Ethics Op. 85-3; Georgia Ethics Op. 26 (1980); Utah Ethics Op. 71 (1979). Each of these opinions rested on the fact that state law imposes a requirement of such notification before bringing a civil action—in other words, the premise is that the Rules of Professional Conduct cannot prohibit that which underlying local law requires for the zealous representation of a client.

But another more troubling construction is also possible. Unlike the situations just referred to, D.C. law does not *mandate* the drafting of a demand letter as a pre-requi-

[6] Even were the citation of law construed as a "threat" we also think that the mere citation of a potentially applicable law in a communication cannot *per se* be deemed "solely" for the purpose of achieving an advantage in the pending civil matter. The existence of alternate purposes for the citation of law seems sufficiently likely to make a *per se* rule unreasonable.

[7] Indeed, this threat is not quintessential "blackmail"—a situation in which one is threatened concerning an act that has already occurred. Ordinarily, one is not subject to blackmail (which, the Jordan Committee reminds us is at the core of the concerns underlying Rule 8.4(g)) for acts that have not yet been completed. This is why Rule 8.4(g) would not apply to any threat made by a lawyer to a witness during a deposition (e.g., that if you don't testify honestly, you can be prosecuted) and also counsels against a blanket *per se* extension of Rule 8.4(g) to the circumstances under consideration in this opinion.

site to a claim; rather it provides that the failure to respond to such a letter has evidentiary consequences. Moreover, in each of the instances referenced above, the attorney was responding to an act by the debtor that had already occurred—the stopping of payment on a check already drawn. By contrast, here the inquirer is writing in respect of an event that has yet to occur—the payment of the alleged debt by means of an unfunded check.

Given these factors, the proposed fifth clause of the demand letter does raise concerns. In light of the contingent nature of the threat, and especially when one considers that the recipient of a demand letter of the form suggested is likely to be unschooled in the law, the context in which the letter is sent and the identity of the recipient might give rise to questions concerning the senders' true motive. A lawyer who knowingly blurs this distinction in a demand letter may be in violation of Rules 4.1, 8.4(c) and 8.4(g) as well as District statutes relating to wrongful debt collection tactics or blackmail.[8]

And we cannot, of course, assume that all claims of debt are incontestable—to the contrary, the debtor may well have valid defenses to the alleged debt. The possibility exists that, confusing the threat of referral for a bad payment with the threat of referral for a non-payment, the debtor may be misleadingly induced to forgo these legitimate grounds for contesting the debt.

The extent to which confusion is likely is, of course, an empirical question as to which the Committee has no data and regarding which the members of the Committee have divergent views. Some consider such confusion highly likely; others much less so.

In the end, however, it is clear to a majority of the Committee that Rule 8.4(g) is not the appropriate vehicle for addressing these empirical concerns. The Rule speaks to a prohibition on threats made "solely" for advantage. Here, the inquirer has articulated a clear and plausible alternate motivation—his experience that many creditors pay with unfunded checks and his desire to avoid the costs and inconvenience associated with that occurrence. We credit such experience. And even if we were disinclined to do so, for purposes of an advisory opinion such as this, we are bound to accept such an articulated representation at face value. *See* Rule E-5, Rules of the D.C. Bar Legal Ethics Committee ("The Committee assumes the facts, as stated in the inquiry, are accurate, and ordinarily it will not look beyond those stated."). Given this eminently plausible alternate motivation we are convinced that Rule 8.4(g) is not violated by this type of threat of referral if the lawyer writing the demand letter is acting with a similar motivation.

Of course it goes without saying that a lawyer may not use this alternate motivation as a pretext for including threatening language in a demand letter merely to intimidate unsophisticated recipients. That would violate the Rule. Whether any individual lawyer has the requisite motivation in any particular case is, of course, a "factual question which this Committee is not equipped to decide." D.C. Ethics Op. 220.

Moreover, caution must be exercised when drafting a form collection letter that contains an analog to the fifth clause. As we have already noted, Rule 4.1 prohibits the making of misleading statements—and we can certainly imagine a letter being drafted that, either by omission of relevant qualifying information or by inclusion of material that goes beyond a simple statement of intent would become, in context, misleading. Thus, the careful practitioner should not read this opinion as an authorization for collection techniques that amount to "high-pressure tactics" or confusing conduct.

Indeed, though it is not required by our rules, the potential for confusion may be ameliorated to a degree by a disclaimer, explicitly advising the recipient of the letter of his right to contest the underlying debt and noting that the criminal laws refer to the means of payment, not whether a payment is, in fact, due. In essence, the inclusion of the fifth clause is assuredly made less misleading if another clause clarifies that "you may contest the debt. The potential for criminal referral arises only if you choose not to contest the debt and then pay the debt with a bad check."

In the end, however, even without such a disclaimer, we are of the view that an appropriately couched reference to the potential for a criminal referral of the matter that is based upon an attorney's prior experience or other non-pretextual motivation and that is contained in a form letter is not, *per se* a threat made "solely" for advantage in a civil action. We cannot say that such references are, in all instances, prohibited by Rule 8.4(g).

*Conclusion*

In sum, the mere citation of a criminal statute or a reference to a criminal sanction that does not mischaracterize the sanction is, in our view, permissible under the Rules. A statement that the attorney may refer the matter for prosecution if payment is made through an unfunded check is not prohibited, though a cautious practitioner will consider accompanying any such reference with a suitable disclaimer.

Inquiry Number: 05-12-22
Published: May 2007

*Opinion 340*

**Contacts with Government Officials In Litigated Matters**

• Under D.C. Rule 4.2(d), a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government's counsel to discuss substantive legal issues, so long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. In addition, the lawyer may also contact officials at other government agencies who have the authority to affect the government's position in the litigation concerning matters, provided that the lawyer makes the same disclosures as stated above. The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel.

**Applicable Rules**

• Rule 4.2(d) (Communicating with Government Officials)

*Inquiry*

We have received an inquiry from an attorney representing an agency of the United States Government concerning the interpretation of D.C. Rule 4.2 governing contacts with represented persons. The attorney is employed by a government agency that frequently finds itself in con-

8. To demonstrate the point, consider the absurd hypothetical in which the fifth clause of our notional letter instead reads: "By the way, jaywalking is a misdemeanor and if I observe you jaywalking I will refer you to the prosecutor." Such a threat, so clearly distinct from the underlying effort to collect a debt, would not be for the purpose of gaining an advantage in the civil action. The issue that arises with the proposed action we consider here is that, though distinct from the underlying debt collection, the action for payment with a bounced check is sufficiently closely related that we cannot disregard the real possibility of confusion.

tract disputes with private entities that provide services to the agency. In these disputes, according to the inquirer, the government contracting officer has the authority to resolve or settle the dispute on behalf of the government. The inquirer requests guidance on when and under what circumstances attorneys for the adverse party may contact the government contracting officer concerning the dispute, and whether they may do so without the consent of the attorneys representing the government agency. Specifically, the inquirer asks whether a private attorney representing the agency's adversary can contact the government contracting officer concerning legal arguments contained in the government's court filings absent consent of the government attorney in the matter.

The inquirer also asks whether contacts, again without the consent of the government attorney, can take place between attorneys for private entities in a dispute with the government and government officials who are not employed by the agency involved but who nevertheless could, by virtue of their positions, affect the government's position in the dispute.

*Background*

D.C. Rule 4.2 generally prohibits communications between a lawyer and persons represented by counsel about the subject of the representation absent the consent of the represented person's counsel. "Person" for the purposes of the Rule includes organizations and specifically covers those individuals within an organization who have "the authority to bind [the] organization" as to the particular matter at issue. D.C. Rule 4.2(c). As we explained in Opinion 80, the government officials "who are deemed to be government 'parties' with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the matter in question." D.C. Ethics Op. 80 (1979) (interpreting DR-7-104(A)(1)).

The purpose of Rule 4.2 as it relates both to represented individuals and organizations is to "protect[ ] represented persons unschooled in the law from direct communications from counsel for an adverse person." D.C. Rule 4.2, Comment [5]; *see also* D.C. Ethics Op. 331 (2005) (recognizing the "basic purpose" of Rule 4.2 "is to prevent a client, who on the one hand is presumed to be relatively unsophisticated legally but who on the other hand has ultimate substantive control over the matter, from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel") (internal quotations omitted) The concept embodied in Rule 4.2 is not a novel one and was reflected in the Code of Professional Responsibility. *See* DR 7-104 (prohibiting communication by a lawyer with "a party he knows to be represented by a lawyer in [the] matter"). In this jurisdiction, the general prohibition stated in Rule 4.2 is subject to a number of exceptions. For example, Comment [5] allows a lawyer to contact in-house counsel of an organization without the consent of outside counsel representing the organization. *See also* D.C. Ethics Op. 331.

This inquiry involves the exception contained in D.C. Rule 4.2(d) that permits contacts without the consent of counsel for the government between a lawyer and "government officials who have the authority to redress grievances of the lawyer's client," provided that the lawyer discloses to the government official "both the lawyer's identity and the fact that the lawyer represents a party that is adverse" to the government.[1] The exception stated in Rule 4.2(d) is not found in the current or prior versions of the ABA Model Rules. However, Comment [5] to Model Rule 4.2 provides that "[c]ommunications authorized by law [and thus exempt from the restrictions of the Rule] 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." *See also* ABA Formal Op. 97-408 (authorizing communication with government officials represented by counsel "provided that the sole purpose of the lawyer's communication is to address a policy issue").

The adoption of the exception concerning government officials contained in D.C. Rule 4.2(d) has been the subject of extensive debate and discussion, much of it decades ago. In 1975, we received an inquiry concerning whether or not Rule 4.2's predecessor, DR 7-104(A)(1), applied to contacts with government officials. At that time, DR 7-104(A)(1) simply prohibited communications by a lawyer with a represented party, and, unlike the current Rule, did not contain any language excepting government agencies or officials.[2] We felt that the matter was sufficiently important that we published a tentative draft opinion and solicited comments on that opinion. See D.C. Ethics Op. 80 n.1. After some four years of consideration and a number of public comments, we released Opinion 80, which concluded that the then-existing rule prohibited contact, absent consent, with "those . . . who have the power to commit or bind the government with respect to the subject matter in question." Id. We recommended, however, that the rule be amended to eliminate the prohibition on contacting government officials absent consent.

Our recommendation was ultimately endorsed and adopted by the Jordan Committee, which made recommendations concerning the District of Columbia's adoption of the ABA Model Rules. In its 1986 report to the Court of Appeals, the Jordan Committee recommended that Rule 4.2 be restricted to "non-governmental parties" and discussed the reasons for its recommendation at length:

> Government officials, especially those who have significant decision making authority, are almost always capable of resisting any arguments or other suggestions that are not proper and genuinely persuasive. Moreover, any government official who is in a high enough position to make binding decisions can surely be relied upon to exercise... individual judgment as to whether to engage in such direct communications at all. . . .

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[1] Rule 4.2(d) states as follows:

> This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Rule 4.2(b) which is referenced in Rule 4.2(d) provides:

> During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

[2] DR 7-104(A)(1) provided that during the course of representing a client, a lawyer shall not, absent consent:

> [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter.

*Proposed Rules of Professional Conduct and Related Comments* 187 (Nov. 19, 1986) ("*Jordan Committee Report*"). The *Jordan Committee Report* noted, among other reasons, that government agencies had "the power to protect themselves by adopting rules and regulations concerning communications between private attorneys and government officials." *Id.* at 188.

In the public comment process that followed the release of the *Jordan Committee Report*, the exclusion of governmental parties from D.C. Rule 4.2 was again the subject of considerable comment. *See Analysis of Comments Submitted to the District of Columbia Court of Appeals in Response to the Court's Order of September 1, 1988*. As a result of the comment process, the Court of Appeals modified the Jordan Committee's original recommendation. The language restricting D.C. Rule 4.2 to "non-governmental parties" was deleted, and D.C. Rule 4.2(d), in its current form, was substituted along with what are now Comments [10] and [11]. Neither Rule 4.2(d) nor the relevant Comments have been amended since their adoption by the Court of Appeals in 1990.

We have addressed D.C. Rule 4.2(d) only once since 1990. In Opinion 280, the inquirer was an attorney who had represented a chiropractor before a District of Columbia licensing board in a proceeding that had concluded with a consent order. The inquirer felt that the board staff had acted improperly in the proceedings leading to the consent order and further understood that members of the board itself were unhappy with the staff "imposing its will on the board with respect to a number of matters." D.C. Ethics Op. 280 (1998). The inquirer wished to discuss with an individual board member both the consent order reached in his client's matter and the general dissatisfaction with the staff's conduct. After reviewing Opinion 80 and discussing the subsequent treatment of the issue in the *Jordan Committee Report*, we concluded that the proposed contacts did not violate D.C. Rule 4.2. In support of our conclusion, we cited Comment [7] (now renumbered as Comment [11] but not otherwise amended), which explains that lawyers may bypass government counsel "with respect to genuine grievances."

*Discussion*

The first question posed by the inquirer is whether it is permissible to communicate about substantive legal issues with a government contracting officer in a matter being litigated absent the consent of the government lawyer. The inquirer suggests a distinction between discussing basic policy positions of the government, concerning which non-consensual contacts are concededly authorized by D.C. Rule 4.2(d), and discussing substantive legal issues, concerning which prior consent should arguably be obtained. We do not find support for this distinction in D.C. Rule 4.2(d).

Comment [11] provides the relevant guidance:

> Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

Contacts concerning substantive legal issues appear to fall within the rubric of "genuine grievances" rather than "routine disputes" relating to run-of-the-mill discovery and scheduling issues. The reference to a "basic policy position" in Comment [11] is preceded by the language "such as" and is thus simply *illustrative* of the type of "genuine grievances" that do not require prior consent. A "genuine grievance" can and frequently does pertain to substantive legal arguments advanced by the government. One of the virtues of Comment [11] is that the line that it draws between those contacts that require consent and those that do not is relatively easy to discern. Even if we were empowered to re-draw this line, we would hesitate before advocating an approach which distinguishes between "basic policy positions" and "substantive legal arguments." One reason that a "basic policy position" can be "faulty", and therefore a permissible subject of non-consensual contacts with government officials under Comment [11], is that it is based on flawed "substantive legal arguments." The inquirer concedes that D.C. Rule 4.2 authorizes a lawyer to argue to a government official that the government's position is faulty, but would not permit the lawyer to make any reference to the legal arguments made by either side. This seems to us unworkable in practice. In addition, making a distinction between "basic policy position[s]" and "substantive legal arguments" has no support in the language of D.C. Rule 4.2 and its accompanying Comments.

The second question asked by the inquirer concerns the extent to which a lawyer for a private party (without the consent of the government lawyer) may contact officials in other agencies or organizations who might affect the government's position in the on-going litigation as part of an effort to further the cause of the lawyer's client. In some instances, the inquirer posits that the government official contacted might not even be aware of the specific dispute in which the government is engaged or the particular issues that are being raised in the dispute. If the official contacted has the "authority to redress the grievances of the lawyer's client" then the contact is within the scope of D.C. Rule 4.2(d), so long as the lawyer makes the appropriate disclosures required under D.C. Rule 4.2(b). If, on the other hand, the official contacted does not have the power to bind the agency in the matter, then the contact remains permissible absent consent because the government official is not a person represented in the matter. *See* Rule 4.2(c) (for organizations, the term "'party' or 'person'" includes only those individuals who have "the authority to bind an organization as to the representation to which the communication relates."); see also D.C. Ethics Op. 80 (limiting government officials covered by the rule to "only those persons who have the power to commit or bind the government to the matter in question").[3] We note that even though we conclude that a lawyer may generally initiate contact with a government official, an official is not obligated to engage in the communication and may ask the lawyer to communicate with government counsel rather than directly with the official.

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3. If the government official contacted is an attorney who serves as an "in-house counsel," then contact absent consent would be permissible under Comment [5] to Rule 4.2.

*Opinion 341*

**Review and Use of Metadata in Electronic Documents**

• A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

**Applicable Rules**

• Rule 1.6 (Confidentiality of Information)
• Rule 3.4 (Fairness to Opposing Party and Counsel)
• Rule 4.4 (Respect For Rights of Third Persons)
• Rule 8.4 (Misconduct)

*Inquiry*

We have received numerous inquiries concerning a lawyer's obligations regarding metadata that is imbedded in electronic documents received from opposing counsel. Metadata is electronically stored information, typically not visible from the face of the document as printed out or as initially shown on the computer screen, but which is imbedded in the software and retrievable by various means. Often described as "data about data," metadata provides information regarding the creation and modification of a document, and sometimes includes comments by persons participating in the creation or modification of the document.[1] To the uninitiated, metadata is hidden and perhaps unknown, but to competent computer-users, the existence of metadata is well known and may be a simple "click" or two away. The information that is embedded is often mundane and of little or no interest, but in some instances it may reveal significant information.

In assessing the ethical obligations of both the sending and receiving lawyer with respect to metadata, we find it useful to distinguish between electronic documents provided in discovery or pursuant to a subpoena from those electronic documents voluntarily provided by opposing counsel. Although the Florida and Alabama Bars have recognized a similar distinction, *see* Florida Bar Op. 06-2; Alabama State Bar, Office of Gen. Counsel Op. No. R0-2007-02, the distinction has not been universally recognized in other ethics opinions addressing metadata. *See* ABA Formal Op. 06-442; Maryland Bar Ass'n Ethics Docket No. 2007-09.

*Analysis*

*A. Electronic Documents Provided Outside of Discovery*

1. The Sending Lawyer

Lawyers sending electronic documents outside of the context of responding to discovery or subpoenas have an obligation under Rule 1.6 to take reasonable steps to maintain the confidentiality of documents in their possession. This includes taking care to avoid providing electronic documents that inadvertently contain accessible information that is either a confidence or a secret and to employ reasonably available technical means to remove such metadata before sending the document. See N.Y. State Bar Ass'n Committee Op. 782. Accordingly, lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures.[2]

2. The Receiving Lawyer

More often than not, the exchange of metadata between lawyers is either mutually helpful or otherwise harmless. Lawyers routinely exchange contracts, stipulations, and other documents that include "track changes" or other software features which highlight suggested modifications. Similarly, spreadsheets include necessary metadata such as formulas for the columns and rows, thereby providing a useful understanding of the calculations made.

But when a receiving lawyer has actual knowledge that the sender inadvertently included metadata in an electronic document, we believe that the principles stated in Opinion Nos. 256 and 318 relating to inadvertent production of privileged material should be used in determining the receiving lawyer's obligations. In Opinion No. 256, we stated that, where a lawyer knows that a privileged document was inadvertently sent, it is a dishonest act under D.C. Rule 8.4(c) for the lawyer to review and use it without consulting with the sender. We reached a similar conclusion in Opinion No. 318, regarding the receipt of documents from third parties. However, we noted in Opinion 318 that, where the privileged nature of the document is not apparent on its face, there is no obligation to refrain from reviewing it, and the duty of diligent representation under D.C. Rule 1.3 may trump confidentiality concerns.

Consistent with Opinion No. 256, we agree generally with the New York and Alabama Bars to the extent that they have found Rule 8.4(c) to be implicated when a receiving lawyer wrongfully "mines" an opponents' metadata. *See* N.Y. State Bar Ass'n Committee Op. 749 (concluding that lawyers have an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets and that "use of such information . . . [is] conduct 'involving dishonesty, fraud, deceit or misrepresentation'"); and Alabama State Bar, Office of Gen. Counsel Op. No. R0-2007-02 (finding that "[t]he unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of... Rule 8.4").

In our view, however, Rule 8.4 is implicated only when the receiving lawyer has actual prior knowledge that the metadata was inadvertently provided. Given the ubiquitous exchange of electronic documents and the sending lawyers' obligation to avoid inadvertent productions of metadata, we believe that mere uncertainty by the receiving lawyer as to the inadvertence of the sender does not trigger an ethical obligation by the receiving lawyer to refrain

[1] The Federal Judicial Center recently issued a publication on electronic discovery that defined the term "metadata" as

> [i]nformation about a particular data set or document which describes how, when, and by whom the data set or document was collected, created, accessed, or modified; its size; and how it is formatted. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden from users but are still available to the operating system or the program used to process the data set or document.

Barbara J. Rothstein, Ronald J. Hedges, & Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges* 24-25 (Federal Judicial Center 2007), www.fjc.gov/public /pdf.nsf/lookup/eldscpkt. pdf/$file/eldscpkt.pdf.

[2] For information on methods for handling metadata, see The Sedona Conference Working Group Series, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Sept. 2005), www.thesedonaconference.org/dltForm?did=TSG9_05.pdf.

from reviewing the metadata. This standard is consistent with our conclusion in Opinion No. 256.[3]

Where there is such actual prior knowledge by the receiving lawyer as to the inadvertence of the sender, then notwithstanding the negligence or even ethical lapse of the sending lawyer, the receiving lawyer's duty of honesty requires that he refrain from reviewing the metadata until he has consulted with the sending lawyer to determine whether the metadata includes privileged or confidential information.[4] If the sending lawyer advises that such protected information is included in the metadata, then the receiving lawyer should comply with the instructions of the sender. The receiving lawyer may, however, reserve his right to challenge the claim of privilege and obtain an adjudication, where appropriate.

A receiving lawyer may have such actual prior knowledge if he is told by the sending lawyer of the inadvertence before the receiving lawyer reviews the document. Such actual knowledge may also exist where a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included. These situations will be fact-dependent, but can arise, for example, where the metadata includes a candid exchange between an adverse party and his lawyer such that it is "readily apparent on its face," D.C. Ethics Op. 318, that it was not intended to be disclosed. As we stated in Opinions 256 and 318, a prudent receiving lawyer who is uncertain whether the sender intended to include particular information should contact the sending lawyer to inquire.

We recognize that other ethics opinions take a different view and have concluded that neither Rule 8.4(c) nor any other ethics rule prohibits the review of metadata. In Formal Opinion 06-442, the ABA noted that there is no rule expressly prohibiting such conduct. The ABA discussed Model Rule 4.4(b), which relates to the inadvertent production of documents, as "the most closely applicable rule," but it declined to state that it directly applied to metadata transmitted within an electronic document. The ABA nevertheless noted that under Model Rule 4.4(b), where it applies, a receiving lawyer has no obligation under the ethics rules beyond notifying the sender.[5]

Notably, however, the version of Rule 4.4(b) adopted by the D.C. Court of Appeals, effective February 1, 2007, is more expansive than the ABA version. Indeed, the D.C. Rule largely codified Opinion No. 256 regarding inadvertent production of privileged documents. See D.C. Rule 4.4, Comments [2] & [3]. D.C. Rule 4.4(b) provides:

> A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

Although the purpose of Rule 4.4(b) was to address the inadvertent disclosure of entire documents (whether electronic or paper),[6] we see no reason why it would not also apply to an inadvertently transmitted portion of a writing that is otherwise intentionally sent.

*B. Electronic Documents Provided in Discovery or Pursuant to a Subpoena*

When metadata is provided in discovery or pursuant to a subpoena, the rules of professional conduct are not the only rules of which lawyers must be aware. Although such other rules lie outside our jurisdiction, we note that the Federal Rules of Civil Procedure now provide steps to identify and address issues related to electronic discovery. *See* F. R. Civ. P. 16(b), 26 (f), 33(d), 34(a) and 37(f) (effective Dec. 1, 2006). Under these new rules, parties are required to consult at the outset of a case about the nature of pertinent electronic documents in their possession and the manner in which they are maintained. This should include specific discussions as to whether a receiving party wants to obtain the metadata, and if so, whether the sending party wishes to assert a claim of privilege as to some or all of the metadata.

Although decided prior to the implementation of the amended federal rules, the case of *Williams v. Sprint/United* Mgt., 230 F.R.D. 640 (D. Kan. 2005), illustrates how metadata may be considered probative evidence in litigation. In *Williams*, plaintiff employees brought a class action claiming age discrimination in connection with a reduction-in-force ("RIF"), and they sought and obtained from the defendant electronic versions of Excel spreadsheets that were created and used by the defendant to identify pools of employees subject to the RIF. The defendant "scrubbed" the metadata from these spreadsheets before producing them, and plaintiffs objected. They moved to compel production of the metadata as originally maintained. The court held that because the metadata could be relevant in determining whether defendants had manipulated the employee pools as alleged, defendants had to provide the metadata to plaintiffs.[7]

1. The Sending Lawyer in the Discovery/Subpoena Context

D.C. Rule 3.4(a) provides the relevant guidance for lawyers providing access to

[3] By stating that the standard for a violation is "actual knowledge," we do not condone a situation in which a lawyer employs a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender. The Rules of Professional Conduct are "rules of reason," Scope [1], and a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks "actual knowledge" in an individual case. Moreover, as stated in Rule 1.0(f), "[a] person's knowledge may be inferred from circumstances."

[4] In Opinion No. 256, we discussed the analogous situation of a lawyer who finds a wallet in the street. Here, the more appropriate analogy may be to a lawyer who inadvertently leaves his briefcase in opposing counsel's office following a meeting or a deposition. The one lawyer's negligence in leaving the briefcase does not relieve the other lawyer from the duty to refrain from going through that briefcase, at least when it is patently clear from the circumstances that the lawyer was not invited to do so.

[5] In its Opinion No. 2007-09, the Maryland Bar also concluded that Rule 8.4(c) is not implicated by a receiving lawyer's accessing metadata. But the Maryland Bar relied on its version of Rule 4.4. which has not been amended to impose any obligation on the lawyer who receives an inadvertently produced document. The Maryland Bar stated that its opinion was "heavily influenced by the difference between the Maryland Rules of Professional Conduct and [ABA Model Rule 4.4]." D.C. Rule 4.4(b), by contrast, imposes upon the receiving lawyer an obligation not only to contact the sending lawyer (as the Model Rule requires), but also to abide by the sending lawyer's instructions regarding the return or destruction of the document.

[6] Under D.C. Rule 1.0(o), a "writing" is defined as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail."

[7] By citing *Williams*, we do not necessarily mean to endorse its holding or to provide any guidance with respect to the rules of discovery. *See Speedway v. NASCAR, Inc.*, 2006 U.S. Dist. LEXIS 92028 (E.D. Ky. Dec. 18, 2006) (criticizing the specific holding in *Williams*). Rather, we cite *Williams* merely to illustrate that courts have required the production of metadata as probative evidence, and we discuss below the implications of this conclusion for the responsibilities of lawyers under the rules of professional conduct.

tangible evidence in discovery:

> A lawyer shall not . . . Obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding. Unless prohibited by law, a lawyer may receive physical evidence of any kind from the client or from another person.

Because it is impermissible to alter electronic documents that constitute tangible evidence, the removal of metadata may, at least in some instances, be prohibited as well.[8] In addition to issues regarding discovery sanctions, the alteration or destruction of evidence can, under some circumstances, also constitute a crime. *See* D.C. Rule 3.4, Comment [4].

2. The Receiving Lawyer in the Discovery/Subpoena Context

In view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally. Moreover, when a document is sought in discovery or through subpoena, the scope of what is protected is narrowed from anything that is a confidence or secret to that material which falls within an evidentiary privilege. *See* D.C. Rule 1.6(e)(2)(A); *Adams v. Franklin*, No. 05-CV-233, slip op. at 5 (D.C. May 10, 2007) ("the lawyer's ethical duty to preserve a client's confidences and secrets is broader [than] the attorney-client privilege").

In addition, when an electronic document constitutes tangible evidence, or potential tangible evidence, the receiving lawyer has an obligation competently and diligently to review, use, and preserve the evidence. *See* D.C. Rules 1.1, 1.3. The electronic document is similar to any other tangible evidence that the lawyer is expected to review in order to advance her client's interests. Where useful, for example, the lawyer in such instances may consult with a computer expert to determine the means by which the metadata can be most fully revealed and reviewed, much as a lawyer does with a finger-print expert.[9]

Notwithstanding all this, even in the context of discovery or other judicial process, if a receiving lawyer has actual knowledge that metadata containing protected information was inadvertently sent by the sending lawyer, the receiving lawyer, under Rule 8.4(c), should advise the sending lawyer and determine whether such protected information was disclosed inadvertently. *See* D.C. Ethics Op. 256 ("The line we have drawn between an ethical and an unethical use of inadvertently disclosed information is based on the receiving lawyer's knowledge of the inadvertence of the disclosure."). If the sender advises that protected information was unintentionally provided, then the receiving lawyer should follow the directives of the sending lawyer regarding the disposition of the electronic document. Under these circumstances, however, the receiving lawyer is permitted to take protective measures to ensure that potential evidence is not destroyed and to preserve the right to challenge the claim that the information is privileged or otherwise not subject to discovery and obtain an adjudication on that point. Of course, this is all subject to applicable rules of procedure and court orders that may otherwise govern.[10]

*Conclusion*

We conclude that when a receiving lawyer has actual knowledge that an adversary has inadvertently provided metadata in an electronic document, the lawyer should not review the metadata without first consulting with the sender and abiding by the sender's instructions. In all other circumstances, a receiving lawyer is free to review the metadata contained within the electronic files provided by an adversary.

(No Inquiry Number)
Published: September 2007

*Opinion 342*

## Participation in Internet-Based Lawyer Referral Services Requiring Payment of Fees

• Lawyers may participate in both not-for-profit and for-profit lawyer Internet-based referral services where the services require a flat fee for participation, a flat fee for transmitting the lawyer's name to a potential client, and/or a flat fee for every client secured as a result of a referral.

### Applicable Rules

• Rule 5.4 (Professional Independence of a Lawyer)
• Rule 7.1 (Communications Regarding a Lawyer's Services)

### Inquiry

We have received a number of inquiries concerning participation in, and the creation of, Internet-based referral services. All inquires seek guidance on whether a lawyer's participation in a specific program would be permissible under the D.C. Rules of Professional Conduct. Specifically, we have been asked to provide guidance with respect to the applicability of D.C. Rules 5.4 and 7.1 to lawyer participation in referral services under the terms common to the programs reviewed.

Most referral programs are run by State Bar Associations or other nonprofit organizations. There are, however, a substantial number of programs that are operated by for-profit organizations, and these services vary in size, sophistication, legal specialty, and design. While most sites have numerous disclaimers that could be accessed from the home page, the cost of lawyer participation and the existence of fees required if a lawyer is selected through the referral service are often not apparent without signing up for the service.

[8] This is not to suggest that all metadata should be treated alike. For example, a Joint Court-Bar Committee of the United States District Court for the District of Maryland has issued a suggested protocol that defines and distinguishes between different kinds of metadata, only some of which are subject to routine production. See Suggested Protocol for Discovery of Electronically Stored Information, *In re: Electronically Stored Information*, ¶11 (D. Md.), www.mdd.uscourts.gov/localrules/localrules.html. The purpose of the protocol is "to facilitate the just, speedy, and inexpensive conduct of discovery involving [electronically stored information or 'ESI'] in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention." *Id.* ¶1.

[9] In concluding that a lawyer *may* review metadata in documents produced in discovery (that is, unless and until the lawyer has actual knowledge that the metadata contains protected information), we do not intend to suggest that a lawyer *must* undertake such a review. Whether as a matter of courtesy, reciprocity, or efficiency,"a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary." D.C. Ethics Op. 256, n.7 (citing D.C. Rules 1.2(a) and 1.4(b)); *see also* D.C. Ethics Op. 318, n.5.

[10] When in litigation, an attorney must comply with the applicable rules of procedure of the court in which the litigation resides. In this regard, for example, Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure requires a lawyer who is informed by opposing counsel that an allegedly privileged document was produced, to return, sequester or destroy the document until the court adjudicates the claim of privilege. *See also* D.C. Rule 3.4(c) (requiring a lawyer to comply with the rules of a presiding tribunal).

The common elements among the inquiries included the following: (1) the services do not charge a fee to the prospective client or consumer; (2) they charge, instead, a flat fee for lawyers to participate in the service; (3) they require that the fees charged by the lawyers to clients secured through the referral service not be higher than fees charged to clients who do not use the referral service; (4) they provide guidelines on the type of information that participating lawyers must provide; (5) they adopt specific qualification requirements for lawyers to participate (e.g., certificates of specialties, malpractice insurance, minimum number of years of practice); (6) they include disclaimers to prospective clients that the lawyer is responsible for the content of the description of the lawyer's services; and (7) they provide disclaimers stating that the referral service does not provide legal advice or recommend a particular lawyer. In addition, none of the referral services reviewed appear to solicit prospective clients by "in-person contact."[1] While the referral services advertise in a variety of media, the consumer or the prospective client must initiate the contact with the referral service to receive any referrals.

## Background

Rule 7.1 of the D.C. Rules of Professional Conduct governs all communications regarding a lawyer's services, including advertising. The Rule prohibits a lawyer from making a false or misleading communication about her services and imposes certain limits on in-person solicitation.[2]

Prior to February 1, 2007, D.C. Rule 7.1(b) permitted lawyers to use paid intermediaries to make in-person contact with prospective clients, so long as the lawyer reasonably knew that such solicitation was consistent with the intermediary's contractual or other legal obligations and the lawyer took reasonable steps to ensure that the potential client was informed about how much the intermediary was paid and the effect, if any, of the payment on the lawyer's total fee.[3] The current version of D.C. Rule 7.1(b) no longer permits the use of paid intermediaries. "A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact." D.C. Rule 7.1(b)(2). Comment [5] explicitly states that a "lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary."

The District of Columbia Bar Rules of Professional Conduct Review Committee recommended this change for two reasons:

> First, lawyer advertising in now widespread, reaching diverse communities in the District of Columbia, including non-English speakers and immigrants. Concerns that certain persons, without the intervention of a paid intermediary, would be unable to locate a lawyer to hire, should no longer exist. Second, there is reason to believe that at least some paid intermediaries, who are effectively beyond the power of the Bar to regulate, have used harassing, abusive, or unseemly practices in soliciting potential clients for lawyers.

District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District to Columbia Rules of Professional Conduct: Final Report and Recommendations (Clean Copy)* 179 (June 21, 2005; revised Oct. 6, 2005).

While we have not previously addressed an inquiry about Internet-based referral services that charge lawyers a fee for participating, we have addressed similar or analogous inquires. All of those inquiries have been resolved, at least in part, with references to the now prohibited practice of using paid intermediaries. *See, e.g.*, D.C. Ethics Ops. 261 (1995), 286 (1998), 302 (2000), & 307 (2001). Thus, our conclusions reached in these prior opinions must be read and reassessed in light of the recent amendments to D.C. Rule 7.1.

There are three principal differences between the Model Rules (and those of other jurisdictions) and D.C. Rule 7.1 that are relevant to the inquiries. First, D.C. Rule 7.1 is more permissive than the Model Rule with respect to lawyer solicitation. Model Rule 7.3 generally prohibits a lawyer from engaging in any in-person solicitation of potential clients (which the Model Rules define to include both live telephone calls and "real-time electronic contact") unless the potential client is either a lawyer or has a pre-existing relationship with the contacting lawyer. By contrast, in the District of Columbia, Rule 7.1 permits a lawyer to make such in-person solicitations so long as the lawyer's claims are not misleading, the solicitation does not involve the use of coercion, duress, or harassment, and the potential client has the capacity to make reasoned judgments regarding the selection of a lawyer. *See* D.C. Rule 7.1(b).[4]

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[1] "In-person contact" or solicitation "include[s] telephone contact but not electronic mail." D.C. Rule 7.1, Comment [5].

[2] As amended, D.C. Rule 7.1 states in pertinent part that:

> (a) 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:
>
> (1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or
>
> (2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.
>
> (b) (1) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:
>
> (A) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);
>
> (B) The solicitation involves the use of coercion, duress or harassment; or
>
> (C) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.
>
> (2) A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact.
>
> (c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

[3] The prior version of D.C. Rule 7.1 included the following language:

> (b) A lawyer shall not seek by in-person contact, or through an intermediary, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:
>
> . . . .
>
> (4) The solicitation involves use of an intermediary and the lawyer knows or could reasonably ascertain that such conduct violates the intermediary's contractual or other legal obligations; or
>
> (5) The solicitation involves the use of an intermediary and the lawyer has not taken all reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged.

[4] Lawyers should be aware that substantive law may limit certain solicitation practices in particular circumstances. *See, e.g.*, D.C. Code § 22-3225.14 (limiting the ability of lawyers and other "practitioners," whether directly or through a paid intermediary, to solicit clients during the 21-day period following a motor vehicle accident).

Second, the D.C. Rule 7.1 is less restrictive than other jurisdictions in regulating advertising. The rule only requires that advertising not contain misrepresentations of fact or law or assertions that cannot be substantiated. *See* D.C. Rule 7.1(a). Comment [4] further states that any restrictions beyond these limited requirements impose barriers to the flow of information about lawyers' services. Although Model Rule 7.2 is similar in this regard, other jurisdictions are much more restrictive. *See, e.g.*, Iowa Rule of Professional Conduct 32:7.2 Advertising.

Finally, D.C. Rule 7.1 differs from the Model Rule regarding participation in lawyer referral programs. Both rules now prohibit a lawyer from paying a person to recommend her services (*e.g.*, intermediaries), and both rules carve out an exception for referral services. Model Rule 7.2, however, states that a lawyer may "pay the usual charges of . . . *a not-for-profit or qualified lawyer referral service*" (emphasis added). A "qualified lawyer referral service" is defined as one that "has been approved by an appropriate regulatory authority." Model Rule 7.2(b)(2). Comment [6] to D.C. Rule 7.1, on the other hand, simply states that "a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs." Thus, the D.C. Rule, which was adapted from the Model Rule, specifically omitted wording that would limit payment of fees only to not-for-profit referral services or to services that are otherwise regulated by appropriate authorities.[5]

**Discussion**

In the District of Columbia, questions regarding a lawyer's participation in an Internet-based referral service are no different than any other question about lawyer communications regarding legal services. We have previously said that "we see nothing untoward in lawyers communicating about their services through web sites, provided that such communications comply with our general rules governing lawyer communications with clients." D.C. Ethics Op. 302. Such communications are governed by D.C. Rule 7.1.

As an initial matter, the rule requires lawyers to ensure that their listings with the referral services, and any statements made by the referral services about the lawyers' services, satisfy D.C. Rule 7.1(a). Thus, the lawyers must ensure that the communications about their services provided by the referral service are neither false nor misleading and that any affirmative statements about their legal services can be substantiated. *See* D.C. Ethics Op. 249 (1994). The referral programs under review request information such as the following: office locations; contact information; years of practice; certificates of specialty if the State Bar recognizes specializations; current areas of practice; certificate of malpractice insurance; and current bar memberships. Our rules expressly permit the public dissemination of this type of information.[6]

The referral service must also conform to the requirements of D.C. Rule 7.1(b)(2), which prohibits a lawyer from giving "anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact." As previously discussed, this language was added to make clear that use of paid intermediaries in the District of Columbia is now prohibited. Notwithstanding this change to the text of the rule, the relevant language in the Comments remains unchanged, and it states that "a lawyer may participate in lawyer referral programs and pay the usual fees charged by such a programs." D.C. Rule 7.1, Comment [6]. Thus, Rule 7.1(b)(2) was not intended to curtail participation in fee charging referral programs, but, rather, to stop lawyers from using paid intermediaries to make in-person solicitations. The key distinction between referral programs and paid intermediaries is that referral programs do not generally engage in unsolicited in-person contact with prospective clients.

Each of the referral programs described by the inquirers requires that the prospective client initiate contact with the referral service to receive any information about a prospective lawyer. While the referral services advertise through websites and other media outlets, none of them initiates unsolicited in-person communications with prospective clients. Instead, the inquirers all described Internet-based services through which prospective clients can electronically request a referral. For some services, the prospective client can call the referral service for technical assistance in using the web site to request a referral. Others allow the prospective client to either submit the request electronically, or call the service to receive referrals. But none of the services engage in any unsolicited contact with prospective clients.[7]

Each referral service also informs the prospective client that the service is simply providing a list of available lawyers and is not recommending any particular lawyer. In many cases, the service provides multiple random referrals for each request. While the particular programs described in the inquiries we received do not recommend any specific lawyers when they transmit the names to potential clients, we do not believe that our conclusions would change if these programs were to make specific recommendations. Such recommendations would, however, be subject to scrutiny under Rule 7.1(a). Specifically, we believe that a service that recommends a lawyer without offering any explanation of the basis for the recommendation could be misleading, particularly if the service simply recommends any lawyer who pays a fee. However, if the basis for the recommendation is clearly explained, such advertising is unlikely to run afoul of Rule 7.1(a).[8]

With respect to fees, the programs described by the inquirers require of each lawyer a flat fee to participate or to have information listed with the service for a specified period of time. Such fees are permissible if they are "the usual fees charged by such programs." D.C. Rule

[5] Because the Internet crosses jurisdictional boundaries, and because we rely on unique aspects of the District of Columbia Rules, lawyers who accept referrals should exercise particular care when doing so from clients based in, or regarding matters arising out of, other jurisdictions, because the rules of those jurisdictions may apply. *See* D.C. Rule 8.5(b), D.C. Ethics Op. 311 (2002).

[6] "This rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance." D.C. Rule 7.1, Comment [3].

[7] Because most of these services allow referrals to be made over the telephone, the communications arguably fall within the definition of "in-person" solicitation under the D.C. Rules. But we interpret the prohibition in D.C. Rule 7.1(b)(2) against paying a person for recommending the lawyer's services through in-person contact not to extend to situations in which a prospective client makes a telephone call to a referral service and affirmatively requests a name or names of lawyers. We do not believe that D.C. Rule 7.1(b)(2) was intended to prohibit a lawyer from paying to participate in a referral service in which the prospective client initiates the contact, expressly seeking lawyer referrals.

[8] The location of such an explanation is likely to vary from web site to web site depending on the design. We have cautioned before that, "because web pages allow multi-layered communications, questions may arise about whether a visitor to a web page may be misled because relevant disclosures are hidden many clicks away from the main pages." D.C. Ethics Op. 302.

7.1, Comment [6]. What is "usual" will vary over time and among different services based on the costs of operating them. At a minimum, "usual" means that the fees fall within a range of fees charged by comparable services.

D.C. Rule 5.4 generally prohibits lawyers from "sharing" fees with nonlawyers. The purpose of this prohibition is to "protect the lawyer's professional independence of judgment." D.C. Rule 5.4, Comment [1]. Although some of the referral programs make the payment of a fee contingent upon securing a client from the referral, none of them makes the fee contingent on the outcome of the case or on the amount of the legal fees. As we explained in Opinion 286, "[a] non-contingent payment for the referral of legal business, *i.e.*, one that is paid regardless of the success or outcome of the representation, is not a division of legal fees. Such payments are simply part of a lawyer's marketing expenses, payable whether or not they produce revenue for the lawyer."[9] Thus, we conclude that a flat fee for transmittals, or for each client secured, does not violate either D.C. Rule 7.1 or 5.4.

In Opinion 307, we considered a referral system operated by the federal government. That referral program required that a law firm bidding to participate on a schedule contract to provide legal services to a government agency pay one percent of the fee income generated in order to cover the costs of the referral program. We concluded that

> the drafters of the D.C. Rules were not particularly concerned about the manner in which non-profit lawyer referral services structured their fee arrangements; their principal focus was on preventing non-lawyer intermediaries from using their power over lawyers who rely on them for business referrals to influence those lawyers' "professional independence of judgment." D.C. Rule 5.4, Comment [1].

We went on to recognize that "the development of referral schemes that do not compromise lawyers' independence [is] a positive development, though we recognize that our Rules are less clear than they could be on this issue." D.C. Ethics Op. 307. The recent amendments to D.C. Rule 5.4 now expressly allow a lawyer to share legal fees "with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code." D.C. Rule 5.4(a)(5).[10]

Thus, while there is no distinction between not-for-profit and for-profit referral services in D.C. Rule 7.1, D.C. Rule 5.4 does make a distinction between not-for-profit and for-profit programs with respect to fee sharing. But as long as the lawyers participating in a for-profit Internet-based referral program pay a flat fee, or a flat fee per transmittal, rather than a portion of the fees earned from the client, D.C. Rule 5.4 is not violated.

Finally, all of the inquiries we received made clear that none of the participating lawyers would have any financial interest in the referral service. Nor would any participating lawyer have any employment or contractual relationship with the referral service provider even where the provider was a large entity with other business interests. If such a relationship were to exist, it would likely prove problematic under D.C. Rule 5.4(b).

In sum, the amended D.C. Rules prohibit a lawyer from conducting, "in-person solicitation through the use of a paid intermediary," but allow a lawyer to "participate in lawyer referral programs and pay the usual fees charged by such programs." *See* D.C. Rule 7.1, Comments [5] and [6]. Thus, we conclude that participation in lawyer referral programs, like those described above, that conform to the D.C. Rules of Professional Conduct in general, and to D.C. Rules 7.1 and 5.4 in particular, is permitted.

Inquiry Nos. 06-01-24 and 06-08-11
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*Opinion No. 343*

**Application of the "Substantial Relationship" Test When Attorneys Participate in Only Discrete Aspects of a New Matter**

• A lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or 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. Two matters are "substantially related" to one another if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation is useful or relevant in advancing the client's position in the new matter. Subject to certain conditions, a lawyer may limit the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter. Specifically, by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client's position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest.

**Applicable Rules**

• Rule 1.2 (Scope of Representation)
• Rule 1.9 (Conflict of Interest: Former Client)
• Rule 1.10 (Imputed Disqualification: General Rule)

*Inquiry*

We have received a number of inquiries that present the general question whether lawyers may limit their participation in a matter in such a way that the current matter is not substantially related to a prior matter in which they represented a former client whose interests are adverse to those of the current client. In other words, even though the overall representation of the current client may be substantially related to the prior representation, we have been asked whether lawyers may nonetheless limit their own participation in the new representation such that the specific matter on which they are representing the current client is not substantially related to the prior matter in which they had represented the former client.

In considering this important question, we find it useful to distinguish between two ways in which a lawyer may be able to limit her participation in a case: First, a

[9] Opinion 286, along with other opinions discussing payments of fees for referrals (*see, e.g.*, D.C. Ethics Op. 307), incorporated into its analysis of fee sharing an analysis of the District of Columbia's unique rule permitting the use of intermediaries. While the rule no longer permits the use of intermediaries, the reasoning of these opinions with respect to fee sharing remains sound.

[10] The rule change only addressed nonprofit organizations that qualify under section 501(c)(3); Opinion 307 continues to apply with respect to *government* referral services.

client may want a lawyer to represent it as to a discrete legal issue as part of a larger legal representation whose interests are adverse to the lawyer's former client, where the specific legal issue is one that is entirely distinct from the matter in which the lawyer (or the lawyer's law firm) had previously represented a former client. For example, Lawyer is an expert in patent law. Client hired Lawyer to advise and represent Client in obtaining all of the rights under a particular patent through an assignment from the original patent holder. Sometime later, Client approaches Lawyer to represent it in a patent infringement suit against Company. However, Lawyer's law firm has previously represented Company in a different patent infringement case involving the same underlying technology. Lawyer informs Client that she cannot participate in the patent infringement action against Company but that she could represent Client on the limited question whether Client's own patent had been properly assigned to it. In other words, Lawyer would represent Client only to the extent that Company asserts that Client lacks standing to pursue the infringement claim on the grounds that the patent had not been properly assigned. Client would hire other lawyers to prosecute its infringement claims. Given that Lawyer's participation would be limited only to whether the patent had been properly assigned to Client rather than to whether Company had infringed that patent, would such a limited representation be permissible under D.C. Rule 1.9 even without Company's informed consent? If so, what precautions or conditions would Lawyer need to take into account?

Second, a client may want to hire a lawyer to represent it as to a discrete stage in the litigation – one that presents a pure question of law that would not involve the lawyer in any factual issues. For example, Lawyer has been asked to represent Client who is interested in filing a petition for certiorari with the United States Supreme Court to challenge a decision of the court of appeals on the grounds that the appellate court lacked jurisdiction over the particular claim. Lawyer and her firm did not represent Client at trial, where Client had filed suit against Company. Some years earlier, other lawyers in Lawyer's firm had defended Company in litigation involving some of the same facts as the current litigation. Lawyer proposes to limit the scope of her representation of Client to preparing a petition for certiorari, merits briefs, and oral argument in the Supreme Court to raise a narrow question of appellate jurisdiction. The scope of her representation would be limited to the Supreme Court proceedings; she would not represent Client should the matter be remanded or, for that matter, should there be any settlement discussions or other proceedings relating to the underlying litigation. Other lawyers represented Client in the lower-court proceedings and would remain involved with the case. Lawyer believes that the issues to be presented at this stage of the proceedings are distinct matters of federal law and that nothing that Lawyer's colleagues might have learned in the prior litigation would be relevant or useful to the legal arguments presented to the Supreme Court. Assuming Client is willing to consent to the circumscribed scope of Lawyer's representation, would it be permissible for Lawyer to represent Client in this matter, consistent with her obligations under the Rules of Professional Conduct?

*Background*

The application of the "substantial relationship" test is one of the most difficult and contentious issues that a lawyer must face when considering whether he or she may represent a client whose interests are adverse to those of a former client. On one hand, by limiting the scope of prohibited matters to those that are the same as or substantially related to the matter in which the lawyer represented the former client, D.C. Rule 1.9 makes clear that it does not intend to prohibit all representations that may be adverse to the interest of a former client. In other words, there are clearly some matters—those that are neither the same as nor substantially related to the prior matter—that a lawyer may take on even if doing so requires the advancement of interests that are adverse to those of a former client. This clearly reflects a policy judgment that clients ought generally to be free to engage the lawyers of their choice. On the other hand, D.C. Rule 1.9 also reflects the judgment that a lawyer should not be permitted (without the former client's informed consent) to take on a matter adverse to the interests of the former client when doing so would put the lawyer in a position of using knowledge obtained in the prior representation against the interests of the former client.

D.C. Rule 1.9 provides that "[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." According to a new comment that became effective in 2007, 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*. . . 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."

D.C. Rule 1.9, Comment [3] (emphasis added).

The commentary to D.C. Rule 1.9 expressly incorporates by reference District of Columbia and federal case law on the substantial-relatedness test, *see, e.g., Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc); *T.C. Theatre Corp. v. Warner Brothers Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953). The restrictions imposed by D.C. Rule 1.9 are grounded in the obligations imposed by D.C. Rule 1.6 to protect client confidences and secrets. *See* D.C. Ethics Op. 239 (1993). Commentators agree that the function of the substantial-relationship test is to protect client confidences. *See* Charles W. Wolfram, *Former-Client Conflicts*, 10 Geo. J. Legal Ethics 677, 685-89 (1997). According to Geoffrey C. Hazard, Jr. and W. William Hodes, "most modern authority holds that 'substantial relationship' is itself essentially a shorthand for not abusing the former client's confidences." The Law of Lawyering § 13.5 (Aspen 3d ed. 2000).[1]

The leading case in the District of Columbia regarding the substantial-relationship test is *Brown v. District of Columbia Board of Zoning Adjustment*. The *Brown* case involved a series of transactions concerning the same parties,

[1] The Restatement notes that a legal position taken in representing a former client ordinarily is not considered to be a substantially related matter unless the underlying facts are also related. *See* Restatement (THIRD) of the Law Governing Lawyers § 132 cmt. D (2007). Thus, for example, a lawyer can argue that a statute is constitutional on behalf of one client and is unconstitutional in representing a subsequent client in a case not involving the former client.

the same property, and similar objectives. Petitioners moved to disqualify two former D.C. Corporation Counsel attorneys who had represented the District of Columbia in connection with issues involving the property during their government service. The *Brown* opinion heavily relied on the analysis in *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978). According to *Westinghouse*, two matters will be substantially related when confidential client information provided to counsel in a prior matter "is relevant to the issues raised in the litigation pending against the former client."[2] *Id.* at 225. Moreover, when evidence demonstrates that counsel may have had access to information that might be relevant or useful in the second case, "[r]ebuttal evidence must therefore focus on 'the scope of the legal representation' involved in each matter and not on the actual receipt of. . . information." *Id.* at 224 (cited with approval in *Brown*, 486 A.2d at 50).

In *Brown*, the factual overlap between the transactions was sufficient for the court to conclude that the moving party had established a prima facie case for disqualification, shifting the burden of rebutting the inference to the former Corporation Counsel attorneys and their law firm. The court ultimately held that the former government attorneys successfully rebutted the inference by demonstrating that none of the information presented in the earlier proceedings would have benefited the property owner in the current proceeding. Thus, the court affirmed the finding of the Board of Zoning Appeals that disqualification was not required.

There are two additional decisions by courts in the District of Columbia that are relevant, and both of them involve former government officials. In *In re Sofaer*, 728 A.2d 625 (D.C. 1999), the respondent was disciplined for representing the government of Libya in a matter in which he participated as Legal Advisor of the State Department. The respondent claimed that the substantial-relationship test did not apply because of the limited scope of the current representation. The court addressed that argument in the following terms:

> Respondent insists that he stayed clear of that overlap by restricting the terms of his agreement to represent Libya so as to "assum[e] Libya's culpability for the [Pan Am 103] bombing." A lawyer may, of course, limit the objectives of a representation with client consent. Rule 1.2(c). But respondent's retainer agreement exemplifies why, in our view, limiting the private representation rarely will succeed in avoiding the convergence addressed by Rule 1.11(a). While stating that "[the firm's] efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions," the agreement emphasized that "[m]easures will be taken only with your [i.e., Libya's] prior consent, and without admission of liability" (emphasis added). The proposed activities included "investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with" the "ongoing civil and criminal disputes and litigation" stemming from the destruction of Pan Am 103—all clearly features of a comprehensive attorney-client relationship. We do not question the sincerity of respondent's belief that the representation could be insulated, factually and ethically, from the investigation and diplomatic efforts of which he had been part. The "substantially related" test by its terms, however, is meant to induce a former government lawyer considering a representation to err well on the side of caution. Respondent did not do so.

*Id.* at 628.

In *United States v. Philip Morris Inc.*, 312 F. Supp. 2d 27 (D.D.C. 2004), the Government had brought a fraud and RICO suit against nine cigarette manufacturing companies and two tobacco trade associations. A former Department of Justice attorney, who had provided legal advice to the FDA and HHS during the Youth Tobacco rulemaking proceeding and then participated on behalf of the government in defending the regulation in court, filed a motion to intervene on behalf of an Australian affiliate of British American Tobacco in the fraud and RICO case. In ruling on the government's motion for disqualification, the court was persuaded that information obtained by the former government attorney in the FDA litigation would assist him in developing strategy and arguments to rebut the Government's claims, and the court refused to accept that the risk of misusing Government information was nonexistent. *Id.* at 42–43. Instead, citing the *Brown* decision, the court said that any case involving close questions about whether particular confidences would be pertinent require disqualification of former government lawyers. *Id.* at 45.[3]

*Discussion*

The D.C. Rules generally permit a lawyer, with the informed consent of the client, to "limit the objective of the representation." *See* Rule 1.2(c).[4] We have expressly recognized "that a client may, if fully informed and freely consenting, contract for limited service arrangements with a legal services provider." D.C. Ethics Op. 330 (2005). "The objectives or scope of services provided by the lawyer may be limited by agreement with the client or by terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose." Rule 1.2, Comment [4]. The *Westinghouse* and *Brown* opinions both recognize that the scope of representation provided to a client is a critical factor in determining whether two matters are substantially related.

In discussing joint representation of clients, Comment [4] to D.C. Rule 1.7 explains that lawyers may limit their representation to avoid adversity, such as by agreeing to represent multiple clients in the liability phase of a case, but not in the

[2] As applied to a former government attorney, the *Brown* court broadened the test and deemed two matters to be substantially related if the confidential information of the former client was relevant or useful in the current representation. *Brown*, 486 A.2d at 49.

[3] Although not directly relevant, *Laker Airways Limited v. Pan American World Airways*, 103 F.R.D. 22, 38–42 (D.D.C. 1984), contains a useful discussion of the applicability of the substantial-relationship test under the predecessor of D.C. Rule 1.9. In *Laker Airways*, Judge Greene concluded that there was not a substantial relationship between a lawyer's representation of an airline on matters concerning the general antitrust immunity of the International Air Transport Association (IATA) and the same lawyer's later antitrust suit against the same airline for conspiring at an IATA conference to engage in illegal price fixing. Although both representations "involve[d] IATA, its organization, operation and activities," Judge Greene held that these facts were mere "resemblances" that were "general and superficial" and insufficient to satisfy the substantial-relationship test. *Id.* at 40.

[4] Similarly, the ABA's Model Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." *Cf.* D.C. Rule 1.2 cmt. 5 ("An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue."). Moreover, as required by D.C. Rule 1.4(b), a lawyer must explain to the client the benefits and drawbacks of the limited scope relationship so that the client has sufficient information to make an informed decision regarding the representation. *Cf.* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 07-447 (2007).

damages phase. Other ethics committees and authorities have acknowledged that limiting the scope of representation may eliminate adversity, such that a lawyer can continue representing a client whose position is otherwise adverse to a former client. *See* ABA/BNA Lawyers' Manual on Professional Responsibility 51:221 ("Adversity may sometimes be avoided by limiting the scope of the current representation to avoid clashing with a former client's interests, as long as the current client gives informed consent."); Wolfram, *supra*, at 736; *see also* New York City Bar Op. 2001-3 (explaining that a lawyer may be able to avoid adversity by limiting the representation to certain claims or by helping the client find other representation for issues in a case that would cause a conflict).[5] The Restatement likewise suggests that "the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client." Restatement of the Law Governing Lawyers at § 132 cmt. E (2007). The Restatement illustrates this comment with an example in which a lawyer agrees to restrict the scope of representation of Client B so that confidential information obtained from Client A in a prior representation would not be relevant to the subsequent representation. With that limitation, the representation of Client B would not be adverse.

Both of the categories discussed below present an example of how a lawyer may avoid creating a conflict of interest under D.C. Rule 1.9 by participating in a discrete aspect of a particular matter.[6] However, it is critical to note that these examples present a rather idealized set of circumstances. The fact that a conflict of interest may potentially be avoided does not, of course, mean that such conflicts can actually be avoided under a specific set of facts that a lawyer may actually face. We shall, therefore, endeavor to identify below which facts are important in determining whether a conflict under D.C. Rule 1.9 can actually be avoided.

*A. Limiting Participation by Representing a Client Only on a Discrete Legal Issue*

Our first category involves a lawyer who is hired only to represent a client on a discrete legal question. Our example involves Lawyer, whom Client would like to hire on the question of defending Client's patent against claims by the defendant Company that the patent had not been properly assigned to Client in advance of Client's bringing suit. Because Lawyer's law firm had previously represented Company in a different case involving infringement claims based on the same underlying technology, Lawyer has sought to limit the scope of her representation so that she represents Client only on the assignment question. Client would be separately represented by other counsel on the claims that Company has infringed Client's patent.[7]

To the extent that Lawyer's participation in the lawsuit can genuinely be limited to the assignment issues, Lawyer's participation in the lawsuit would not violate D.C. Rule 1.9. The matter on which Lawyer represents Client is not substantially related to the matter on which Lawyer's law firm had previously represented Company. We caution, however, that Lawyer must ensure that her participation in the case never extends to the patent infringement issues. Indeed, it would be essential to maintain wholly separate litigation teams to handle the two sides of this case. Such a structure is likely to be unusual, and Lawyer would be expected to explain all of this prior to obtaining Client's consent. But if Client is prepared to accept the costs and inefficiencies that such a rigid and artificial division would require—and assuming, of course, that Lawyer can provide competent representation under these conditions—such a limited representation would not run afoul of D.C. Rule 1.9.

*B. Limiting Participation by Representing a Client Only at a Discrete Stage of Litigation*

The second category of ways in which the scope of representation may be limited involves a lawyer's participation at a discrete stage in litigation. Client has sought to hire Lawyer for her expertise in Supreme Court litigation against Company where the only issue is a pure question of law that does not depend on the underlying factual record for resolution. Lawyer's law firm had previously represented Company in a matter that would be considered substantially related to the underlying litigation in this case. In other words, confidential information that would normally have been obtained by lawyers at Lawyer's law firm would have been relevant or useful to counsel for Client at trial or in assessing the value and wisdom of a settlement. So, without Company's consent, neither Lawyer nor her law firm could have represented Client at trial. But the question is whether the proposed limitations on the scope of the representation at this late stage in the litigation are sufficient to rebut the presumption that these two, factually related matters are, in fact, "substantially related" to one another within the meaning of D.C. Rule 1.9.

Lawyer and Client have agreed that Lawyer's engagement is limited to raising a question of federal jurisdiction in challenging the lower court's decision. This is a pure legal issue that was never part of the prior representation provided by Lawyer's firm to Company. Given the limited scope of Lawyer's representation, there is no basis to conclude that confidential information of Company that is imputed to Lawyer would be relevant to or useful in Lawyer's representation of Client.[8] Because the limitations on the scope of Lawyer's representation have eliminated virtually any risk that Company's confidential information would be used by Lawyer, we conclude that the two matters are not substantially related to one another and that D.C. Rule 1.9 does not, therefore, apply.[9]

[5] New York City Bar Op. 2001-3 ("[T]he scope of a lawyer's representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client, provided that the client whose engagement is limited consents to the limitation after full disclosure and the limitation on the representation does not render the lawyer's counsel inadequate or diminish the zeal of the representation. An attorney whose representation has been limited, however, must be mindful of her duty of loyalty to both clients. Where the portion of the engagement to be carved out is discrete and limited in scope, such a limitation may well resolve the conflict presented.").

[6] Although we identify and discuss two specific examples of how a lawyer may limit the scope of representation to avoid creating a conflict of interest under D.C. Rule 1.9, we do not mean to suggest that these are the *only* two ways in which this issue may arise.

[7] We do not address here the separate issues that could arise when a lawyer's past work (or the past work of others in the lawyer's firm) becomes an issue in litigation between the lawyer's client and a third party and the lawyer is asked to represent the client in such litigation. Such a representation may raise issues under D.C. Rule 1.7(b)(4) implicating the lawyer's own business or personal interests as well as under D.C. Rule 3.7 concerning the lawyer's obligations as a potential witness.

[8] Although we have been assuming that the confidential information would not be relevant or useful in Lawyer's representation, it would certainly be advisable for the other lawyers in Lawyer's firm who were privy to such information from the prior case to avoid any involvement in the litigation before the Supreme Court. Although not required under our rules, such precautions would certainly make it easier for Lawyer to prove, for example, that no confidences or secrets were, in fact, disclosed or used in violation of D.C. Rule 1.6.

[9] Our conclusion here does not apply to discrete stages of the *same* matter. In other words, if

However, we note that even in litigation before the Supreme Court on what appears to be a purely legal issue, confidential factual information may turn out to be useful to a lawyer. Supreme Court cases are sometimes about narrow procedural questions—*e.g.*, whether a case must be heard in state court rather than federal court—or about discrete, threshold legal issues—*e.g.*, whether a particular statute gives a plaintiff standing to sue. But, at other times, the cases are about whether a particular party is entitled to prevail on the facts as presented and developed at trial. Even if such facts are "frozen" by the time the case reaches the Supreme Court, where a lawyer has (or is presumed to have) relevant information about the underlying facts from a prior representation of the adverse party, D.C. Rule 1.9 is likely triggered even if her representation were limited to the Supreme Court stage of the litigation. In other words, whether or not a lawyer may avoid a conflict under D.C. Rule 1.9 by limiting her participation to a discrete stage in the litigation will depend, at least in part, on the nature of the legal question that she is asked to present. The confidential information in the hands of other lawyers in Lawyer's firm, which is imputed to Lawyer and must therefore be presumed to be in Lawyer's possession, could well prove significant in the way she argues the case. In such situations, the matters would indeed be substantially related, and her representation would be improper unless the former client consents. But there are certainly those cases that turn on discrete, interlocutory questions of law that have nothing to do with the underlying merits of the case, and we believe that a lawyer's limiting the scope of her representation to such issues would likely not present a problem under D.C. Rule 1.9. We are mindful of the Court of Appeals' admonition in *In re Sofaer*, that even if a lawyer sincerely believes that his or her representation "could be insulated, factually and ethically," from the earlier representation, the belief might be mistaken. In that case, "[t]he 'substantially related' test by its terms,. . . is meant to induce a. . . lawyer considering a representation to err well on the side of caution." 728 A.2d at 628.

* * * * *

Even if it is permissible generally to restrict a representation to avoid substantial overlap with a prior representation, it may not be possible in a particular case. Private lawyers, like former government lawyers, should "err well on the side of caution." *Id.*[10] We have considered two different categories in which a lawyer may avoid the applicability of D.C. Rule 1.9—by agreeing only to represent a client as to a discrete legal issue and by agreeing to represent a client with respect to a discrete stage of the litigation. While we recognize that these categories can, under appropriate conditions, allow for lawyers to represent clients without violating D.C. Rule 1.9, we also appreciate that it may prove very difficult for lawyers to do so in fact. Where confidential information from the prior representation could be useful in or relevant to the new representation—however it may be limited or circumscribed—then the substantial-relationship test is satisfied, and the new representation may not proceed without the consent of the former client.

Inquiry No. 07-03-22
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*Opinion 344*

**Conflicts of Interest for Lawyers Engaged in Lobbying Activities That Are Not Deemed to Involve the Practice of Law**

• The District of Columbia Rules of Professional Conduct regulate "lobbying activity" by lawyers who practice law in the District of Columbia. The conflicts rules for lobbying matters are as follows:

- Rule 1.7(a) prohibits one lawyer or law firm from advancing opposing positions in the same lobbying matter. This conflict cannot be waived.
- Lobbying representations are not subject to Rule 1.7(b)(1) because such representations are *not* "matters involving a specific party or parties," a phrase which excludes lobbying, rulemaking and other matters of general government policy.
- Rules 1.7(b)(2), (b)(3) and (b)(4) prohibit lobbying representations if:
  - The proposed representation is likely to be adversely affected by another representation;
  - Another representation is likely to be adversely affected by the proposed representation; or
  - The lawyer-lobbyist's professional judgment reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party, or the lawyer's own financial, business, property, or personal interests.
- Typically apparent in "punch-pulling" situations where the lawyer's zealousness in one representation may arguably be compromised by representations of other clients or by other interests of the lawyer, these conflicts can be waived in some circumstances through informed consent from the affected clients. *See* Rule 1.7(c).

Because nonlawyers may engage in lobbying activity, lawyers and their associates may remove such activities from the conflicts provisions of the Rules of Professional Conduct through strict compliance with the regulations of D.C. Rule 5.7 for "law-related services." To do so, however, the lobbying client must receive clear notice that the services are not legal services and that the usual protections accompanying a client–lawyer relationship do not apply.

**Applicable Rules**

• Rule 1.0(h) (Terminology: Definition of "Matter")

• Rule 1.6 (Confidentiality of Information)

• Rule 1.7 (Conflicts of Interest: General)

• Rule 1.10 (Imputed Disqualification General Rule)

• Rule 1.11 (Successive Government and Private or Other Employment)

• Rule 5.3 (Responsibilities Regard-

Lawyer's law firm had represented Company at trial in the same case (as opposed to having represented Company in an entirely separate matter), Lawyer could not argue that she is free to represent the other side against Company in the Supreme Court on the grounds that the issues before the Court are entirely distinct from those on which Lawyer's colleagues had represented Company at trial. In such a circumstance, we believe that a lawyer who switches sides *in the same case* (albeit at a later stage where the issues are different) triggers the prohibitions of D.C. Rule 1.9, regardless of how a lawyer might limit the scope of representation in the subsequent stage of the matter.

[10] We do not intend this Opinion to address the application of the substantially related test to the specific situation of former government lawyers under D.C. Rule 1.11(a). Although we acknowledge that D.C. Rules 1.9 and 1.11 use the same terms to describe the relationship between former and current matters, cases involving the disqualification of former government lawyers also raise concerns about the possible misuse of information obtained under government authority and about actions taken to enhance the government lawyer's private sector employment prospects. *See Brown*, 486 A.2d at 43, cited with approval *Philip Morris*, 312 F. Supp. 2d at 38. In light of these and other concerns unique to the former government lawyer context, we leave for another day the question whether former government lawyers may limit the scope of their subsequent representation and thereby avoid a conflict of interest under D.C. Rule 1.11(a).

ing Nonlawyer Assistants)
• Rule 5.4 (Professional Independence of a Lawyer)
• Rule 5.7 (Responsibilities Regarding Law-Related Services)

*Inquiry*

The Committee on Unauthorized Practice of Law of the District of Columbia Court of Appeals (the "UPL Committee") recently issued an opinion concluding that "U.S. legislative lobbying does not constitute the practice of law under Rule 49, and Rule 49 does not require individuals engaged in such lobbying to be members of the D.C. Bar." Unauthorized Practice of Law Opinion 19-07, *Applicability of Rule 49 to U.S. Legislative Lobbying* (Dec. 17, 2007) [hereinafter the "UPL Opinion"]. In the wake of that opinion, the Legal Ethics Committee has received an inquiry about the obligations of a lawyer-lobbyist who *is* a member of the D.C. Bar. The inquirer asked whether a lawyer has a conflict of interest under Rule 1.7 when she lobbies Congress in favor of a special tax break for her Client X even though she knows the break will directly disadvantage the lawyer's other client, Client Y.

The specific holding of the UPL Opinion was that "U.S. legislative lobbying does not constitute the practice of law within the meaning of Rule 49(b)." For purposes of its opinion, the UPL Committee defined the phrase "U.S. legislative lobbying" in a way that "does not necessarily include all activities" related to congressional matters.[1] The UPL Opinion is narrowly drawn—activities outside the scope of this definition may constitute the practice of law.[2]

Having defined an area that does not involve the practice of law, the UPL Opinion confirms that nonlawyers may establish offices in the District of Columbia for the purpose of "U.S. legislative lobbying." Similarly, lawyers licensed in other jurisdictions, but not in the District of Columbia, may act as "U.S. legislative lobbyists" from offices in the District of Columbia. UPL Opinion, at 3-4.

Non-D.C. lawyers lobbying from the offices of law firms in the District of Columbia "must make clear that they are not engaged in the general practice of law in the District of Columbia." *Id.* at 4. This is so because Rule 49 prohibits persons not licensed in D.C. to "hold [themselves] out" as being authorized to practice law in D.C.[3] As the UPL Opinion notes, "[i]dentifying an individual as a lawyer in a D.C. law firm generally implies that the individual is authorized to practice law in the District of Columbia." UPL Opinion at 4. Consistent with the approach used for several other limited practice exceptions to Rule 49, the UPL Opinion suggests certain disclaimers and notices on business cards, websites and correspondence that will avoid any impermissible holding out. *Id.* at 4-5.

The UPL Committee specifically declined to address "whether or to what extent (a) legislative lobbyists may be subject to the professional obligations of lawyers or (b) communications between lobbyists and clients may be protected by the attorney–client privilege." UPL Opinion at 6. Like the UPL Committee, we also decline to address the applicability of the attorney–client privilege to communications between clients and lawyer-lobbyists.[4]

The immediate question before us is how Rule 1.7 on conflicts of interest applies to cases in which a lawyer undertakes a lobbying activity as a legal representation. The principles stated in this Opinion regarding conflicts of interest apply to lobbying activities related to both legislative matters and executive branch rulemaking matters. Implicit in the immediate question is the applicability of Rule 1.7 to lobbying services that do not themselves involve the practice of law but are provided by lawyers or nonlawyers affiliated with law firms.

Although the inquiry before us involves only lobbying before Congress, the established understanding of the phrase "involving a particular party or parties" means that the principles discussed in this opinion also apply to conflict-of-interest questions faced by lawyers who lobby other legislative bodies, or who lobby administrative agencies or executive branch officials on legislation, rulemaking or other matters of general policy. The Rules of Professional Conduct do not distinguish between lobbying at the federal level and lobbying at the state or local level.

*Discussion*

At one level, the inquiry asks whether lawyer conduct rules apply when nonlegal lobbying services are performed. As discussed in Part I below, the D.C. Rules of Professional Conduct regulate "lobbying activity" when undertaken by lawyers. Specific conflict-of-interest rules apply to such activities. Part II discusses the ability of lawyers and law

[1] According to the UPL Committee,

> [t]his Opinion uses the term "U.S. legislative lobbying" to refer to any activities to influence, through contacts with members of Congress and their staffs, the passage or defeat of any legislation by the U.S. Congress, as well as other congressional actions such as ratification of treaties and confirmation of nominees. Such activities may include, but are not limited to: oral, written, and electronic communications with members of Congress, congressional committees, and congressional staff with regard to the formulation, modification, or adoption of federal legislation; preparation and planning activities, research, and other background work in support of such contacts; and development of legislative strategy and tactics. *The term does not necessarily include all activities that have a relationship with congressional actions. For example, advising a client about how legislative testimony might affect pending or prospective criminal or civil litigation before a court may constitute the practice of law*.

UPL Opinion at 1-2 (emphasis added). The UPL Opinion also "does not address lobbying of the executive branches of the U.S. or D.C. governments, including federal and D.C. departments and administrative agencies." *Id.* at 7 (noting that unauthorized practice of law questions respecting such representations are addressed in subsections (c)(2) and (c)(5) of Rule 49).

[2] While the UPL Opinion does not address whether individuals "may use the District of Columbia as a base for lobbying legislative bodies other than the U.S. Congress," it notes that "some of the principles addressed in this Opinion may apply in that context." UPL Opinion at 8.

[3] Holding out, for purposes of Rule 49, means:

> to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia. Among the characterizations which give such an indication are "Esq.," "lawyer," "attorney at law," "counselor at law," "contract lawyer," "trial or legal advocate," legal representative," "legal advocate," and "judge."

Rule 49(b)(4).

[4] The applicability of the attorney–client privilege is a question of law outside the scope of our jurisdiction. Lawyer-lobbyists should be aware, however, that there is case law to the effect that the attorney-client privilege does not apply to communications between a client and a lawyer who is acting solely or primarily as a lobbyist. *See, e.g., In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F. Supp. 2d 270, 285 & 289-91 (S.D.N.Y. 2001) (noting, however, that "the inquiry is fact-specific"). The lawyer's ethical obligation to preserve client "confidences and secrets" is broader than the attorney-client privilege. Under Rule 1.6(b), lawyers must also protect unprivileged "secrets," which the rules define as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client."

firms to take certain steps to avoid the application of those conflict rules to lobbying and other "law-related services" under the District of Columbia's new Rule 5.7. Absent strict compliance with the requirements of Rule 5.7, the conflicts rules will apply to lobbying activities by D.C. lawyers, law firms, and their lobbying associates, partners and affiliates.

### *I. Prohibited Conflicts of Interest in Lobbying Activities Governed by the Rules of Professional Conduct*

The Rules of Professional Conduct regulate a lawyer's "lobbying activity." Rule 1.0(h) defines "matter" to

> mean[ ] any litigation, administrative proceeding, *lobbying activity*, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, *except as expressly limited in a particular rule*.

(emphasis added).[5] The last clause of this definition is critical because, as discussed below, lobbying matters are effectively excluded from the operation of one of the prohibitions of Rule 1.7, specifically subsection (b)(1). But lobbying matters remain subject to the rest of the prohibitions, specifically subsections (a), (b)(2), (b)(3) and (b)(4) of Rule 1.7.

Rule 1.7 governs conflicts among current clients of the lawyer or law firm. It divides such conflicts into two broad categories, those that may be waived and those that cannot be waived. Rule 1.7(a) defines a situation in which a proposed representation is absolutely prohibited, even if all potentially affected clients are willing to consent. Rule 1.7(b) defines four situations in which a representation is only conditionally prohibited. Representations governed by Rule 1.7(b) may be undertaken if each potentially affected client provides informed consent and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client. *See* Rule 1.7(c).

#### *A. Rule 1.7(a)—Representation Absolutely Prohibited*

Rule 1.7(a) provides that "a lawyer shall not advance two or more adverse positions in the same matter." This prohibition cannot be waived by the affected clients. It applies to lobbying activities by virtue of the underlying definition of "matter." Indeed, the Peters Committee, which recommended the current formulation of the rules on these issues, specifically concluded that lobbying opposite sides of the same issue should be prohibited:

> [T]he Committee rejected the concept that lobbying should be totally excluded from the reach of Rule 1.7 and expressly included lobbying in the definition of "matter" proposed in the Terminology section of the Rules. As a result, Rule 1.7(a) applies to lobbying activities and prevents a lawyer from lobbying for one position for one client in the same matter in which the lawyer (or the lawyer's firm, *see* Rule 1.10(a)) is lobbying for a conflicting position on behalf of a second client.

*Peters Report* at 18. Although ABA Model Rule 1.7 and D.C. Rule 1.7 "state the position differently, both rules prohibit the lawyer from advancing two adverse positions in the same matter or proceeding, even with the client's consent. [D.C.] Rule 1.7(a) states the position succinctly: 'A lawyer shall not advance two or more adverse positions in the same matter.'"[6]

The pending inquiry before the Committee does not involve Rule 1.7(a) because the lawyer-lobbyist has not been asked to advocate opposite sides of the same lobbying issue. Instead, she has been asked to pursue a tax break for Client X even though she knows that the tax break will directly disadvantage another client (Client Y) whom the lawyer (or the firm) is not representing in that particular lobbying matter.

#### *B. Rule 1.7(b)—Representation Conditionally Prohibited*

Rule 1.7(b) defines four conflicts situations in which a representation is prohibited unless each potentially affected client gives informed consent and the other requirements of Rule 1.7(c) are satisfied. As discussed below, the first of the four does not apply to lobbying matters. The remaining three do.

##### *1. Rule 1.7(b)(1)—Adversity to Another Client in a Matter Involving a Specific Party or Parties*

Rule 1.7(b)(1) provides:

> [A] lawyer shall not represent a client with respect to a matter if . . . *that matter involves a specific party or parties* and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.

Rule 1.7(b)(1) (emphasis added).

The inquirer did not say whether the lawyer expects the other client to lobby against the tax break she will be seeking for the first client. If the other client's active participation were expected in the lobbying matter, the representation of the first client would involve the lawyer taking a position known to be adverse to another client's position in the same matter.

However, that alone is not enough to create a conflict under Rule 1.7(b)(1) because of the limitation of that rule to "matter[s] involv[ing] a specific party or parties." That phrase is a term of art, which, for the reasons discussed below, has the effect of removing lobbying representations from the operation of Rule 1.7(b)(1).

Part (a) explains why the limitation of Rule 1.7(b)(1) to "matter[s] involv[ing] a specific party or parties" effectively excludes lobbying representations. Part (b) summarizes the history of revisions that led to the current rule, a history which confirms the conclusion in Part (a).

##### *a. Meaning of Phrase "Matter Involving a Specific Party or Parties"*

The key to the analysis is the meaning of the phrase "matter involv[ing] a specific party or parties." The phrase appears in only two places in the Rules of Professional Conduct: Rule 1.7(b)(1) and Rule 1.11, which deals with the ability of a lawyer to represent clients after leaving government service for private practice. As discussed in Part (i) below, the phrase has a black-letter law meaning for purposes of Rule 1.11, a meaning that preceded incorporation of the phrase into Rule 1.7(b)(1) and that excludes lobbying matters from the conflicts rule. Under established principles of statutory and

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[5] The D.C. Court of Appeals added this definition to the Rules in November 1996, after receiving and considering a number of recommendations from the Bar. *See Proposed Amendments to the District of Columbia Rules of Professional Conduct* (as adopted by the Board of Governors March 8, 1994) [hereinafter "*Peters Report*"]. As discussed in more detail below, one purpose of the recommended changes was to revise and clarify the rules on conflicts of interest in the lobbying context. *See id.* at 3-4 & 17-18.

[6] William V. Luneburg & Thomas M. Susman, *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers & Lobbyists* § 27-3.6.2.1, at 501 (3d Ed. 2005) (providing the following example of a "nonconsentable" conflict in the lobbying context: "Handgun Control, Inc. calls to retain you to lobby for an extension of the assault weapon ban; the NRA calls the next day to hire you to lobby against an extension.")

regulatory construction, the phrase must have the same meaning in each rule where it appears, as discussed in Part (ii). While there is some arguably inconsistent language in one of the comments to Rule 1.7, the text of the rules controls over the comments, as discussed in Part (iii).

*(i.) Meaning of the Phrase "Matter Involving a Specific Party or Parties" in Rule 1.11*

Rule 1.11(g) confines the operation of the rule to a "matter involving a specific party or parties." "'Matter' is defined in paragraph (g) so as to encompass only matters that are particular to a specific party or parties. *The making of rules of general applicability and the establishment of general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11*." Rule 1.11, Comment [3] (emphasis added).

This interpretation comes from the well-established understanding of the meaning of an analogous phrase in 18 U.S.C. § 207, which imposes certain restrictions on the work that may be performed by former government employees and officials after they leave government service. Some of those restrictions apply only to a "matter . . . involv[ing] a specific party or specific parties." 18 U.S.C. § 207(a)(1)(C) & (a)(2)(C). "Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties." *Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. 36,168, at 36,193 (June 25, 2008) (to be codified at 5 C.F.R. § 2641.201(h)(2)) [hereinafter "*Federal Post-Employment Conflict of Interest Restrictions*"].[7]

In Opinion 297, we considered whether a former government lawyer's participation in a negotiated rulemaking precluded him from subsequent representations involving those rules. We concluded that, because the former government lawyer's work on a negotiated rulemaking did not involve a particular party or parties, "successive representation is not per se prohibited by Rule 1.11(a) and (g) where the initial representation is in connection with a rulemaking of general applicability." D.C. Ethics Op. 297 (2000).

*(ii.) The Phrase "Matter Involving a Specific Party or Parties" Must Have the Same Meaning in Rule 1.7(b)(1) As It Has in Rule 1.11*

The phrase "matter involving a specific party or parties" cannot have one meaning in Rule 1.11 and a different meaning in Rule 1.7(b)(1). As a general principle of construction, "a particular term should be assumed to have a consistent definition throughout a statute." *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1248, 1263 n.12 (D.C. 2000) (citing *Carey v. Crane Serv. Co., Inc.*, 457 A.2d 1102, 1108 (D.C.1983)). Application of that principle compels the conclusion that Rule 1.7(b)(1) excludes legislative lobbying matters.

Moreover, the phrase had a clear meaning in the context of former government lawyers long before it was ever added to Rule 1.7. Where the lawmaker "borrows terms of art in which are accumulated the legal tradition and meanings of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *1618 Twenty-First Street Tenants' Ass'n v. Phillips Collection*, 829 A.2d 201, 202 (D.C. 2003) (quoting *Bates v. District of Columbia Bd. Of Elections & Ethics*, 625 A.2d 891, 894 (D.C. 1993)) (additional citations omitted).

Applying those principles here, the phrase "matter involv[ing] a specific party or parties" must be given the same meaning for purposes of Rule 1.7(b)(1) as it has for Rule 1.11 and the progenitor of Rule 1.11, 18 U.S.C. § 207. Given the well-established meaning of that phrase for purposes of Rule 1.11 and 18 U.S.C. § 207, Rule 1.7(b)(1) does not apply to lobbying representations involving legislation, rulemaking or other matters of general policy.

*(iii.) The Text of Rule 1.7(b)(1) Controls Over Any Inconsistent Language in the Comments to Rule 1.7.*

The analysis thus far has focused only on the text of Rule 1.7(b)(1), Rule 1.11, and the established meaning of the phrase "matter involving a specific party or parties" as used in Rule 1.11 and its predecessors. Rule 1.7 has a comment which, if read in isolation, could suggest a greater duty under Rule 1.7(b)(1) when the lawyer knows or has some way of discovering that another client is likely to oppose or disagree with the result being sought through the lawyer's lobbying efforts.[8]

[7] This final rule release replaces a similar rule which provided that a matter involving a specific party or specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. *Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter.* 5 C.F.R. § 2637.201(c)(1) (2007) (emphasis added). *See also Laker Airways Ltd. vs. Pan American World Airways*, 103 F.R.D. 22, 34 (D.D.C. 1984) ("In short, a government attorney may participate in legislative or other policy-making activity without precluding his subsequent representation of private parties affected by such rules or policies"). There is authority "that certain rulemakings, although rare, may be so focused on the rights of *specifically identified* parties as to fall within the ambit of section 207(a) even though most rulemaking proceedings are of general applicability beyond the scope of [that section]." *Federal Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. at 36,176 (citations omitted) (emphasis added). *But cf. id.* at 36,193 (to be codified at 5 C.F.R. § 2641.201(h)(2), Example 5) (giving an example where even a rulemaking that has an immediate effect on only three or four companies nevertheless constitutes a rulemaking of general applicability). Private relief legislation may also involve specific parties. *See* Office of Government Ethics Advisory Opinions 83 x 7 and 06 x 9.

[8] Comment [19] to Rule 1.7 provides as follows:

Lawyer's Duty to Make Inquiries to Determine Potential Conflicts

[19] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

Such a reading cannot be reconciled with the limitation of Rule 1.7(b)(1) to a "matter involv[ing] a specific party or parties" because that phrase takes lobbying matters and other matters of general policy out of the rule. The use of the word "party" was intended to limit the scope of Rule 1.7(b)(1) to those situations that involve particular clients participating in a pending or threatened adjudicative proceeding, a negotiation of a contract, or other discrete and isolatable transactions between identifiable and specific persons.[9] To the extent that the comment suggests otherwise, the language of the rule must control. As explained in Paragraph [6] of the Scope section of the Rules, "[t]he Comments are intended as guides to interpretation, but the text of each Rule is controlling."

Thus, whether the lawyer knows or has a way of knowing that other clients may have different views of the lobbying issue is irrelevant for purpose of Rule 1.7(b)(1) because Rule 1.7(b)(1) does not regulate lobbying matters or other matters of general policy.

*b. The Legislative History of Rule 1.7(b)(1) Confirms That the Court of Appeals Adopted a Bright Line Test to Eliminate Substantial Uncertainties That Lawyer-Lobbyists Would Otherwise Face*

When the District of Columbia Bar recommended the initial adoption of Rule 1.7, it rejected the ABA's Model Rule 1.7. As explained by the Bar Committee's report:

> [T]he ABA draft . . . is so confusingly organized and ambiguously worded that it gives little guidance to lawyers trying to understand it or conform to it. Although the ABA drafters state in their notes that their draft is intended to codify standards that have evolved in application of the preexisting disciplinary rule and the "appearance of impropriety" test, those standards are not self-evident from a reading of the proposed language. Instead, members of the Bar would be forced to parse ambiguous phraseology and even perform research concerning case law and D.C. Bar Legal Ethics Committee interpretations before they could get a clear idea of what this basic rule means.

*Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar* at 67 (Nov. 19, 1986) [hereinafter the "*Jordan Report*"].

Both the Jordan Committee and its successor, the Peters Committee, devoted extensive resources to consideration of what the rules should be in the context of lobbying, where the potentially affected or interested players are not readily apparent at the outset, and where the active players and positions shift and change over time. It was at the Peters Committee's recommendation that, in November of 1996, the District of Columbia Court of Appeals adopted the current general definition of "matter," which includes "lobbying activity . . . except as expressly limited in a particular rule," and the current formulation of Rule 1.7(b)(1), which applies only to a "matter involv[ing] a specific party or parties."

The Peters Committee explained that it had "attempted to fashion in amended Rule 1.7 detailed, 'black letter' guidance to the Bar regarding conflicts of interest." *Peters Report* at 11. The Committee limited Rule 1.7(b)(1) to matters involving specific parties because "it is not practical—and may well harm the interests of a new client—for a lawyer asked to represent that client in lobbying activities to take affirmative steps to obtain disclosure from other clients as to whether they have (or will have) an adverse position in the matter." *Peters Report* at 18.

> Accordingly, the Committee has limited the obligations set out in Rule 1.7(b)(l) to situations involving "a specific party or parties." Because situations that may arise under Rule 1.7(b)(l) are numerous, the Committee has not attempted to define those matters that involve "a specific party or parties," but has left that definition to case-by-case development.

*Id.*

This bright line rule eliminates the need for lawyer-lobbyists to look to Rule 1.7(b)(1) for guidance on conflicts in lobbying matters. However, they must still consider potential conflicts under subsections (b)(2), (b)(3) and (b)(4). Such conflicts may exist when they know that another client strenuously objects to or will be seriously harmed by a lobbying result they are hired to pursue.

*2. Rule 1.7(b)(2), (b)(3) and (b)(4)—Waivable Conflicts Rules That Do Apply to Lobbying Matters*

Rules 1.7(b)(2), (b)(3) and (b)(4) do apply to lobbying activities because, unlike Rule 1.7(b)(1), they contain no language that clearly limits their scope to adjudications and other discrete and isolatable transactions between identifiable persons. Rules 1.7(b)(2) and (b)(3) are mirror images of each other. Under the former, a lawyer may not represent a client with respect to a matter (including "lobbying activity" under Rule 1.0(h)) if "such representation will be or is likely to be adversely affected by representation of another client." Under the latter, the lawyer may not undertake the representation if "representation of another client will be or is likely to be adversely affected by such representation."

Rule 1.7(b)(4) looks beyond the potential effects of one client representation on another client representation. It asks if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interest."

Collectively, these three rules all apply to circumstances in which an objective observer would doubt the lawyer's incentive to be a zealous advocate. For that reason, they are often referred to as the "punch-pulling" conflicts rules because the lawyer might be tempted to "pull her punches" on behalf of one client so as not to harm the interests of another. D.C. Ethics Op. 309 (2001). *Accord* D.C. Ethics Op. 317 n.6 (2002).[10]

The *Peters Report* specifically identified "punch-pulling" as a potential obstacle to a lobbying representation:

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[9] As expressed in the recent amendment of the federal regulations, "only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." *Federal Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. at 36,193 (to be codified at 5 C.F.R. § 2641.201(h)(1)).

[10] Comment [7] to Rule 1.7 explains:

> The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

> [W]hile the Committee believed it appropriate to narrow Rule 1.7(b)(1), the Committee recommends no change to Rules 1.7(b)(2) through 1.7(b)(4). Rule 1.7(b)(1) implements a general duty of loyalty and, where it applies, prohibits representation whether or not that representation would in fact have any adverse impact on another client. The remainder of Rule 1.7(b), however, defines situations where the representation of a client would likely be compromised by representation of another client. If, for example, a lawyer knows that there is a risk that he or she would "pull punches" for client A in a lobbying matter to avoid angering large client B represented solely in a litigation matter, then representation of client A is not proper whether or not client B will appear in the lobbying matter.

*Peters Report* at 18.

The inquiry before the Committee does not supply enough information to determine whether a "punch-pulling" issue exists here. Certainly, the lawyer should consider discussing with her lobbying client (Client X) the fact that she knows her other client (Client Y) will be harmed by the tax credit to be sought in the lobbying. If the lawyer-lobbyist perceives a basis for a concern that her zealousness on Client X's behalf might be impaired by her knowledge of Client Y's position, Rule 1.7(c) requires her to satisfy herself that she can provide competent and diligent representation to X in these circumstances, and to obtain an informed consent from X, the client whose representation might be affected by Y's expected involvement. In some cases, Y's consent might also be required because of a potential adverse effect of the proposed lobbying representation on the ongoing representation of Y.[11]

### *3. Imputation of Conflicts of Interest*

Under Rule 1.10, while lawyers are associated in a law firm, none of them may knowingly represent a client when any one of them practicing alone would be precluded from doing so by Rule 1.7. This rule imputing each lawyer's conflicts to all other lawyers in the firm applies to lobbying representations and lobbyists employed by a law firm. However, a conflict will not be imputed when "the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm." Rule 1.10(a)(1).

## *II. Avoiding Application of the Conflict Provisions to Lobbying and Other "Law-Related Services"*

Lawyers and law firms must take steps to assure that the nonlawyers associated with them abide by the Rules of Professional Conduct.[12] Moreover, lawyers themselves are governed by some of the Rules of Professional Conduct even when they act in a nonlawyer capacity.[13] Because clients who procure legal services are entitled to certain protections that do not typically apply to the provision of nonlegal services (such as confidentiality and avoidance of conflicts), the rules effectively require the lawyer to abide by all of the Rules of Professional Conduct, including the conflicts rules, when the client may reasonably believe that legal services are involved. Rule 5.7 addresses these issues for lawyer-lobbyists and their staff by setting forth a lawyer's "Responsibilities Regarding Law-Related Services."[14]

Despite the name, "law-related services" are not legal services. They are not legal services because they "are not prohibited as unauthorized practice of law when provided by a nonlawyer." Rule 5.7 (b). Such services are deemed to be "law-related" because they "might reasonably be performed in conjunction with and in substance are related to the provision of legal services." *Id.*

The comments to Rule 5.7 identify "legislative lobbying" as a "law-related service." Rule 5.7, Comment [9]. Indeed, the reference to "legislative lobbying" in the comments to Rule 5.7 played a central role in the UPL Committee's conclusion that U.S. legislative lobbying does not involve the practice of law. *See* UPL Opinion at 3.[15]

When a lawyer or law firm provides both legal and nonlegal services, there is a risk that the client will be confused about the protections to which the client is entitled as part of the services. "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 such is not the case. Rule 5.7, Comment [1].

To protect such expectations, Rule 5.7(a)(1) requires lawyers to abide by all of the Rules of Professional Conduct when the "law-related services" are provided "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients." Rule 5.7(a)(2) requires application of all of the Rules of Professional Conduct if the services are provided "in other circumstances by an entity controlled by the lawyer individually or with others *if the lawyer fails to take reasonable measures to assure that [the recipient of the services] knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.*" (emphasis added).

"The burden is upon the lawyer to show that the lawyer has taken responsible measures under the circumstances to communicate the desired understanding." Rule 5.7, Comment [7]. "A sophisticated user of law-related services, such as a

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[11] While the notion of "punch-pulling" captures most of the circumstances regulated by Rules 1.7(b)(2) through (4), there may be others as well. One of these is a situation involving an "issue" or "positional conflict," such that the lawyer's effectiveness in a matter being handled for one client would be adversely affected by the result being sought on behalf of another client as, "for example, when a decision favoring one client will create a precedent likely to seriously weaken the position being taken on behalf of the other client." Rule 1.7, Comment [13]; D.C. Ethics Op. 265 (1996). Nothing in the pending inquiry suggests that the proposed lobbying representation seeking a tax credit implicates any positional conflict issues.

[12] *See* Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); Rule 5.4(b) (requiring—as part of the District of Columbia's unique rule allowing nonlawyer partners in law firms—that the nonlawyers abide by the Rules of Professional Conduct).

[13] For example, Rule 8.4(c) makes it professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Under that rule, "[a] lawyer is held to a high standard of honesty, no matter what role the lawyer is filling, acting as lawyer, testifying as a witness in a proceeding, handling fiduciary responsibilities, or conducting the private affairs of everyday life." *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994).

[14] Rule 5.7 was added to the District of Columbia's Rules of Professional Conduct in 2007.

[15] We do not address whether and to what extent lobbying services other than "U.S. legislative lobbying"—as that phrase is used in the UPL Opinion—may qualify for treatment as a "law-related service" for purposes of Rule 5.7. Since the definition of "law-related service" requires a determination that the service is "not prohibited as the unauthorized practice of law when provided by a nonlawyer," an essential predicate issue is outside the scope of our jurisdiction. *See supra* notes 1 & 2.

[16] *See also* Rule 5.7, Comment [8] ("Under some circumstances the legal and law-related services may be so closely entwined that they cannot

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. . . ." *Id.*[16] When the lawyer has not severed the connection in the client's mind between the "legal" and "nonlegal" services, "*the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest. . . .*" *Id.*, Comment [10] (emphasis added).

One book describes Model Rule 5.7 (the text of which is identical to D.C. Rule 5.7) as a way of "opting out" of the Rules of Professional Conduct for lobbying matters.[17] It warns that, "[f]or the lawyer-lobbyist who practices in a traditional law firm setting and provides lobbying services to his clients in that setting, it seems clear that the Model Rules would apply to that lawyer's lobbying activities."[18] We agree that the burden falls on the lawyer-lobbyist to show that she has taken reasonable measures under the circumstances to communicate to the client that she is not acting as the client's lawyer.[19] "The lawyer must also take 'special care' to keep the provision of any legal services separate from the law-related services, in order to minimize the risk of confusing the client."[20]

*Conclusion*

Most of the conflict rules apply to lawyer-lobbyists engaged in lobbying. Lawyer-lobbyists in the District of Columbia who hold themselves out as lawyers may not advance opposing positions in the same lobbying matter even with consents from all of their lobbying clients. Moreover, the lawyer-lobbyist must also ensure that she is not placing herself in a position where she might have to pull her punches on behalf of one client so as to protect the interests of another. Such conflicts can be waived with informed consent from the affected clients, provided that the lawyer reasonably believes that he or she can provide competent and diligent representation. Absent special circumstances, all of these restrictions also apply to other lobbyists in the same law firm, even if those other lobbyists are not themselves lawyers.

Lawyer-lobbyists are not, however, generally subject to Rule 1.7(b)(1) in the conduct of lobbying activities. This rule is confined to "matter[s] involv[ing] a specific party or parties," a phrase that excludes lobbying, rulemaking and other matters of general government policy. As a result, Rule 1.7(b)(1) does not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist's law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist's firm.

Finally, Rule 5.7 provides guidance for lawyers and law firms who wish to establish a law-related lobbying practice that is not governed by the conflicts provisions of the Rules of Professional Conduct. To do so, however, the lobbying client must receive clear notice that the services are not legal services and that the usual protections accompanying a client-lawyer relationship do not apply.

Inquiry No. 07-12-21

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*Opinion 345*

**Reimbursement of Interest Charges Incurred When a Lawyer Uses the Firm's Line of Credit to Advance the Costs of the Representation**

• A lawyer who uses the firm's line of credit to advance to a client the costs of the representation will incur interest charges from the bank in doing so. The lawyer may pass these costs along to the client, so long as the client has been fully informed in advance of these charges, the client has agreed to pay them, the costs are reasonable, and the lawyer maintains a separate accounting of the interest charges incurred for that client. Finally, the costs of the line of credit must be directly attributable to the representation of that client; in other words, the lawyer may not pass on to individual clients the costs of maintaining a line of credit used to fund the firm's general overhead expenses.

**Applicable Rules**

- Rule 1.5 (Fees)
- Rule 1.8(d)

*Inquiry*

In a personal injury case, costs are incurred for copying, for ordering deposition transcripts, for court costs, for expert witnesses, and for similar disbursements related to the prosecution of the case. The firm representing a party is contemplating using the firm's line of credit to pay for such costs, but it will have to pay the bank interest for doing so. The firm has inquired whether it may pass on to the client at the end of the case the charges for the interest incurred.

*Discussion*

There are two alternatives to this proposed arrangement: either the client will have to pay for these disbursements as they are incurred or the firm will have to absorb these additional costs, likely passing them on to all clients through increases in fees. If the client must pay these expenses, the client may have to borrow funds to do so, in which case the client would pay interest charges directly. Rule 1.8(d) allows lawyers to advance the costs of litigation to clients, but they are not required to do so. Thus, neither of these alternatives is required by the Rules.

If a lawyer uses his or her credit line to operate a law office or to fund normal operating expenses, the lawyer cannot pass along the interest incurred to do so to individual clients. However, requiring a client to pay for the costs incurred in prosecuting his or her case is clearly allowed by the Rules. Comment [2] to D.C. Rule 1.5 specifies that a lawyer may seek payment from the client for expenses including filing fees, copying costs, and transcript costs. D.C. Rule 1.5(b) provides that when a lawyer has not regularly represented a client, these expenses "shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." By setting forth the charges for which the lawyer or his or her firm will seek payment by the client, the lawyer provides the client with a clear understanding of the lawyer's costs and allows for discussion of these terms at the outset of the attorney–client relationship.

Neither the Rules nor the Comments specifically mention reimbursement of

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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 that the lawyer controls complies in all respects with the Rules of Professional Conduct.").

[17] Luneburg & Susman, *supra* note 6, § 27-2.3.2, at 490. The cited edition of the book predates the adoption in 2007 of Rule 5.7 by the District of Columbia, a later event that supersedes some of the analysis in the current edition of the book. *See id.* § 27-2.3.3, at 491.

[18] *Id.* at 490.

[19] *Id.* at 491.

[20] *Id.*

interest costs. Some threshold concerns about seeking reimbursement of these charges from clients are not implicated here. For example, the inquirer has already specified that the firm will not be making a profit on the advancement of the payments for costs incurred. Rather, it will seek only to recover the costs of the interest the bank will charge the firm for using the firm's line of credit to cover them.

This inquiry raises competing interests. On the one hand, allowing lawyers to pass on the carrying costs of such charges to individual clients ensures that the firm's other clients are not paying these charges through increased fees. On the other hand, since many firms and lawyers maintain lines of credit to support their practices, it is not appropriate for some of a lawyer's clients to bear indirectly certain overhead expenses that appropriately should be absorbed by the lawyer or spread fairly among all the lawyer's clients.

Because a lawyer may only charge the client the amount of interest directly attributable to that client's case, the lawyer must maintain detailed accounts of the amount of any advance and the interest charged by the lender and attributable to the client's costs. Although not required by the Rules, a lawyer may wish to maintain a line of credit for the advancement of such costs that is separate and apart from the line of credit on which the lawyer regularly draws for purposes of paying overhead expenses.

In addition, any interest charged to the client must be reasonable, and the lawyer "will have the burden of establishing the reasonableness" of such charges. Moreover, it is clearly improper for a lawyer to pass onto the client any late fees or account maintenance costs that result from the lawyer's inefficient or imprudent financial management of the line of credit.

Finally, any fee agreement with a client that would include interest costs should be made at the beginning of the representation. In Opinion 310, the Committee reviewed the question whether a lawyer could charge interest on its fees if the client did not pay them promptly. *See* D.C. Ethics Op. 310 (2002). The Committee noted that the payment of interest resulted in charges only to the client directly affected and thus allowed the lawyer to avoid "upward fee pressures" caused by spreading the additional costs associated with late payment of fees to all of his or her clients. In that Opinion, the Committee noted that changing the fee agreement in an ongoing representation in order to include these charges is subject to "strict scrutiny" because of the possibility of "overreaching" by the lawyer. *Id.* (citing *Chase v. Gilbert*, 499 A.2d 1203, 1209 (D.C. 1985)) ("What may constitute overreaching in particular circumstances is of course dependent on such factors as the resources and sophistication of the client, the presence or absence of such external factors as a favorable litigation schedule that would be lost if the client had to change counsel, and so on."). So, wherever possible, the lawyer should specify at the outset of the representation that, should it be necessary for the lawyer to draw on a line of credit to pay for litigation expenses, the client is responsible for the applicable interest charges.

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*Opinion No. 346*

## The Required Elements for Triggering a Duty of Confidentiality to a Prospective Client

• When a lawyer, with whom a prospective client has consulted, receives permission from the prospective client to speak with other counsel who the lawyer believes may be better suited to handle the case, any client information conveyed by the first lawyer during such a discussion with the second lawyer should be treated by the second lawyer as confidential, even though he never speaks directly with the prospective client.

**Applicable Rules**

• Rule 1.6 (Confidentiality of Information)

• Rule 1.18 (Duties to Prospective Client)

*Inquiry*

A would-be client comes to Lawyer A to speak with her about taking on his case. After listening to the prospective client's story, Lawyer A determines that she is not in a position to be of assistance. However, Lawyer A believes that a different lawyer would be better suited to meet the prospective client's needs. Lawyer A asks the prospective client whether he would like her to call Lawyer B on his behalf to discuss the possibility of Lawyer B taking on the representation, and the prospective client says "yes." Lawyer A calls Lawyer B, who works at a different firm, and explains the person's predicament. After hearing the story from Lawyer A, Lawyer B determines that he has a conflict of interest and cannot represent the person. The question is whether Lawyer B has a duty to safeguard the information that Lawyer A communicated to him.

D.C. Rule 1.18, which became effective February 2007, defines a lawyer's obligations to a person with whom a lawyer discusses the possibility of representation, but who does not become the lawyer's client. The rule recognizes a new category of persons, "prospective clients," and states that "[e]ven when no client–lawyer relationship ensues, a lawyer *who has had discussions with a prospective client* shall not use or reveal information learned in the consultation, except as permitted by Rule 1.6." (Emphasis added). The uncertainty in this inquiry arises because Lawyer B never had direct "discussions with a prospective client." His only discussions were with Lawyer A.

*Discussion*

We analyze this inquiry under two alternate theories: (1) That the duty of confidentiality to would-be clients exists in Rule 1.6 and, therefore, is not dependent on the definition of a "prospective client" in Rule 1.18; and (2) the requirement of a discussion in Rule 1.18 is met because Lawyer A is an agent of the prospective client. We believe that under both theories, Lawyer B owes a duty of confidentiality.[1]

*1. Confidentiality to Would-Be Clients Under Rule 1.6*

ABA Model Rule 1.18 was adopted in 2002 as part of the ABA Ethics 2000 project. D.C. Rule 1.18(a), which is identical to Model Rule 1.18(a), provides: "A person who discusses with a lawyer the possibility of forming a client–lawyer relationship with respect to a matter is a prospective client." The confidentiality component of the rule (as distinct from its provision relating to conflicts of interest) was intended to codify the existing obligation of a lawyer under Model Rule 1.6 to a person with whom the lawyer had a preliminary consultation of some sort, but who never entered into an attorney–client relationship.[2] Indeed, ABA Ethics Opinion No. 90-358, written 12 years before

[1] Under either theory, the substance of the duty of confidentiality is governed by Rule 1.6.

[2] What is substantively new in Model Rule 1.18 is that a lawyer's duties to prospective clients with respect to conflicts of interest are defined. Before the new rule, courts were left to determine whether one or more consultations created an attorney–client relationship or no relationship at all. *See*

the adoption of Rule 1.18, states:

> Information imparted from a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform work for the would-be client.

Similarly, Comment [9] to D.C. Rule 1.6 recognizes this obligation under D.C. Rule 1.6. The Comment states:

> Principles of substantive law external to these Rules determine whether a client–lawyer relationship exists. Although 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, *the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client–lawyer relationship shall be established*. Other duties of a lawyer to a prospective client are set forth in Rule 1.18. (Emphasis added.)

*See also* Restatement (Third) of the Law Governing Lawyers § 15.

Because the duty of confidentiality owed to persons who do not become clients exists in Rule 1.6 and in Rule 1.18, we need not rely solely on the language of Rule 1.18, which requires a discussion between a person and a lawyer. Comment [9] to D.C. Rule 1.6 clarifies that the duty of confidentiality is triggered "when [a] lawyer agrees to consider whether a client-lawyer relationship shall be established."[3]

The Committee concludes, therefore, that a duty of confidentiality is owed by the second lawyer under Rule 1.6, notwithstanding the language of Rule 1.18, because the second lawyer presumably agreed to consider the possibility of a client–lawyer relationship when he spoke with the first lawyer.

*2. Communications From Agents of Clients*

Alternatively, we assume for purposes of further analysis that the requirement of a discussion with the would-be client, as stated in Rule 1.18(a), must be met in order for the duty of confidentiality to attach. Under that assumption, the requirement would be met if the first lawyer was considered to be the agent of the would-be client in speaking with the second lawyer.

In assessing the confidentiality of communications with clients in connection with the attorney–client privilege, courts have often recognized that clients sometimes speak to their lawyer through agents.[4] This can include interpreters, family members, and business agents, provided that under the circumstances, the agent is someone who the client trusts to maintain the confidentiality of the communications. This concept is recognized in the Restatement (Third) of The Law Governing Lawyers § 70(f). Under that section, the Restatement addresses the circumstances under which a person can speak to a lawyer as a client's agent and have the communication fall within the attorney–client privilege. That section states:

> A client's agent for communication. A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.

The Restatement provides three illustrations: (1) A client is arrested and barred from speaking to his counsel and so asks his friend to convey a message to his lawyer; (2) a client does not speak English and uses an interpreter to speak to the lawyer; and (3) a client uses his personal secretary to provide information to his lawyer.

In *In Re Lindsay*, 158 F.3d 1263, *cert. denied*, 525 U.S. 996 (1998), the D.C. Circuit addressed whether Deputy White House Counsel Bruce Lindsay acted as President Clinton's agent in speaking with the President's private counsel regarding the president's personal legal issues. The court did not decide whether the use of an agent as intermediary need be "reasonably necessary" in order to retain the privilege because it found that by adding his own legal analysis, Mr. Lindsay could not be deemed a mere intermediary. In rejecting the privilege under these circumstances, the court reasoned that "the attorney–client privilege must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *Id.* at 1281 (quoting *In Re Sealed Case*, 676 F.2d 793, 807 n.44 (D.C. Cir. 1982)) (*quoting In Re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979)).

We believe that the intermediary principle applies to a lawyer's ethical obligation of confidentiality under Rule 1.6 and Rule 1.18 as well, but without the same need to so strictly limit its applicability. The reason for the distinction is that in the context of attorney–client privilege, as with any evidentiary privilege, there is the important countervailing demand from a party in a legal proceeding for evidence which may be relevant. Unless applying an exception under Rule 1.6 (c), (d), and (e), a lawyer's duty of confidentiality, on the other hand, should be broadly interpreted in order to ensure that client expectations are met. *See* Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* § 9.7 (3d ed.) stating:

> Because the ethical obligation of confidentiality is broader [than the attorney-client privilege], lawyers ordinarily should operate on the presumption that essentially no unfavorable client information may be disclosed without the client's consent.

Because the first lawyer was an agent of the prospective client, the second lawyer must treat the discussion with the first lawyer as confidential under Rule 1.18.

*Conclusion*

When a prospective client consents to having a lawyer speak to a second lawyer on his behalf regarding the possibility of establishing an attorney–client relationship, the second lawyer has an obligation under Rules 1.6 and 1.18 to treat the communication as confidential, even if the second lawyer never speaks directly with the prospective client.

Given the importance of maintaining confidentiality of any information received by the first lawyer, it is advis-

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*Derrickson v. Derrickson*, 541 A.2d 149 (D.C. 1988), in which the court, in ruling on a motion to disqualify a party's counsel, had to determine whether a single consultation of about one hour, taking place eight years earlier and which the lawyer contended he had no recollection of, created a lawyer–client relationship. The court found no attorney–client relationship and, therefore, no conflict of interest.

[3] Whether that formulation also triggers the conflict of interest features of Rule 1.18(c) is a separate question not addressed in this Opinion.

[4] The more common situation of nonlawyers who are assisting the lawyer serving as the *lawyer's* agent in receiving confidential communications from a client is also a related but separate issue, not addressed in this Opinion.

able that the first lawyer disclose at the outset of the conversation with the second lawyer that the purpose of the discussion is to consider taking on a new case for someone, and to limit initial disclosures to the essential facts until it can be determined whether the second lawyer has a conflict of interest.

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*Opinion 347*

**Reverse Contingent Fees**

• A reverse contingent fee is a fee that is based upon the difference between the amount a third party demands from a lawyer's client, and the amount ultimately obtained from the client, whether by settlement or judgment. The Rules of Professional Conduct (Rules) do not prohibit reverse contingent fees, and a fee arrangement of this nature may align the lawyer's and client's interests more closely than hourly or fixed fee arrangements. Like all fees, reverse contingent fees must be reasonable. Beyond the requirement of reasonableness, entering into a reverse contingent fee arrangement places increased burdens of disclosure on the lawyer in order to obtain informed consent to such a fee arrangement. The lawyer is in a better position to assess the likely outcome of a dispute than a client is, and the lawyer must fully and fairly communicate that assessment to the client in any discussion concerning a reverse contingent fee. In addition, a lawyer should take particular care in setting the percentage of the reverse contingent fee, because unlike contingent fees based upon a client's recovery, there is little established practice upon which a client and lawyer can rely. Finally, as with other Rule provisions, the degree and nature of the disclosure required of the lawyer and the ensuing scrutiny of the fee arrangement may vary based upon the experience and sophistication of the client.

**Applicable Rules**

• Rule 1.5 (Fees)

*Inquiry*

The inquiry is whether, and under what circumstances, a reverse contingent fee i.e., a fee computed based upon the savings to a client, rather than the client's recovery, comports with the Rules of Professional Conduct.

*Background and Discussion*

Rule 1.5 governs the fees charged by lawyers. Rule 1.5(a) mandates that fees be reasonable and sets forth eight factors to be considered in assessing the reasonableness of a fee. Reasonableness is assessed based on the facts and circumstances of the representation, as they exist both at the beginning and the end of the representation. "A fee that looked to be reasonable at the outset of the representation may have become excessive as measured by the outcome of the client's case." *Contingent Fees*, ABA/BNA Lawyers' Manual on Professional Conduct, 41:901, at 18 (2004).

Rule 1.5 discusses when contingent fees are and are not permissible, but it does not directly address "reverse contingent fees." Rule 1.5(c) allows fees "contingent upon the outcome of the matter for which service is rendered." Comment [6] to the Rule states that "[g]enerally, contingent fees are permissible in all civil cases." Contingent fee agreements must be in writing and must "state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer." Comment [7] to Rule 1.5 provides a caution with regard to domestic relations cases: "[c]ontingent fees in domestic relations cases, while rarely justified, are not prohibited by Rule 1.5." Such fees in domestic relations matters are "permitted in order that lawyers may provide representation to clients who might not otherwise be able to afford to contract for the payment of fees on a noncontingent basis." The only outright prohibition of contingent fees in Rule 1.5 is limited to representations of defendants in criminal cases.[1]

Rule 1.5 appears to contemplate only the standard contingent fee arrangement (i.e., where a recovery is generated for the client) rather than a reverse contingent fee. Rule 1.5(c) provides that a contingent fee agreement must address "expenses to be deducted from the *recovery*." (emphasis added). Comment [8] requires a lawyer to "provide the client with a written statement at the conclusion of a contingent fee matter, stating the outcome of the matter and explaining the computation of any *remittance* made to the client." (emphasis added).

We have addressed contingent fees in a number of prior Opinions.[2] None of these prior Opinions discuss reverse contingent fees. Like Rule 1.5, these Opinions consider the typical contingent fee where the lawyer is "'produc[ing] a res with which to pay the fee.'" D.C. Ethics Op. 262 (1995) (quoting Code of Professional Responsibility Ethical Consideration 2-20, which discussed the basis for prohibiting contingent fees in criminal representations).

Outside of the District of Columbia, reverse contingent fees have been addressed by a number of jurisdictions. In Formal Opinion 93-373 (1993), the ABA concluded that "[t]he Model Rules do not prohibit 'reverse' contingent fee agreements for representations of defendants in civil cases where the contingency rests on the amount of money, if any, saved the client, provided the amount saved is reasonably determinable, the fee is reasonable in amount under the circumstances, and the client's agreement to the fee arrangement is fully informed."

The ABA identified several significant differences between typical, recovery-based contingent fees and reverse contingent fees. First, while the setting of percentages in typical contingent fee cases is susceptible to abuse or overreaching by the lawyer, the "profession's long experience with straight contingent fees and the active regulation by the courts and the legislatures" have "pretty well established" the "range of reasonable percentages." For reverse contingent fees, reasonableness "will not be so readily determinable." The legal profession "has not built up a long term common experience with the concept. The fact that straight contingent fees typically range from 25% to 33% does not necessarily mean that the same percentage is reasonably applied to the potential savings of a defendant." Second, even if a fair percentage can be set, reverse contingency fees have the added complication of cal-

[1] Substantive law may restrict those matters in which a reverse contingency fee is permitted. *See, e.g.*, 31 C.F.R. § 10.27 (IRS regulation prohibiting reverse contingent fee for preparation of a tax return but permitting such fee under other circumstances). This opinion does not purport to address any additional conditions or restrictions imposed by substantive law on reverse contingent fees.

[2] D.C. Ethics Ops. 29 (1977) (Change in Contingent Fee Arrangement In Course of Representation); 37 (1977) (Provisions of Contingent Fee Retainer Agreements With Respect to Payment of a Fee in the Event of Discharge or Withdrawal of the Attorney); 42 (1977) (Written Retainer Agreement Based on Combination of Contingent Fee Plus Time Charges); 115 (1982) (Propriety of Contingent Fees In Non-Litigation Matters); 161 (1985) (Contingency Fees in Child Support Cases); 208 (1989) (Calculation of Attorneys Fees in Structured Settlements); 262 (1995) (Application of Rule 1.5(d) to Receipt of a Contingent Fee in a Writ of Error Coram Nobis Proceeding).

culating the amount saved the client. A plaintiff's demand may be overstated or not specifically enumerated; thus, "the amount demanded cannot automatically be the number from which saving resulting from a judgment or settlement can reasonably be calculated." ABA Formal Op. 93-373 (1993).

While not leading it to conclude that reverse contingency fee arrangements were unethical, the ABA determined that the above considerations require that the lawyer exercise greater care and consultation than in the typical "straight" contingency fee case. A lawyer must "fairly evaluate the plaintiff's claim and set a reasonable number as the amount from which the plaintiff's recovery will be subtracted to determine the defendant's savings." The lawyer has the burden of "demonstrating fairness in this process," a burden that is significantly greater when negotiating with an unsophisticated client than it is when dealing with, for instance, an organization represented by an experienced in-house counsel.

The cases and other authorities considering reverse contingency fees are generally consistent with the ABA's approach. In Ethics Opinion E-359 (1993), the Kentucky Bar Association stated that it is permissible for a defense lawyer to charge a reverse contingent fee in a civil case but noted that the lawyer bears "the burden of proving that the method of computing the charge, and the amount of the fee, are reasonable and rational under the circumstances." In Ethics Opinion 98-03 (1998), the Iowa Supreme Court Board of Professional Ethics and Conduct approved a reverse contingent fee because the damages sought from the lawyer's client were liquidated and readily determinable. *See also* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion 92-76 (1992) (approving use of reverse contingent fee in tax appeal). In *Wunschel Law Firm v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980), the court invalidated a reverse contingent fee because it was based upon the plaintiff's damages demand in a defamation suit. While noting "nothing in the nature of [a contingent fee] contract limits its use to employment by plaintiffs," it rejected "a contingent defense fee predicated on a percentage of the amount saved under the prayer in defending an unliquidated tort claim." *Id.* at 333.

The case of *Brown & Sturm v. Frederick Road L.P.*, 768 A.2d 62 (Md. Ct. Spec. App. 2001) illustrates the potential for abuse in reverse contingent fee cases. In that case, the underlying representation concerned the value of a family farm. The clients requested an hourly fee arrangement but the lawyers insisted on a reverse contingency fee. The Internal Revenue Service (IRS) assessed the property at $60 million. While negotiating the fee agreement with their clients (the individuals who had inherited the farm), the lawyers knew that the IRS assessment was inflated, "more than double any other contemporaneous appraisal of the property." *Id.* at 76. The attorneys concealed from their clients appraisals that depicted "a more realistic worst-case market value" and entered into a reverse contingent fee contract with their clients based upon the inflated $60 million appraisal. The underlying litigation with the IRS was settled prior to trial, based on a $20 million valuation. Under the fee agreement, the attorneys claimed a $40 million "savings" and charged the clients $4.8 million in fees. The Court of Special Appeals upheld findings that the attorneys' failure to disclose to their clients what they knew about the property's net worth made their fee agreement unenforceable. The court also upheld a finding that the fee "was unreasonable because it bore little relation to time, labor, novelty and risk of the legal problem." *Id.* at 81.

*Conclusion*

Consistent with ABA Formal Opinion 93-373 and other authorities discussed above, we conclude that reverse contingency fee agreements are not unethical. Indeed, in the appropriate instance, such arrangements "may be in the best interests of the clients." ABA Formal Opinion 93-373 (1993). Unlike a typical fixed fee or hourly arrangement, under a reverse contingency arrangement, the lawyer could "receive no fee if not successful in saving the client money." *Id.* Like any other fee, a reverse contingent fee must be reasonable, as judged both at the outset and the conclusion of the representation. A reverse contingent fee arrangement must also be reflected in a written fee agreement under Rule 1.5(c), and such fee agreement must state the "method by which the fee is to be determined."

The key components of a reverse contingency fee arrangement are (a) the selection of the sum or amount from which a client's savings are computed and (b) the percentage to be applied to such savings to produce the lawyer's fee. The selection of the former should be the product of full disclosure by the lawyer and informed consent by the client. The lawyer may not suggest a number based upon an assessment of the matter or experience in the particular type of dispute that is not disclosed to the client. A lawyer whose experience and knowledge provide insight into the range of results that are typically achieved in a particular type of matter must share such insight with the client. The amount demanded by an adversary may not be taken alone as the basis for a reverse contingent fee. Following such a course would be highly problematic. Instead, to the extent a demand is used by an attorney as the basis for a contingent fee, the lawyer should perform his or her own independent analysis and thoroughly discuss the matter with the client.

The percentage to be applied to the savings obtained by the lawyer must similarly be the product of full disclosure by the lawyer and informed consent by the client. Unlike typical contingent fee arrangements, there are no established norms concerning the appropriate percentages for a lawyer to use. It is beyond the expertise of this Committee to opine about the percentages, or range of percentages, that might be appropriate. To support the reasonableness of a particular percentage, the lawyer should consider discussing with the client the likely range of fees under hourly or fixed fee arrangements as compared to the range of fees that might result from a reverse contingent fee arrangement.

The lawyer should summarize for the client, preferably in writing, the analysis underlying the sum or amount from which a client's savings are computed and the percentage to be applied to produce the lawyer's fee. Particularly when it is the lawyer and not the client who suggests the reverse contingent fee, a prudent lawyer will recognize that a writing will facilitate review of the reasonableness of the fee and of the client's informed consent to the fee arrangement. A lawyer may also find it advisable to document any offer to accept a fixed or hourly fee arrangement as an alternative to a reverse contingency fee arrangement.

The sophistication and experience of the client is an important factor to be considered by the lawyer in discussing and reaching a reverse contingent fee arrangement. The type of discussion and disclosure that are required when the client is a sophisticated in-house attorney for a large corporation is different from those required when the client is unsophisticated and is not being advised by independent counsel. *See* Comment [2] to Rule 1.0 (assessing adequacy of disclosure to

obtain informed consent in light of client's sophistication in legal matters). To the extent that a reverse contingent fee arrangement is with a sophisticated client, who has the benefit of independent legal advice and who provides the lawyer with suggested figures and percentages to base the fee arrangement upon, many of the above disclosures and discussions may not be necessary. On the other hand, with respect to an unsophisticated client, the lawyer should be assured before proceeding with the representation that the client has a full understanding of the amount from which the client's savings would be computed and the percentage to be applied to that amount to produce the lawyer's fee.

The partial dissent of our colleagues reflects a disagreement over the relatively narrow issue of whether a lawyer violates Rule 1.5 by failing to provide the client a writing that sets forth the lawyer's analysis or explanation of the components of a reverse contingent fee. Our view is that such a writing is preferable, but not required. The partial dissent concludes that Rule 1.5(c) mandates a writing containing such analysis or explanation. In reaching a different conclusion than our colleagues, we are mindful that our role is to interpret the Rules as we find them, not to revise them as if we were starting anew.

We believe that a writing containing the lawyer's analysis of the sum or amount from which the savings are to be computed and the percentage to be applied to such sum or amount is not required by Rule 1.5 for three reasons. First, as outlined previously in this opinion, Rule 1.5 was not drafted with reverse contingent fees in mind. The Rule speaks of "expenses to be deducted from the recovery" and "remittance[s] made to the client." Rule 1.5(c) & Comment [8]. We find no indication that reverse contingent fees were contemplated by the drafters of Rule 1.5.

Second, we do not believe that Rule 1.5(c)'s requirement that the "method" by which a contingent fee is to be determined be set forth in writing mandates anything more than providing the arithmetic components of the reverse contingent fee. "Method" is a "means" or a "manner of procedure," especially, according to one dictionary, "a regular and systematic way of accomplishing anything."[3] The term does not mean an explanation of how or why one decided to employ that particular method or process. The method used to calculate the relationship between the sides of a right triangle and its hypotenuse is the Pythagorean theorem. How Pythagoras arrived at that method is another matter.

Finally, Rule 1.5(c) speaks of the method "by which the fee *is to be determined…"* (emphasis added). In other words, the phrase refers to something that is going to happen in the future, i.e., how the fee will be calculated in the future when the case is resolved. Future-looking language does not encompass something that has already occurred. It cannot include the analysis that the lawyer went through in the past in order to propose a particular fee arrangement.

*Partially Dissenting Opinion*

While we agree with most of the Committee's opinion, we disagree on one small but significant point, namely what must go into the written fee agreement establishing a reverse contingent fee. On this point, we dissent because we believe that the Committee's opinion does not adequately protect unsophisticated clients. Adequate protection requires that the written agreement state not only the percentage the lawyer will receive of the amount saved, and the baseline value against which savings are calculated, but also the lawyer's analysis of how he or she came up with the baseline. The opinion correctly notes that, typically, the baseline cannot simply be the amount demanded in the adversary's complaint, which is likely to be inflated. Rather, it represents an analysis and estimate of the client's exposure.[4] We believe that Rule 1.5(c) requires a written explanation, however brief, of how the lawyer and client arrived at such estimate. By contrast, the Committee's opinion requires an oral explanation to the client, but makes the writing optional.

First, let us note common ground with the Committee's opinion. A reverse contingency fee may be to the client's advantage, and we agree with the Committee that the Rules of Professional Conduct permit reverse contingency fees. We also agree that the Rules require the lawyer to explain the reverse contingent fee thoroughly enough to obtain the client's informed consent to the arrangement. As the opinion notes, this oral explanation must include both a discussion of the applicable percentage used to compute the fee and the lawyer's analysis of the baseline value of the case against which savings are calculated. The point of contention lies in a single sentence, and in fact a single word. The opinion states, "The lawyer should summarize for the client, *preferably* in writing, the analysis underlying the sum or amount from which a client's savings are computed and the percentage to be applied to produce the lawyer's fee." (emphasis added). The word "preferably" means that the lawyer is not strictly required to put his or her oral analysis of the baseline value into writing. We disagree, and would not weaken Rule 1.5(c)'s writing requirement by making this analysis optional.

In a "straight" contingent fee, there is no uncertainty about the amount to which the percentage is applied: the *res* is what it is. In the reverse contingent fee, however, the baseline value is inherently indeterminate. We do not mean merely that it can never be better than a rough ballpark estimate of the client's exposure, which might turn out to be completely wrong. The inevitable uncertainty of the estimate should be clear—if not, it is the lawyer's job to make it clear—and it is a risk that both lawyer and client assume when they agree to a reverse contingent fee.[5] The additional problem is knowing what the lawyer is trying to estimate. Is the lawyer estimating the settlement value of the case, or the unlikely worst-case scenario if it goes to trial and they lose badly, or the most likely trial outcome? These may be many thousands of dollars apart. The Committee's opinion correctly notes that the lawyer has to explain to the client, at least orally, "the analysis underlying…the sum or amount from which a client's savings are computed." Surely, that includes explaining the measure of exposure the lawyer is using. At the bare minimum, therefore, the lawyer has to tell the client whether the proposed baseline value represents an estimate of the worst-case scenario, the most likely outcome, or

[3] The American Heritage Directory of the English Language 857 (3d ed. 1993).

[4] It is possible that the proposed baseline does not represent an estimate of potential exposure at all, but is simply an arbitrary number. In effect, the lawyer makes a sporting proposition to the client: "If I can save you money below $X, I get Y% of it; if I cannot, you owe me nothing." Whether a fee agreement that, in effect, sets the lawyer's fee by a game of chance can be "reasonable" under Rule 1.5(a) is a question that we do not address here. We simply assume that the baseline value of the case represents a ballpark estimate of the client's exposure.

[5] The lawyer's risk is that the case is shakier and more difficult than she had anticipated, so that she puts in many hours for a small fee because she is unable to save much money below the agreed-upon baseline. The client's risk is the opposite: the case turns out to be unexpectedly easy, it settles for a small amount of money, and the client pays a large fee for very few lawyer hours.

something entirely different. Otherwise, the client might agree to a high baseline that really represents an unlikely worst case, without understanding how unlikely it is. A lawyer who withholds that information has not met the minimum disclosure requirement under Rule 1.4(b). The client might wind up paying an inflated fee under a misapprehension that an improbable million-dollar judgment against him is really a significant risk.

Complicated information like this is hard to take in for an unsophisticated client. If the lawyer does not put it in writing, unsophisticated clients will have to trust their memory of a conversation about something out of their ordinary experience. Six months or two years later, a client with doubts about the bill will have nothing to talk over with the lawyer except that memory. If worst comes to worst and the client wants to challenge the reasonableness of the fee, he has nothing beyond his memory, and his possibly garbled understanding of what the lawyer told him many moons ago, to go on. That is unfair to the unsophisticated client. It puts that client at a disadvantage.

We believe that both the letter and the policy of Rule 1.5(c) require putting the analysis leading to the baseline in writing.

The text of Rule 1.5(c) is clear:

> "*A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined*, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter." (emphasis added).

In a straight contingent fee, the Rule is traditionally understood to require only that the terms of the agreement be in writing. But the Rule does not actually say that. It says to put the "method by which the fee is to be determined" in writing. In a straight contingent fee, which has a hundred-year-old tradition, the "method" does not need more explanation than specifying the percentages and how the expenses are handled. That is not true with the reverse contingent fee. The reverse contingent fee is a relatively unfamiliar device. It has two variables that are both "soft" and unsettled by tradition: the percentage and the baseline.

If Rule 1.5(c) really meant that the percentage and expense arrangements are the only things that have to go in the fee agreement, it would have omitted the words "…the method by which the fee is to be determined, including…." We take it that those words are not surplus. The plain meaning of the Rule is that the written agreement must include the percentage and the expense arrangements, but not that those are the only items needed to state the method by which the fee is to be determined. An unfamiliar fee arrangement calls for more information in writing. The question is what this "more" includes, in a species of contingent fee that the Rule's drafters never thought about.

The Committee relies on the dictionary definition of "method" and the grammar of the phrase "method by which the fee is to be determined." We are skeptical that any substantive conclusions can be derived this way.[6] From the dictionary we learn that a "method" involves regularity. We agree. The first step of this regular method consists of estimating (or guesstimating) the client's exposure, either at trial or in the settlement process, in order to set the baseline. Whether or not that first step must go into the written agreement cannot be learned from the dictionary.

Neither does anything come from noticing that the phrase "is to be determined" is in the future tense. To be sure, if an reverse contingent fee specifies that "the fee will be X% of the money saved under $2 million," that is indeed a method by which the fee is to be determined. But so is "the fee will be X% of the money saved under $2 million, which represents Attorney's estimate of likely settlement" or "…which represents Attorney's estimate of potential liability in a jury trial." Grammar alone does not make the latter sentences any less a statement of the "method by which the fee is to be determined" than the first sentence. The issue dividing us from the Committee is not a verbal one.

In our view, when semantics and custom do not settle the scope of an ambiguous Rule, it helps to look at the practical point of the Rule. The practical point of imposing a writing requirement on lawyers is to protect clients by creating something objective that an impartial reviewer can examine to settle disagreements between the lawyer and the client.[7] Such a disagreement can be over the numerical terms of the agreement ("Forty percent? You told me thirty-three!"). But it can also be over the reasonableness of the agreement. In a straight contingency fee that specifies only the percentage and the handling of expenses, custom will enable prudent lawyers to evaluate whether the fee is reasonable.[8] A reviewing body knows that 33 percent is a reasonable contingency fee for many typical cases, and it knows that 80 percent is not.

In the reverse contingent fee, however, simply seeing a number like "$2 million" is not enough to know if the lawyer has proposed a reasonable baseline. Cases of this sort may typically settle for a quarter that amount. But $2 million could be a reasonable worst-case estimate of the client's exposure in the unlikely event that settlement fails and the case goes to trial. Neither way of arriving at the baseline is inherently unreasonable. The same number—$2 million in this example—can be a reasonable guesstimate of worst-case exposure to liability at trial and an absurdly inflated guesstimate of the settlement range. Without knowing what the number represents, a reviewing body would be unable to declare that the agreement has violated Rule 1.5(a)'s requirement that the fee "shall be reasonable." Ergo, the client loses.

It may well be that reverse contingent fees will mostly be proposed by sophisticated clients who understand quite well—maybe better than the lawyer—how to value cases. An insurer, for example, has extensive data on the settlement value of automobile collision cases. That insurer might well propose a flat fee with an reverse contingent fee "bonus" to defense counsel who can beat the averages. In such cases, we agree with the Committee's opinion: when the client proposes the terms of a reverse contingent fee, the written agreement need say nothing beyond noting that fact. That satisfies the letter of the Rule. But when

[6] The dictionary definition of "method" is especially unhelpful. A method is a "manner" or "procedure." The same dictionary defines a "procedure" as a "manner" or "set of…methods." The American Heritage College Dictionary 1090 (1993). It likewise defines a "manner" as "a way of doing something," noting that in this sense the word is a synonym for "method." *Id.* at 825. The word "way," unsurprisingly, is defined as a "manner or method." *Id.* at 1527. A closed circle of synonyms chasing each other's tails tells us nothing.

[7] Obviously, written agreements protect lawyers too. Presumably, the Court of Appeals does not impose enforceable disciplinary rules to make sure that lawyers protect themselves.

[8] Rule 1.5(a)(3) makes "the fee customarily charged in the locality for similar legal services" a criterion of reasonableness.

the lawyer proposes a reverse contingent fee and a baseline for calculating it, a written agreement that includes the baseline value but not even a hint of the method the lawyer used to arrive at that baseline violates the Rule and under-protects clients. The *Brown & Sturm* case that the opinion discusses shows that lawyer overreaching in a reverse contingent fee is not merely a hypothetical danger to clients.[9]

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*Opinion No. 348*

## Accepting Credit Cards for Payment of Legal Fees

• A lawyer may accept credit cards from a client for payment of fees, including unearned fees (commonly referred to as a retainer or advance fees), so long as the lawyer ensures that she complies with applicable District of Columbia Rules of Professional Conduct, including ensuring that she does not enter into a merchant agreement with the credit card company that violates the Rules.

**Applicable Rules**

• 1.5 Fees
• 1.4(b) Communications
• 1.6 Confidentiality of Information
• 1.15 Safekeeping Property
• 1.16 Declining or Terminating Representation
• 7.1 Communications Concerning Lawyer's Services

*Inquiry*

A lawyer inquired whether she may accept a credit card as payment for unearned (advance) fees from a client. This inquiry prompted the Committee to consider the broader question of the acceptance of credit cards to pay earned as well as advance fees.

*Discussion*

The District of Columbia Rules of Professional Conduct (Rules) do not address the issue of accepting credit cards for payment of legal fees. The issue, however, was addressed by our Committee in Opinion 23 (1976), as an interpretation of District of Columbia Code of Professional Responsibility, the predecessor of the Rules. Opinion 23 dealt only with the issue of accepting credit cards for payment for services rendered (earned fees), not the issue raised by this inquiry. Moreover, Opinion 23 was modeled after and relied upon ABA Formal Opinion 338 (1974), which the ABA has since withdrawn.

In light of the adoption of the Rules, opinions by courts and our Committee that expanded the permissible scope of advertising, and the evolution in the use of credit cards, the Committee withdraws Opinion 23 and examines anew the conditions under which a lawyer may accept credit cards for payment of fees and expenses, including as payment for advance (unearned) fees.

*I. Accepting Credit Cards Generally*

In Opinion 23, this Committee grudgingly approved accepting credit cards for payment of fees, but implied that the use of credit cards should be discouraged and limited. Today, credit cards are recognized as useful in facilitating the ability of many persons to obtain legal services at the time the services are needed and to pay for those services on a schedule that comports with their budgets. In addition, accepting credit card payment of fees provides lawyers with assurance that they will be paid for their services and obviates the need for them to expend time and money pursuing clients who do not pay on time.[1]

Many jurisdictions now recognize the benefits of accepting credit cards for the payment of legal services.[2] While the evolution of the use and acceptance of credit cards in society led many jurisdictions to approve the use of credit cards to pay for legal services, accepting credit cards for payment of legal services involves the participation of a third party—the credit card company—in the payment process and, therefore, raises concerns generally not present in the typical attorney-client fee arrangement. Thus, we must examine the ethical restrictions faced by lawyers as a result of the requirements credit card companies impose on lawyers as "merchants."[3]

The rights and duties of lawyers as merchants, of clients as cardholders, and of credit card companies as card issuers are contractual in nature. Each party contracts with the other independently, so there are three separate contracts to be considered. *See* Gregory E. Maggs, *Regulating Electronic Commerce*, 50 Am. J. Comp. L. 665, 678 (2002). While credit card merchant contracts applicable to lawyers may contain similar terms and conditions, there may well be as many differences as there are similarities among the form contracts used by credit card companies. Discussing the nuances of various agreements is beyond the scope of this opinion.[4]

We emphasize, however, that, because of the unique arrangements (where the lawyer and the client each has a contract with the credit card company that imposes different rights and responsibilities) and the ethical obligations imposed on lawyers by our Rules, it is imperative that lawyers (i) know and follow the Rules, (ii) know the specifics of their merchant agreements, and (iii) ensure that those agreements comply with the letter and the spirit of the Rules. In that regard, a central tenet that undergirds every successful lawyer-client relationship is communication. Clearly communicating with clients about the unique features and challenges involved in accepting credit cards for payment of fees will help lawyers avoid some of the ethical pitfalls that could attend this type of payment arrangement.[5] Rule 1.4(b) also requires lawyers to explain matters necessary to

[1] *Cf.*, D.C. Ethics Op. 310 (2002) (discussing considerations involved in attorney–client fee agreements and noting certain factors may have a positive impact on the formation of lawyer–client relationships).

[2] *E.g.*, California Bar Formal Op. 2007-172 (2007); Colorado Formal Ethics Op. 99 (1997); Michigan Ethics Op. R.I. 168 (1963); Utah State Bar Ethics Advisory Op. 97-06 (1997).

[3] Lawyers who accept credit cards for payment of legal services are "merchants," as that term iscommonly used in contracts credit card companies use with business entities. The specifics of the "merchant agreement" (which sets forth the terms on which credit card companies will pay merchants who accept credit cards for payment) between the lawyers and the credit card companies may differ from other merchant agreements because the rules governing the lawyer–client relationship differ from those governing other business entities and their customers.

[4] In section III of this Opinion, we discuss some of the more salient requirements and prohibitions contained in credit card merchant contracts applicable to lawyers.

[5] Rule 1.5(b) requires that, when a lawyer has not regularly represented a client, the lawyer shall communicate in writing the basis or rate of the fee and the expenses for which the client will be responsible. The lawyer should also comply with Rule 7.1 when communicating with the client about accepting credit cards (e.g., disclose all facts necessary to ensure that the client is not misled concerning the lawyer's services).

[9] *Brown & Sturm v. Frederick Road L.P.*, 768 A.2d 62 (Md. Ct. Spec. App. 2001).

permit their clients to make informed decisions concerning their representation, which includes the consequences of paying by credit card.

*II. Issues Presented in Accepting Credit Cards as Payment*

*A. Maintaining a Client's Confidences and Secrets*

Rule 1.6(a)(1) provides that, "Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client." Rule 1.6(e)(1) provides that, "A lawyer may use or reveal client confidences or secrets with the informed consent of the client."

Lawyers should advise clients that certain information, that may include "confidences or secrets," such as the client's identity, automatically will be revealed to the credit card company in credit card transactions. *See* Colorado Formal Ethics Op. 99 (1997) ("A lawyer cannot assume that a client who is paying a bill by credit card has impliedly authorized the attorney to disclose otherwise confidential information"). Where a client informs a lawyer that he wishes the fact of being represented to remain confidential, or a lawyer has reason to believe he does, the lawyer should be especially vigilant in informing the client that the use of credit cards involves the disclosure of some confidential information, and of the kind of information that is likely to be disclosed. *See Id.*

A credit card company may require a lawyer to provide information about the nature of services, with the amount of detail required determined by the particular credit card company. Therefore, a lawyer should make every effort to enter into an agreement with a credit card company that will allow her to provide generic descriptions of services rendered. Generic descriptions recommended by other jurisdictions include: "for professional services rendered," California Bar Formal Op. 2007-172 (2007); "services and expenses," or "fees and expenses," Colorado Formal Ethics Op. 99 (1997); "services and expenses" or "consultation," Michigan Ethics Op. R.I. 168 (1963). If this level of generality cannot be accomplished, the lawyer must inform the client and obtain his informed consent to whatever disclosures the credit card company requires the lawyer to make.[6]

A more troubling confidentiality problem is the requirement by some credit card companies that the lawyer cooperate with them in the event there is a dispute between the client and the company. The lawyer should first seek to enter into an agreement with a credit card company that relieves her of any obligation to cooperate with the company in the event of a dispute between the credit card company and the client. If that is not possible, the lawyer is obligated to inform the client of the ramifications of the lawyer cooperating with the credit card company in any dispute between the company and the cardholder, and to obtain the client's informed consent that he still wants to pay by using a credit card. In the event a dispute develops and the credit card company seeks the lawyer's cooperation, the lawyer must comply with Rule 1.6.[7] *See generally* Michigan Ethics Op. R.I. 344 (2008) (examining whether a lawyer may accept credit cards for payment of advance fees and discussing special concerns with respect to Rule 1.6).

*B. Treatment of Fees Charged by Credit Card Companies for Processing Payment*

Credit card issuers generally debit a merchant (here the lawyer) a percentage of the cardholder's (here the client's) payment as its fee for processing the payment. This practice raises the issue of how the lawyer may treat the credit card fee vis-à-vis her invoices for her services (i.e., whether to pass the fee on to the client or to absorb it as a cost of doing business).

Nothing in our Rules prohibits a lawyer from increasing her fee for legal services to cover any additional cost incurred in accepting credit cards. The only limitation imposed by the Rules is that the fee must be "reasonable." Rule 1.5(a). Among the factors to be considered in determining whether a fee is reasonable are "the limitations imposed by the client or by the circumstances." A client's need to procure legal services from a lawyer whom the client believes is qualified to meet his needs and a client's decision that using a credit card to pay for the services is the best means of obtaining those services are limitations or circumstances within Rule 1.5. We thus believe a lawyer properly may pass on to the client the fees charged by credit card companies for processing payment.[8]

In Opinion 310, this Committee examined the propriety of a lawyer charging interest when a client fails to pay timely and is instructive in assessing the propriety of passing on to clients the additional costs incurred in accepting credit cards. Recognizing that a lawyer must somehow account for the additional cost of clients who do not pay or who pay late, the Committee stated, "[I]f the lawyer can focus the lawyer's additional costs of dealing with clients who do not pay or pay timely on those clients themselves, that allows the lawyer to avoid attempting to spread those additional costs among all of the lawyer's clients." D.C. Ethics Op. 310 (2001).

We believe Opinion 345 also supports our view that a lawyer who incurs an additional cost for accepting credit cards may pass those costs on to the client who charged the legal services. In Opinion 345, this Committee recognized that a lawyer who incurs interest charges from her bank when she has used the firm's line of credit to advance to a client the costs of the representation may pass those costs along to the client. D.C. Ethics Op. 345 (2008). Just as the lawyer who passed on the interest charges assessed against her was not making a profit, the lawyer who passes on the fee that the credit card company charges for processing payments is not making a profit.[9]

Before passing on such fees, however, the lawyer must comply with Rule 1.5(b) by explaining to the client that the fee charged by the credit card company will be charged to the client as an expense. To guard against later misunderstanding, the Committee suggests that the lawyer go further and obtain the client's "informed consent" to being charged an additional amount to recapture the fees that the lawyer must pay the credit card company.[10]

[6] As defined in Rule 1.0(e), "'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."

[7] It is difficult to imagine that a lawyer would voluntarily cooperate with a credit card company if there is a dispute between the company and the client, absent a provision in the merchant contract that requires the lawyer to do so. A lawyer must resist any effort by a credit card company to compel her to disclose client confidences or secrets protected by Rule 1.6. Absent the client's informed consent, a contractual requirement of cooperation cannot trump the lawyer's obligation of confidentiality.

[8] An alternative way of accomplishing the same result might be to offer a discount to clients who pay cash or by check.

[9] At least one other jurisdiction considering this issue has found that the fees charged by the credit card company "are legitimate costs that the attorney may pass on to the client." Utah State Bar Ethics Advisory Op. No. 97-06 (1997).

[10] In the context of credit card use, this means the lawyer would explain to the client that the client's use of a credit card will increase the lawyer's fees by the exact percentage the credit card charges for a fee (e.g., if the client's bill is $5,000 and the credit card company charges three percent (3 percent), the client must pay $5,150).

We conclude that there is no ethical bar to lawyers passing on the credit card processing fees to their clients,[11] however, we note that as a matter of good business practice, lawyers may wish to follow the practice of other merchants and absorb the costs. *See* Utah State Bar Ethics Advisory Op. No. 97-06 (1997). In Michigan, lawyers are required to absorb these costs. Michigan Ethics Op. R.I. 168 (1963); *compare* California Bar Formal Op. 2007-172 (2007) (lawyer may "ethically absorb the service charge debited by the credit card issuer").

### *C. Advertising and Promoting the Acceptance of Credit Cards*

When the ABA first considered use of credit cards–and in our now withdrawn Opinion 23–there was considerable discussion of the lawyer's ability to advocate and advertise the use of credit cards. Although these concerns now seem outmoded, we discuss them briefly.

Over the years, the Rules were changed to recognize the evolution in the legal profession with respect to lawyer advertising. Decades ago, it was recognized that advertising does not inherently bring dishonor to the profession and that prohibitions on all advertising conflicted with antitrust laws and the First Amendment. Rule 7.1 allows advertising so long as the lawyer does not use false or misleading statements. Stating that "the interest in expanding public information about legal services ought to prevail over considerations of tradition," Comment [2] to Rule 7.1 recognizes the dual benefits of advertising: it promotes the lawyer's active quest for clients, while at the same time, fulfills the public's need to know about legal services. Comment [3] to Rule 7.1 expressly states that the Rule permits public dissemination of information about "payment and credit arrangements."

Another issue is whether a lawyer may advocate the client's use of credit cards or just accept the cards passively. There is nothing in the Rules that explicitly prohibits a lawyer from encouraging a client to use a credit card for payment of legal services. Although we can foresee circumstances when encouraging a client in dire financial straits to pay by credit card might not be in the client's best interests, a lawyer is generally not a financial advisor. Unless the scope of the lawyer's representation includes such advice, in which case Rule 2.1 might be implicated, the client is responsible for evaluating his ability to pay the lawyer's fee and for deciding how to do so. *Compare* Utah State Bar Ethics Advisory Op. 97-06 (1997) (noting that, while nothing in Utah's Rules explicitly requires an attorney to discourage the use of credit cards for payment, economic factors of a client's situation could require the attorney to advise that client not use a credit card).

### *III. Issues Presented by Accepting Credit Cards for the Payment of Advance Fees and Expenses*

Opinions from other jurisdictions generally conclude that a lawyer may accept credit cards for the payment of advance fees. *See* California Bar Formal Op. 2007-172 (2007); Colorado Formal Ethics Op. 99 (1997); Massachusetts Bar Ethics Op. 78 -11 (1978); Michigan Op. R.I. 344 (2008); North Carolina Formal Ethics Op. 97-9 (1998); Oregon Ethics Op. 2005-172 (2005). *Contra* Arizona Ethics Op. 08-01 (2008) ("Use of credit cards for payment of advance fees or expected costs is not ethically permissible in Arizona for several reasons"). With the exception of California, which has no requirement that lawyers deposit advances into trust accounts, these other jurisdictions require that the advance payments—whether paid in cash, by check, or by credit card—be deposited into the lawyer's trust account, as opposed to her operating account.

We find there is nothing in the D.C. Rules that prohibits a lawyer from using a credit card for unearned legal fees and expenses (advance fees), provided that the use of a credit card does not jeopardize the security of entrusted funds.

### *A. Depositing Advance Fees Into Trust Accounts*

Rule 1.15(d) provides, "Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement."

As we noted above, the law governing credit card transactions is contractual in nature, and the details of merchant agreements vary depending on the credit card company. While we cannot detail or discuss all the provisions of every agreement, many agreements include some or all of the following requirements and prohibitions:

- Requirement that reimbursement of unused fees must be credited to the user's card and not paid by cash or check;
- Requirement that the cardholder (client) have "chargeback" rights pending resolution of a dispute (i.e., the credit card company has the right to access the lawyer's account to debit funds previously deposited into that account and charge it back to the cardholder);
- Provision that in disputes, no "chargeback" is made, but the client would not be charged until the matter is resolved (both parties would have an opportunity to submit evidence and have the matter resolved by the company's dispute resolution section);
- Prohibition on charging for services before services are rendered;[12]
- Requirement that payments made to the lawyer by the credit card company be made through an approved Settlement Account.

Before accepting credit cards for an advance fee, the lawyer must have a complete and detailed understanding of the agreement imposed on her by credit card companies. In many cases it may prove impossible for the lawyer to deposit advance fees paid by credit card into trust accounts and adhere to the terms of the agreement. Funds in trust accounts belong to the clients, not to the lawyer. As such, they cannot be attached by the lawyer's creditors. But because many credit card agreements permit the credit card company to invade the merchant's bank account and charge back monies already paid the merchant if the customer disputes a bill, there is a danger that funds deposited in a lawyer's trust account might be "clawed back." Under some circumstances this could result in a situation where there are insufficient funds in the account.

For example, suppose a lawyer deposits an advance fee of $50,000 into her trust account and, as the fee is earned, transfers $40,000 to her operating account. If the client lodges a protest with the credit card company challenging the lawyer's right to payment, the credit card company, under its standard merchant

[11] It may be that the lawyer's agreement with the credit card company addresses whether the fees can be passed on. This is a matter of contract, which we do not address.

[12] If the merchant agreement provides that services must have been rendered prior to the submission of charges, the lawyer may not accept a credit card as a payment of a retainer or advance. *See* Colorado Bar Formal Ethics Op. 99 (1997). The Colorado Opinion provides a much more detailed discussion of the nuances of merchant's agreements.

agreement, might invade the lawyer's trust account, and claw back the entire $50,000, pending resolution of the dispute. This would mean that the lawyer had insufficient funds in her account to cover her obligations to other clients whose funds she is holding. In some circumstances, it could even result in the account being overdrawn.

Because the Committee does not and cannot know the details of all contractual arrangements between lawyers and credit card companies, we cannot conclude that credit cards can never be used to pay advance fees into trust accounts. But if a credit card is used in this fashion, the lawyers must ensure that under no circumstances can the credit card company invade her trust account. If that possibility exists, a credit card may not be used. Moreover, the lawyer must understand all the provisions of her agreement with the credit card company to ensure that entrusted client funds are safe and secure. Absent that assurance, a credit card may not be used to advance entrusted funds.

*B. Consent to Deposit Advance Fees in Operating Accounts*

Rule 1.15(d) permits the deposit of advance fees into a lawyer's operating account provided that the client provides informed consent. Such fees are treated as the lawyer's property, although she has the obligation to and must have the wherewithal to repay them promptly if she does not earn them. To ensure that the consent provided by a client is "informed consent," the lawyer must explain that, unlike fees deposited in a trust account, these fees can be attached by the lawyer's creditors because legally they are the lawyer's property. Moreover, the provisions of the agreement with the credit card company may raise other issues if credit cards are used to pay advance fees into an operating account, which the lawyer must not only understand, but explain to her client.[13]

A lawyer who deposits credit card advance payments into an operating account potentially faces a dilemma with respect to charge-backs. An example may help explain the potential dilemma. Clients A and B retain Lawyer for unrelated legal work. Both are required to pay a substantial advance. Client B pays his advance by check and grants Lawyer permission to deposit the advance into her operating account. Client A chooses to pay the advance by credit card, and also grants Lawyer permission to deposit the advance into her operating account. Client A's credit card company has a policy of withdrawing money from merchants when the cardholder has a dispute with a merchant, pending resolution of the dispute.

Nine months into the relationship, Client A disputes his bill from Lawyer and contacts the credit card company to complain. The credit card company immediately invades Lawyer's operating account and withdraws the entire disputed amount, which is substantially all of the advance. Meanwhile, Lawyer has concluded service to Client B successfully and owes Client B a refund, which she promptly makes by issuing Client B a check drawn on the operating account. The charge-back by the credit card company has left Lawyer without sufficient funds to cover the check to Client B. Were this insufficiency of funds to occur in a trust account, the lawyer would face charges of misappropriations. Even if the lawyer technically has not misused Client B's funds because funds in the operating account are not "entrusted," she still has an obligation to refund unearned fees. Having insufficient funds in her operating account might jeopardize obligations to Client B.

As the foregoing example makes clear, even if advance funds may be deposited into a lawyer's operating account and thus are not impermissibly commingled, the lawyer must employ the necessary safeguards, including accounting procedures, to ensure that she remains in full compliance with all ethical rules. A lawyer may substantially eliminate the likelihood of a charge of misusing a client's funds if she follows a strict practice of billing clients only after the services have been rendered and withdrawing funds only after the dispute period (most cardholders typically have 120 days from the date of a transaction within which to dispute a charge). *See* Kentucky Ethics Op. E-426 (2007) (suggesting that a lawyer "could avoid the ethical implications of a chargeback by delaying disbursements until after the time a chargeback could occur").

*C. Refunding Unearned Fees*

Irrespective of whether a client consents to the lawyer depositing the advance into an operating account, Rule 1.16(d) requires that the lawyer return to the client any unearned or unused portion of advanced legal fees and costs at the termination of the lawyer's services. Specifically, Rule 1.16(d) provides, as pertinent, "In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as… refunding any advance payment of fee or expense that has not been earned or incurred."

Accepting credit cards for the payment of unearned fees imposes on a lawyer the obligation to know whether her merchant contract with the credit card company requires her to refund any unearned funds to the client directly, or whether she may leave the charge on the credit card and return the fees to the client by cash or check. If the credit card company requires crediting the refund to the account, the lawyer must explain this in writing before accepting the credit card for payment. *See* Rule 1.5(b) (requiring that "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing representation"). *See also* Rule 7.1.

*IV. Conclusion*

Credit cards are an acceptable method of paying legal fees provided that the client understands and consents to whatever disclosures to the credit card company are required by the merchant agreement. The client must also be informed of the actual cost of using the credit card if the lawyer intends to recapture from her client the fees she must pay to the credit card company. While credit cards may also be used to pay advance fees or retainers, this may be done only if it does not endanger entrusted client funds and only if the lawyer thoroughly understands the merchant agreement and arranges her affairs so that she has the ability to meet her obligation to refund unearned fees.

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[13] While a discussion of substantive law is beyond the scope of this Opinion, any lawyer who chooses to accept a credit card for payment of legal fees must be knowledgeable about and comply with federal and state consumer credit laws, such as the Truth in Lending Act (15 U.S.C. § 1666i); Regulation Z (12 C.F.R. § 226.12); and the District of Columbia Consumer Protection Procedures Act, (D.C. Code 29-3901, et seq.)

*Opinion 349*

**Conflicts of Interest for Lawyers Associated with Screened Lawyers Who Participated in a Joint Defense Group**

Joint defense agreements do not create "former client" conflicts under Rule 1.9 because members of a joint defense group do not become the lawyer's "clients" by virtue of such agreements. However, a lawyer who participates in a joint defense agreement may acquire contractual and fiduciary obligations to the members of the joint defense group who were not the lawyer's clients. Such obligations can give rise to a personally disqualifying conflict under Rule 1.7(b)(4) to the extent that they materially limit the lawyer's ability to prosecute or defend a substantially related matter adverse to a joint defense group member.

Under Rule 1.10(a)(1), such conflicts are not automatically imputed to other lawyers in the lawyer's firm. If the lawyer has moved to a new firm since handling the joint defense group matter, other lawyers at the new firm could undertake a substantially related matter adverse to a joint defense group member, provided that the personally disqualified lawyer is timely screened from the new representation. The analysis is more difficult if the lawyer has remained at the same firm. If that firm wishes to undertake a related matter adverse to a member of the joint defense group, the firm must consider: (i) whether the entire firm is bound by a joint defense agreement that one of its lawyers signed while affiliated with the firm; and (ii) if not, whether the lawyers who would be handling the new matter might have been exposed to confidential information from the joint defense group matter while that matter was being handled by others in the same firm.

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification General Rule)

*Inquiry*

The District of Columbia Rules of Professional Conduct ("Rules") provide clear guidance to a lawyer who is considering taking on a representation that would be adverse to a former client of that lawyer or of another lawyer in the same law firm. The Committee has received multiple inquiries about whether and to what extent the Rules apply to representations adverse to members of a joint defense group who were never clients of the lawyer or law firm. In this opinion, the Committee considers two variations of the following scenario:

Lawyer A represented an individual in a criminal investigation focused on the individual's employer ("Employer") and others. Lawyer A executed a joint defense agreement with the other subjects of the investigation, including Employer, arising out of a common interest. Lawyer A subsequently received confidential information relating to the investigation from Employer and participated in meetings with Employer's counsel to discuss joint strategy and other work product. Lawyer A ultimately resolved the individual client's matter with the government, and the representation terminated.

**Scenario #1—New Firm:** After Lawyer A resolved the criminal matter on behalf of the individual, he left his original law firm and joined a new law firm ("New Firm"). Client X approaches New Firm about suing Employer for damages arising out of the conduct that gave rise to the criminal investigation. New Firm proposes to screen A from the representation. Lawyer A is the only lawyer at New Firm who participated in the joint defense agreement. Because that representation was completed before Lawyer A joined New Firm, there are no other lawyers at New Firm who represented the individual employee in the criminal investigation. Would this representation violate the Rules, in particular, Rules 1.6, 1.9, and 1.10?

**Scenario #2—Same Firm:** Lawyer A does not change law firms. After the resolution of the criminal matter, Client X approaches Lawyer A's law firm ("Firm") about suing Employer for damages arising out of the conduct that gave rise to the criminal investigation. Because the joint defense agreement that Lawyer A signed with Employer required A to keep confidential all information as well as work product shared by Employer, Firm proposes to screen Lawyer A and all the lawyers with whom he worked on the criminal investigation from participating in the lawsuit to be filed by Client X. Assuming that an effective screen is imposed, would Firm's representation of Client X against Employer violate of any of the Rules, in particular Rules 1.6, 1.9, and 1.10?

*Analysis*

In the District of Columbia, the Rules do not mention joint defense agreements. Certain decisions in other jurisdictions have disqualified lawyers from matters adverse to members of a joint defense group because of the past membership in the joint defense group of another lawyer in the same firm. *See, e.g., All American Semiconductor, Inc. v. Hynix Semiconductor, Inc.*, 2009-1 Trade Cas. (CCH) ¶ 76,465 (N.D. Cal. Dec. 18, 2008), *order clarified by* 2009-1 Trade Cas. (CCH) ¶ 76,501 (N.D. Cal. Feb. 5, 2009); *In re Gabapentin Patent Litig.* 407 F. Supp. 2d 607 (D.N.J. 2005), *reconsideration denied*, 432 F. Supp. 2d 461 (D.N.J. 2006); *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996).1 Those cases relied upon the obligations that a lawyer owes a former client under the rules of other jurisdictions. In approaching these questions in the District of Columbia, one must distinguish between obligations imposed by the Rules and obligations arising under other law, such as the law of contracts or principles of fiduciary duty. This Committee's jurisdiction is limited to questions arising under the Rules.

*A. Background.*

*1. Duties to Former Clients.*

Without a former client's consent, a law firm may not represent others in suing the former client in matters that are the same as or substantially related to the matter in which the firm represented the former client. Rule 1.9 prohibits the lawyer who represented the former client from representing anyone against the former client in the same or in a substantially related matter.[2] Rule

[1] In the *Gabapentin Patent Litigation* case, for example, a law firm was disqualified from litigation despite the screening of two lateral attorneys who joined the firm during the litigation. The firm had obtained a consent from the laterals' former client. However, the firm was disqualified because it did not obtain separate consents from the other members of the joint defense group in which the laterals had participated. Finding "a fiduciary and implied attorney-client relationship between" the two laterals and the other members of the joint defense group, the court held that the other members of the joint defense group were, "by implication, [the laterals'] 'former clients'. . . ." 407 F. Supp. 2d at 615. The law firm was disqualified because the court concluded that the two laterals were personally disqualified under New Jersey's Rule 1.9, and that conflict was imputed to other lawyers in the same firm under New Jersey's Rule 1.10. *Id.* Under those rules, screening without a consent was not available to cure the conflict. *Id.* at 615-16.

[2] Rule 1.9 provides: "A lawyer who has formerly represented a client in a matter shall not there-

1.10(a) imputes that conflict to all other lawyers in the same law firm, even if those other lawyers had nothing to do with the representation of the former client.[3] When a lawyer joins a new firm, however, conflicts are imputed to the other lawyers in the firm only if the lawyer had "in fact acquired information protected by Rule 1.6 [confidentiality of information] that is material to the matter." Rule 1.10(b).[4] Although the Rules recognize the concept of a screen[5]—and require use of screens in certain circumstances—a screen alone does not resolve an imputed former client conflict under Rules 1.9 and 1.10. *See* D.C. Legal Ethics Opinion 279 (1998).

*2. Joint Defense Agreements Generally.*

Joint defense agreements are entered into by parties who, by choice or by necessity given applicable conflict of interest rules, have separate counsel in the matter but have some common interests. They may be used in both criminal and civil matters. They may be written or unwritten. This Committee is not opining on the validity or intricacies of joint defense agreements, but sets forth here a brief background on such agreements as context for the application of the Rules to the questions presented.

A joint defense agreement (also known as a common interest agreement) is a way for clients and their lawyers to share privileged information with third parties without waiving otherwise applicable privileges.

> The joint defense privilege, often referred to as the common interest rule, is an extension of the attorney-client privilege that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement. It permits a client to disclose information to her attorney in the presence of joint parties and their counsel without waiving the attorney-client privilege and is intended to preclude joint parties and their attorneys from disclosing confidential information learned as a consequence of the joint defense without permission.

*United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000) (citations omitted). "It protects communications between the parties where they are 'part of an ongoing and joint effort to set up a common defense strategy' in connection with actual or prospective litigation." *Minebea Co. v. Papst*, 228 F.R.D. 13, 15 (D.D.C. 2005) (citations omitted). "[T]he rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." *Id.* at 16 (quoting *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). "Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." United States v. BDO Seidman, LLP, 492 F.3d 806, 815 (7th Cir. 2007).

As with any contract or other agreement, the precise terms of a joint defense agreement depend on the agreement itself. Some forms of joint defense agreement define in great detail the rights and obligations that each member of the joint defense group is assuming with respect to every other member of the group. For example, the joint defense agreement might specifically disclaim any attorney-client relationship with the members of the joint defense group who are not the participating lawyer's client. It might also provide a specific waiver to allow use of confidential joint defense information to cross-examine and impeach a member of the joint defense group who becomes a witness for the adversary after abandoning the joint defense through, e.g., a guilty plea or settlement agreement.

One form of joint defense agreement that does both provides as follows:

> Nothing contained herein shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney and the fact that any attorney has entered this Agreement shall not be used as a basis for seeking to disqualify any counsel from representing any other party in this or any other proceeding; and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such attorney's participation in this Agreement; and the signatories and their clients further agree that a signatory attorney examining or cross-examining any client who testifies at any proceeding, whether under a grant of immunity or otherwise, may use any Defense Material or other information contributed by such client during the joint defense; and it is herein represented that each undersigned counsel to this Agreement has specifically advised his or her respective client of this clause and that such client has agreed to its provisions.

*United States v. Stepney*, 246 F. Supp. 2d 1069, 1085 (N.D. Cal. 2003) (quoting Joint Defense Agreement, Am. Law Institute-Am. Bar Ass'n, Trial Evidence in the Federal Courts: Problems and Solutions, at 35 (1999)).

Indeed, the *Stepney* court recommended use of such a waiver in a criminal case after holding that a joint defense agreement which purported to create "a general duty of loyalty to all participating defendants" was "unacceptable" and supported by "neither precedent nor sound policy." 464 F. Supp. 2d at 1084-85.[6] The court found that "[a] duty of loyalty

after 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."

[3] Rule 1.10(a) provides:

> 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:
>
> (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or
>
> (2) the representation is permitted by Rules 1.11 [successive government and private employment], 1.12 [former arbitrator], or 1.18 [duties to prospective client].

[4] Rule 1.10(b) provides: "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter. The firm is not disqualified if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18."

[5] *See* Rule 1.0(l) (defining "screened").

[6] *See also Stepney* at 1079-80 ("Joint defense agreements are not contracts which create whatever rights the signatories chose, but are written notice of defendants' invocation of privileges set forth in common law. Joint defense agreements therefore cannot extend greater protections than the legal privileges on which they rest. A joint defense agreement which purports to do so does not accurately set forth the protections which would be given to defendants who sign. In the present case, unless the joint defense privilege recognized in this Circuit imposes a duty of loyalty on attorneys who are parties to a joint defense agreement, the duty of loyalty set forth in the proposed agreement would have no effect other than misinforming defendants of the actual scope of their rights.") (footnote omitted).

between parties to a joint defense agreement would create a minefield of potential conflicts." *Id.* at 1083. Such conflicts would include:

- The inability to cross-examine at trial co-defendants who participated in the joint defense group but later decided to cooperate with the adversary and testify on its behalf.[7]
- The inability to "cross-examine a defendant who testified on his own behalf." *Id.*
- The inability "to put on a defense that in any way conflicted with the defenses of the other defendants participating in a joint defense agreement." *Id.*
- The inability to "shift blame to other defendants or introduce any evidence which undercut their defenses." *Id.*

As illustrated by the above, "a joint defense agreement that imposes a duty of loyalty to all members of the joint defense agreement eliminates the utility of employing separate counsel for each defendant and (for purposes of conflict analysis) effectively creates a situation in which all signing defendants are represented jointly by a team of all signing attorneys." *Stepney* at 1083. Such a situation is ethically impermissible in some circumstances, including those presented to the *Stepney* court. *See id.* at 1083-1084 ("The court certainly could not permit joint representation of defendants with such disjointed interests as those in the present case.") (citing Fed. R. Crim. P. 44(c)(2)).

Just as a joint defense agreement may contain a specific waiver to allow cross-examination and impeachment of a defecting joint defense group member, it might also provide specific agreed-upon ground rules to address situations in which:

- Other lawyers in a participating attorney's law firm are asked to represent clients in matters adverse to one or more non-client members of the joint defense group, including matters that are substantially related to the joint defense matter.
- A participating lawyer moves to another law firm which has, or is later asked to undertake, representations adverse to one or more members of the joint defense group that are substantially related to the joint defense matter.

The parties could agree, for example, that other attorneys at any law firm that the participating attorney might later join shall not be precluded by virtue of the attorney's past participation in the joint defense group from undertaking, or continuing to handle, potentially related matters adverse to one or more non-client members of the joint defense group, provided that the lawyer in question does not personally participate in the representation and is timely screened from it. Such an understanding would provide certainty and avoid potential issues under the rules of professional conduct in most jurisdictions by providing advance consent to the extent that a consent might be deemed to be required under the applicable rules.[8]

*B. Joint Defense Agreements and the Rules.*

In the District of Columbia, Rule 1.9 addresses only conflicts that involve a "former client" of the lawyer. By its own terms, Rule 1.9 creates no obligations with respect to a person or entity who never was a client.[9] Case law in the District of Columbia requires a showing "that an attorney-client relationship formerly existed" in order for the Rule to apply. *Derrickson v. Derrickson*, 541 A.2d 149, 152 (D.C. 1988). Because a non-client member of a joint defense group is not a "client"—and in many cases could not be a client under the applicable conflicts rules—Rule 1.9 does not preclude adversity to non-client joint defense group members. In the absence of a prohibited "former client" conflict under Rule 1.9, there is nothing to impute to other lawyers at the same firm under Rule 1.10(a).

Similarly Rule 1.10(b) speaks only to a situation in which a lawyer moves from one firm to another after having represented a "client" at the first firm. Nothing in the text of that rule prohibits other lawyers at the new firm from being adverse to a person or entity their new colleague never represented.

Nor does Rule 1.6 create any confidentiality obligations to non-clients that are enforceable through discipline under the Rules. The only obligations that Rule 1.6 imposes involve "a confidence or secret of the lawyer's client." A joint defense agreement does not make the parties "clients" of the participating lawyers. Indeed the raison d'être for a joint defense agreement is to share privileged information with non-clients.

Even though non-client members of a joint defense group are not "clients" or "former clients," they are "*third parties*" to whom an individual attorney may owe an obligation under a joint defense agreement. Such an obligation can give rise to a conflict of interest under Rule 1.7.

Rule 1.7(b)(4) addresses conflicts involving third parties:

> [A] lawyer shall not represent a client with respect to a matter if . . . the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected *by the lawyer's responsibilities to* or interests in *a third party* or the lawyer's own financial, business, property, or personal interests. (emphasis added).

Under this Rule, a lawyer's confidentiality responsibilities to a non-client member of a joint defense group may preclude the lawyer from undertaking a representation adverse to the member in a substantially related matter that implicates the confidential information. The lawyer will be personally disqualified from such a matter unless the lawyer can secure a release from the obligation.[10]

[7] *See id.* at 1083 ("Should any defendant that signed the agreement decide to cooperate with the government and testify in the prosecution's case-in-chief, an attorney for a non-cooperating defendant would be put in the position of cross-examining a witness to whom she owed a duty of loyalty on behalf of her own client, to whom she also would owe a duty of loyalty. This would create a conflict of interest which would require withdrawal. . . . [T]he existence of a duty of loyalty would require that the attorneys for *all* noncooperating defendants withdraw from the case in the event that any *one* participating defendant decided to testify for the government.").

[8] In some jurisdictions, consents must be in writing or confirmed in writing. *See, e.g.* ABA Model Rules 1.7(b)(4) and 1.9(a). While the D.C. Rules do not require that waivers be in writing (*see* Rule 1.7 cmt. 28), this Committee has recommended "that—for the protection of lawyers as well as clients—advance waivers be written." D.C. Legal Ethics Opinion 309 (2001).

[9] *See also* ABA Formal Opinion 95-395, *Obligations of a Lawyer Who Formerly Represented a Client in Connection with a Joint Defense Consortium* (1995) (while a lawyer "would almost surely have a fiduciary obligation to the other members of the consortium . . . [h]e would not, however, owe an ethical obligation to them, for there is simply no provision of the Model Rules imposing such an obligation.").

[10] Conflicts arising under Rule 1.7(b) can be waived if "(1) each potentially affected client provides informed consent . . .; and (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected clients." Rule 1.7(c). In this context, of course, the non-client joint defense group member is not an "affected client" whose consent is required under 1.7(c). However, law independent of the Rules may require the lawyer to get a release of some kind before the lawyer may begin a representation that would otherwise be prohibited by the joint defense agreement. If the terms of that release impose any material limitations on the lawyer's rep-

Unlike other conflicts under Rules 1.7 and 1.9, a Rule 1.7(b)(4) conflict is not necessarily imputed to other lawyers in the same law firm. Rule 1.10(a)(1) takes such conflicts out of the general imputation 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: (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm . . . .

Thus, a joint defense agreement obligation to a non-client will be treated as an individual lawyer's obligation to a third party. That obligation is not imputed to other lawyers in the firm as long as the individual lawyer's interest does not present a significant risk of adversely affecting the representation of the client by the other lawyers in the firm. In most circumstances, deployment of a timely and effective screen will eliminate the risk that an individual lawyer's obligations under a joint defense agreement will adversely affect the client's representation by other lawyers in the firm.[11]

*C. Application to the Pending Inquiry.*

Both scenarios presented to the Committee for analysis involve a law firm being asked to represent Client X in related litigation against a non-client participant (Employer) in a joint defense agreement to which one of the firm's current lawyers, Lawyer A, had been a party. We assume the litigation will not involve or adversely affect the employee—Lawyer A's former client from the criminal investigation.[12] Lawyer A has confidential information from Employer that the joint defense agreement precludes him from sharing or using on another's behalf against Employer. The law firm seeking to represent X in the litigation against Employer plans to screen the lawyer from the representation.

The only difference between the two scenarios is that, in the first scenario, Lawyer A has changed law firms since handling the criminal matter. New Firm has been asked to represent X in the litigation and New Firm's only connection with the past criminal representation is that it is now associated with the lawyer who handled it at a previous firm. In the second scenario, by contrast, the law firm that is being asked to represent Client X against Employer is the same firm that Lawyer A was associated with during the representation of the employee in the criminal matter.

*1. The Screened Lawyer Is At a New Firm, Which Has Been Asked to Handle the Related Matter Against the Joint Defense Group Member.*

In the first scenario, New Firm should not be precluded from representing Client X in the litigation against Employer under Rules 1.7(b)(4) and 1.10(a)(1). While we assume Lawyer A at New Firm has relevant confidential information of Employer that cannot be shared with others because of the joint defense agreement, a timely and effective screen assures that Lawyer A will not violate the lawyer's own personal obligations under the joint defense agreement, and that others in New Firm will not be tainted by exposure to confidential information that cannot be used or disclosed. This is a situation in which there would not appear to be any "significant risk of adversely affecting the representation of the client by the remaining lawyers in" New Firm, so Lawyer A's personal disqualification would not be imputed to others in the firm. New Firm does not need a consent from Employer because Employer never was Lawyer A's client. Thus, Rule 1.9 does not apply to Lawyer A, and there is no Rule 1.9 conflict to impute to other lawyers in New Firm under Rule 1.10(a). Similarly, Employer's never-client status as to A means that the New Firm does not have an imputed conflict under Rule 1.10(b), which applies only to matters involving a lateral attorney's past representation of a "client."

*2. The Screened Lawyer Has Stayed at the Same Firm, Which Now Has Been Asked to Handle the Related Matter Against the Joint Defense Group Member.*

When Lawyer A stays at the same firm, the analysis under Rule 1.9 is the same as it was when he changed firms: Lawyer A has no conflict under Rule 1.9 because Employer was never Lawyer A's client. There is no Rule 1.9 conflict to impute to other lawyers in the same firm under Rule 1.10. However, Lawyer A will have a personally disqualifying conflict under Rule 1.7(b)(4) if his obligations to third parties under the joint defense agreement will, or reasonably may, adversely affect his professional judgment on behalf of a client in a matter adverse to a joint defense group member.

As discussed above, an individual lawyer's joint defense agreement conflict under Rule 1.7(b)(4) is imputed to other lawyers in the same law firm only if the personally disqualified lawyer's obligations under the joint defense agreement "present[] a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm" Rule 1.10(a)(1). The analysis of whether this will occur in the second scenario (where the lawyer stayed at the same firm) is complicated by two issues: (i) the possibility that the firm itself is bound by the joint defense agreement that one of its lawyers signed during an affiliation with the firm; and (ii) the practical difficulty of establishing a retroactive screen.

Putting aside the signing lawyer's individual obligations under a joint defense agreement, the lawyer's firm would need to consider carefully whether the firm and its other lawyers had any confidentiality or other relevant obligations under an agreement signed by a firm lawyer during the lawyer's practice with the firm. That analysis cannot be done in the abstract without reference to the terms of a specific agreement. However, it is unlikely that a firm could allow lawyers who had not participated in the prior representation to search the firm's files respecting that representation for information that would be useful in the case

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resentation of the client in the proposed matter—such as prohibiting the lawyer from using on the client's behalf relevant confidential information of which the lawyer is aware—Rule 1.7(c) will require an informed consent from the client in the matter. If the terms of the release place too many restrictions on the lawyer's proposed representation, the lawyer will not be able to satisfy the Rule 1.7(c)(2) requirement that he or she "reasonably believe[ ] that the lawyer will be able to provide competent and diligent representation . . . ." In such event, the lawyer would have to decline the representation.

[11] Strictly speaking, a screen is not necessary if the personally disqualified lawyer avoids participation in the new matter and does not reveal any confidential information about the prior matter to the lawyer's colleagues, thereby fulfilling the lawyer's own obligations under the joint defense agreement. However, use of a screen is prudent to remind the personally disqualified lawyer of his obligations, to alert the involved lawyers to the existence of the issue, and to confirm their commitment to take extra care in the screened lawyer's presence.

[12] If the litigation did involve or adversely affect the lawyer's former client, the lawyer and the firm would be required to conduct an analysis under Rule 1.9 to determine whether the new matter could be accepted. Such adversity to the former client could exist if the representation of the new client exposed the former client to claims by other members of the joint defense group based on an alleged breach of the joint defense agreement. *See also* ABA Formal Opinion 95-395, *supra*.

against the joint defense group participant. Moreover, to the extent that information obtained pursuant to a joint defense agreement is protected under Rule 1.6, the firm and its other lawyers would be precluded from using that information for the advantage of another client, unless the former client's consent has been obtained or certain other Rule 1.6 exceptions apply.

In addition, the original firm's own involvement in the criminal investigation—through the then-and still-associated lawyer and any other firm attorneys or staff who participated in the representation – would raise questions about the timeliness and effectiveness of any screen it might erect to block the attorneys who planned to handle the substantially related litigation against Employer from exposure to confidential information arising from the earlier matter. While the firm could take steps to prevent future discussions of the past matter with the litigators on the new matter, it would also need to be sure that none of them was exposed to information about the case in the past, when there might not have been any reason to take extra steps to keep them from hearing about or discussing the criminal matter that was being handled by others in that firm.

Thus, in this scenario, the law firm likely would be precluded from undertaking the representation unless the law firm could conclude: (i) it and its other lawyers are not bound by the joint defense agreement; and (ii) none of the other lawyers had been exposed to any confidential information relating to the joint defense agreement.

This is an issue that could have been clarified by the terms of the joint defense agreement. The law firm in this scenario would have more options if the joint defense agreement provided that:

> (1) Screens would be erected within the firm so that only the participating lawyer and certain other named individuals associated with the firm would have access to confidential joint defense information; and
> (2) Nothing in the joint defense agreement would preclude screened lawyers in the firm from undertaking litigation and other matters adverse to non-client members of the joint defense group, including matters that might be deemed to be substantially related to the matter that is the subject of the joint defense agreement.

We acknowledge that it may be difficult in many circumstances to get potential joint defense group members to agree to such an approach.

*Conclusion*

Under the D.C. Rules, joint defense agreements with non-clients do not create "former client" conflicts for lawyers as to those non-clients under Rule 1.9. Joint defense agreements may create obligations to a third party, however, that will cause the individual participating lawyer to have a conflict under Rule 1.7(b)(4) in a proposed new matter adverse to the joint defense group member. However, such conflicts are imputed to other lawyers in the same law firm only if the personally disqualified lawyer's obligations under the joint defense agreement "present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the law firm." Rule 1.10(a)(1). Where the joint defense group matter was handled by the personally disqualified lawyer while at a different law firm, the lawyer's new firm may avoid any imputed disqualification by screening the lawyer from the new matter. When the personally disqualified lawyer remains at the same law firm, however, other lawyers at that firm who are considering undertaking the new matter adverse to the joint defense group member likely will face a disqualifying conflict under Rule 1.7(b)(4) unless it is clear that: (i) none of them has any obligations under the joint defense agreement signed by another lawyer in the same firm; and (ii) none of them was exposed to confidential information about the past representation.

Inquiry No. 09-02-12
Published: September 2009

*Opinion 350*

**Whether A Lawyer Is Obliged To Surrender To A Former Client Work-Product Procured Through The Former Client's Factual Misrepresentations**

A lawyer who drafted a brief and affidavit in reliance upon fraudulent factual misrepresentations made by a former client has no duty under Rule 1.16(d) to surrender these documents to the client. Rule 1.2 prevents a lawyer from assisting a client in conduct that the lawyer knows is fraudulent. Such conduct includes assisting a client in drafting or delivering documents that the lawyer knows are fraudulent. The lawyer may: (1) if practicable and effective, redact all portions of the documents containing misrepresentations and surrender to the client only the redacted documents; (2) if redaction is impractical or ineffective, refuse to produce the entire document to the client; or (3) if the client consents or Rule 1.6(d) is applicable, turn over the unredacted document(s) to the former client's successor counsel with full disclosure as to the fraud contained in the document(s). The lawyer should also write the client demanding the immediate destruction or return of all prior drafts of documents containing the misrepresentations and directing the client not to file such documents with the court.

**Applicable Rules**

- 1.0(f) Definition of Terms
- 1.2(e) Assisting Wrongful Conduct by Client
- 1.6(d) Confidentiality
- 1.16(d) Termination of Representation
- 3.3(a) Candor to Tribunal

*Inquiry*

After drafting a brief and affidavit which included various material factual representations asserted by the client, a lawyer discovered that those representations were false and, refusing to file such fraudulent documents with the court, the lawyer withdrew from the representation. The former client now demands that the lawyer surrender these documents, but the lawyer has reason to believe, though not actual knowledge, that the former client intends to file the brief and affidavit in going forward with the case. The client did not owe the lawyer any outstanding legal fees at the time the lawyer terminated the representation.

*Discussion*

Pursuant to Rule 1.16(d):

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property *to which the client is entitled*. . . .[1]

The Legal Ethics Committee has consistently determined that under the District of Columbia Rules of Professional Conduct, the entire file belongs to the client and must be surrendered to the client upon termination of the representation, unless the client has agreed otherwise or unless the lawyer is permitted by

[1] Emphasis added.

Rule 1.8(i) to retain unpaid attorney work product.[2] Here the Committee is presented, however, with the narrow question of whether a former client is entitled to a lawyer's work product containing fraudulent misrepresentations or omissions. We conclude that he is not.

The lawyer's duty to remove misrepresentations before surrendering the documents arises under Rule 1.2(e), which prohibits the lawyer from assisting a client "in conduct that the lawyer knows is criminal or fraudulent." Particularly instructive is Comment [7], which provides that "the lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent."

Additionally, Rule 3.3(a)(1) prohibits a lawyer from "*knowingly* mak[ing] a false statement of fact or law to a tribunal . . .;" Rule 3.3(a)(2) prohibits a lawyer from "knowingly . . . assist[ing] a client to engage in conduct that the lawyer *knows* is criminal or fraudulent . . ." (emphasis added); and Rule 3.3(a)(4) prohibits a lawyer from "offer[ing] evidence that the lawyer knows to be false." We conclude that a lawyer who knows that the former client's representations are false and has good reason to believe that the former client (whether through another lawyer or *pro se*) intends to file the brief and affidavit containing such misrepresentations would violate Rule 3.3 by surrendering such documents to the former client.[3]

Rather than decline to produce the entire document to the former client, the lawyer may, where practicable and effective, opt to redact all factual misrepresentations of which he knows—and all legal analysis and discussion which rely upon or incorporate such misrepresentations—and surrender only such redacted affidavit and brief. An effective redaction is where the lawyer excises sufficient material, including context where necessary, such that the client cannot simply re-insert the fraudulent facts or misrepresentations and file the brief essentially unchanged from its original fraudulent form.[4]

Even where a lawyer acts with utmost diligence to either withhold the entire document or surrender only a carefully redacted version to the client, there nonetheless remains the potential for the former client to use the lawyer's past services to perpetrate a fraud upon the tribunal. For this reason, the lawyer should also transmit a letter to the former client demanding that the former client immediately destroy or return all prior drafts of documents containing or making use of the misrepresentations and directing the client not to file the brief and affidavit, or an earlier draft thereof.[5]

In the event that the former client attempts to perpetrate a fraud upon the tribunal by filing the fraudulently obtained documents or by forwarding the documents to successor counsel for use on the client's behalf, and if substantial injury to another's financial interests or property are reasonably certain to result from the former client's fraud, then Rule 1.6(d) permits the original lawyer to make disclosure of the fraud to successor counsel or the tribunal, regardless of client consent. Specifically, Rule 1.6(d) provides:

> When a client has used or is using a lawyer's services to further a crime or fraud, the lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> (1) to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another; or
>
> (2) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud.

As such, disclosure is permitted, and not mandated, in those circumstances where substantial injury to a third party's financial interests or property is reasonably certain to result from the former client's fraud, and any disclosure under this rule must be limited to that which is reasonably necessary to prevent, mitigate, or rectify the substantial injury. Alternatively, counsel may disclose the fraud to successor counsel, without concern for 1.6(d)'s limiting factor of reasonably certain substantial injury, if counsel obtains his former client's consent to do so.

*Conclusion*

Rule 1.16(d) does not require a lawyer to surrender to a former client a brief and affidavit that were fraudulently procured through the client's factual misrepresentations. Rather, the lawyer should (1) if practicable and effective, redact the sections of the documents containing factual and legal misrepresentations and surrender only those portions of the documents not containing misrepresentations to the former client, (2) if not practicable or effective, withhold the documents in their entirety, or (3) if the client consents or Rule 1.6(d) is applicable, turn the unredacted document(s) over to the former client's successor counsel with full disclosure of the fraud contained in the document(s).

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[2] *See* Legal Ethics Opinion 250 (Duty to Turn Over Files of Former Client to New Lawyer When Unpaid Fees are Outstanding.); Legal Ethics Opinions 286 (Former Client Files) and Legal Ethics Opinion 333 (Surrendering Entire Client File Upon Termination Of Representation). Rule 1.16(d) references Rule 1.8(i), which permits a lawyer—in very limited circumstances—to retain his or her work product after the termination of the representation where the client failed to pay for such work product. In this case, however, there were no outstanding legal fees owed by the client to the lawyer at the time the lawyer terminated the representation.

[3] We recognize that having "good reason to believe" a fact is different from having actual knowledge of it. *See* Rule 1.0(f) (defines "knowingly" and "knows" as "actual knowledge of the fact in question," which "may be inferred from the circumstances.") While, in the instant case, the lawyer lacks actual knowledge that the former client intends to use the work product in question, the lawyer does have actual knowledge that the client fraudulently procured the lawyer's work product. Under these circumstances, the lawyer's actual knowledge of his client's fraud, taken together with his reasonable belief that the client intends to file the documents, requires that the lawyer refuse to surrender the unredacted documents to the client.

[4] This can be facilitated, for example, by "cutting and pasting" the documents to excise the misrepresentations or by drawing lines in indelible ink through the misrepresentations. The lawyer should also indicate in the redacted document in some clear fashion that the redactions are being made to prevent fraud. The Committee recognizes that distinguishing those portions of the document that the client may otherwise be entitled to receive from those that are predicated on information that is found to be fraudulent, may not always be easy and requires some amount of professional discretion. Arguably, delivering remaining portions of documents that appear to be truthful, but later turn out to also contain misrepresentations may present some risk that the lawyer may be deemed liable for that information he "should have known" was false. However, we think such a standard is too broad and does not have a basis in the language of the rules. Whether redaction of a document is effective rests in the good faith judgment of the lawyer.

[5] Were the lawyer to discover that the client filed an earlier draft of the fraudulent documents, the lawyer *may* reveal the client's misrepresentations "to prevent the client from committing the crime or fraud if it is reasonably certain to result in substantial injury to the financial interests or property of another" or "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud." *See* Rule 1.6(d). A lawyer's *duty* to take prompt remedial measures pursuant to Rule 3.3(d) to correct a fraud perpetrated upon the tribunal does not apply here because a lawyer's obligation to remediate ends with the lawyer's withdrawal from representation. *See* Comment [12] to Rule 3.3.

*Opinion 351*

**Sharing Legal Fees with Clients**

In the particular circumstances presented, the payments to clients contemplated by the inquiries below do not violate Rule 5.4(a)'s prohibition against sharing legal fees with nonlawyers.

**Applicable Rules**

- Rule 1.5(a) (Fees)
- Rule 1.8(d) (Conflict of Interest: Specific Rules)
- Rule 1.15(b) (Safekeeping Property)
- Rule 5.4(a) (Professional Independence of a Lawyer)

*Inquiry*

The Legal Ethics Committee ("Committee") has been asked whether two proposed payments by lawyers to their clients violate the fee-sharing prohibition of Rule 5.4(a) of the D.C. Rules of Professional Conduct ("D.C. Rules").

**Scenario One:** Plaintiff and Lawyer A have a contingent fee agreement under which Lawyer is to receive one-third of any recovery.[1] Plaintiff is offered a $90,000 settlement by Defendant, but Defendant insists that the settlement agreement designate $60,000 as attorney fees and $30,000 as compensatory damages. (The Plaintiff's claim arises under a "fee-shifting" statute that provides for attorney fees.) As contemplated by her agreement with Plaintiff, Lawyer A wants to retain only $30,000 in attorney's fees (one-third) and allocate the other $30,000 (of designated "attorney fees") to Plaintiff. Plaintiff, therefore, would end up with $60,000 of the $90,000 settlement payment, as contemplated by the contingent fee agreement made by Plaintiff and Lawyer A at the beginning of the engagement.

**Scenario Two:** Pro bono Lawyer B receives attorney fees under a fee-shifting statute and wants to give the awarded fees to his client ("Client"), who is an individual. Lawyer B has not made an advance commitment to pay Client the attorney fee or any other sum.

[1] Scenario One offers no explanation for Defendant's proposed allocation of the settlement amount. We express no view on the propriety of Defendant's proposed designation of $60,000 of the settlement amount as "attorney fees" and $30,000 as "compensatory damages," or the propriety of any acquiescence by Plaintiff or Lawyer A in that designation.

*Discussion*

"A lawyer or law firm shall not share legal fees with a nonlawyer." D.C. Rule 5.4(a). One of the five exceptions to this prohibition is relevant to, but not dispositive of, Scenario Two:

> (5) A lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

The prohibition is intended "to protect the lawyer's professional independence of judgment." Comment [1] to D.C. Rule 5.4; *accord* Comment [1] to ABA Model Rule 5.4; Restatement of the Law Governing Lawyers § 10, cmt. b (2000) ("Restatement"). Other authorities have spoken of the need to ensure that the lawyer will control the litigation, the deterrence of solicitation by nonlawyer intermediaries, and the protection of *clients from unreasonably high fees. Emmons, Williams, Mires & Leech v. California State Bar*, 6 Cal. App. 3d 565, 573-74, 86 Cal. Rptr. 367, 372 (Ct. App. 1970); ABA Formal Op. 87-355 (1987); ABA Informal Op. 86-1519 (1986).

A Restatement comment on the prohibition focuses on the situation where the nonlawyer is *entitled* to share the lawyer's fees—a situation that does not obtain in either scenario set out above:

> A person *entitled* to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could lead to inadequate legal services. The Section should be construed so as to prevent nonlawyer control over lawyers' services, not to implement other goals such as preventing new and useful ways of providing legal services or making sure that nonlawyers do not profit indirectly from legal services in circumstances and under arrangements presenting no significant risk of harm to clients or third persons.

Restatement § 10, cmt. b (emphasis added). Moreover, this Committee has counseled against an unduly broad reading of Rule 5.4(a), D.C. Bar Legal Ethics Op. 233 (1993), and the Virginia Bar's ethics committee has said that "application of Rule 5.4(a) must move beyond a literal application of language of the provision to include also consideration of the foundational purpose for that provision." Va. Legal Ethics Op. 1783 (2003); *see Emmons, Williams, Mires & Leech*, 6 Cal. App. 3d at 575, 86 Cal. Rptr. at 373 (focusing on "policy objectives" of the rule).

Most federal fee-shifting laws make attorney fee awards the property of the client, rather than of the lawyer. *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co.*, 76 F.3d 114, 116 (7th Cir. 1996) (Easterbrook, J.); *see, e.g., Evans v. Jeff D.*, 475 U.S. 717, 730 (1986) (Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988); *Venegas v. Mitchell*, 495 U.S. 82, 87 (1990) (same).[2] Some federal fee-shifting statutes, though, envisage awards to the lawyer, *e.g., Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977) (Age Discrimination in Employment Act), and some state laws do the same, e.g., *Flannery v. Prentice*, 28 P.3d 860, 862 (Cal. 2001) (California Fair Employment and Housing Act).[3] Awards made to the client, of course, do not implicate Rule 5.4(a). *See Central States*, 76 F.3d at 116 (where statutory fees are client's property, their contractual allocation between client and lawyer does not raise a fee-splitting issue).

We do not think that either proposed payment would constitute a prohibited sharing of legal fees. In Scenario One, the "fee" for purposes of Rule 5.4(a) is the amount agreed upon in advance between Plaintiff and Lawyer A. It is not the sum designated in the settlement agreement as "attorney fees." This is so even if the applicable fee-shifting statute assigns ownership of such funds to the lawyer. The fact of the advance agreement ensures that the proposed payment would not interfere with the lawyer's independence of judgment or contravene the other rationales for the prohibition

[2] The Supreme Court soon will consider whether Equal Access to Justice Act (EAJA) fee awards belong to the lawyer or the client. *Compare Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008) (EAJA awards are made to attorney, not client), *cert. granted*, 174 L. Ed. 2d 631, 2009 U.S. LEXIS 5148, 78 U.S.L.W. 3169 (No. 08-1322) (Sept. 30, 2009), *and Marre v. United States*, 117 F.3d 297, 304 (5th Cir. 1997) (same), *with Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009) (EAJA awards are made to client), *and Reeves v. Astrue*, 526 F.3d 732 (11th Cir. 2008) (same). The Court's decision in *Ratliff* should not affect the conclusions of this opinion. If EAJA fees are the property of the client, there presumably is no issue under Rule 5.4(a). If the award is the property of the lawyer, this opinion presumably will apply in respect of EAJA awards in the same way it applies to awards under other fee-shifting statutes.

[3] *Flannery* indicates that its rule can be varied by "an enforceable agreement to the contrary" between lawyer and client. *Flannery*, 28 P.3d at 862.

that are noted above. Indeed, a failure by Lawyer A to give Plaintiff $60,000 of the $90,000 settlement amount would violate the contingent fee agreement, *see Venegas*, 495 U.S. 82 (lawyer and client may agree to a fee that exceeds the amount ultimately awarded under 42 U.S.C. § 1988); Va. Legal Ethics Op. 1783 (2003) (sustaining payment to client of portion of "fee" received from adverse party that exceeds fee contractually agreed upon between lawyer and client), might constitute an improper withholding of client funds in violation of Rule 1.15(b), *see In re Haar*, 667 A.2d 1350 (D.C. 1995), and—given that $60,000 represents two-thirds of the settlement amount—might constitute an unreasonable fee in violation of Rule 1.5(a).

In Scenario Two, we assume that the fee award to which the inquiry refers is the property of Lawyer B rather than Client. Otherwise there presumably would be no issue under Rule 5.4(a). *See Central States*, 76 F.3d at 116; *Turner v. Secretary of the Air Force*, 944 F.2d 804, 808 (11th Cir. 1991) (court's award of statutory attorney fees to client does not violate prohibition on *attorney's* splitting fees with client). Also, we understand that there has been no advance commitment by Lawyer B to pay Client an amount equal to Lawyer B's fee or, for that matter, any amount. Accordingly, we think the proposed payment is not the sharing of a fee but an *ex gratia* payment.[4] *See National Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848, 853-54 (D.C. Cir. 1981) (noting that lawyers are not prohibited from donating their fees to charity or to their employers); *Jordan v. United States Dep't of Justice*, 691 F.2d 514, 516 n. 14 (D.C. Cir. 1982) (same).

Finally, neither scenario implicates Rule 1.8(d)'s prohibition on advancing or guaranteeing financial assistance. This is because there is no indication in either instance that the lawyer promised, let alone made or guaranteed, any such payment while the litigation was pending.

This Committee's charter limits it to addressing whether the proposed payments violate the D.C. Rules. D.C. Bar Legal Ethics Comm. R. A–1, C–4. We accordingly do not address such issues as the tax consequences of the proposed payments.

*Conclusion*

Accordingly, in the specific circumstances presented by these inquiries, neither proposed payment by a lawyer to the client would violate the fee-sharing prohibition of D.C. Rule 5.4(a).

Adopted: November 2009

*Opinion 352*

**Professional Responsibility Duties for Temporary Contract Lawyers and the Firms that Hire Them**

The imputation of a temporary contract lawyer's individual conflicts to a hiring firm under D.C. Rule 1.10 depends on the nature and extent of the lawyer's relationship with the firm and the extent of the temporary lawyer's access to the firm's confidential client information. A temporary contract lawyer who works with the same firm sporadically on a few different projects, or on a single project for a longer period of time, would not be "associated with" the hiring firm if the firm does not have or otherwise create the impression that the temporary contract lawyer has a continuing relationship with the firm, and the firm institutes appropriate safeguards to ensure that the temporary contract lawyer does not have access to the firm's confidential client information except for the specific matter or matters on which he is working.

In addition, the temporary contract lawyer and the hiring firm must protect the confidentiality of all client information, and the firm must take appropriate steps to avoid obtaining the confidences and secrets the temporary contract lawyer learned during his former employment.

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.9 (Duties to Former Clients)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 4.4 (Respect for Rights of Third Persons)

*Inquiry*

The Committee has received an inquiry from a temporary contract lawyer who works for Law Firm A, which is representing a party in a multi-party case. The project the temporary contract attorney was hired to perform ends, and Law Firm A terminates the contract. The litigation of the case continues. Law Firm B, a firm representing another party adverse to the party Law Firm A represents in the same or a substantially related case, wants to hire the temporary contract lawyer to perform work on an unrelated matter.[1]

The temporary contract lawyer would work solely on a single matter for Law Firm B, performing tasks such as digesting transcripts and reviewing discovery documents for responsiveness and privilege. The temporary contract lawyer works through a number of temporary service agencies that have an arrangement under which Law Firm B pays for the temporary contract lawyer's services.

The temporary contract lawyer might work for Law Firm B at a satellite office, essentially a warehouse resembling a call center, but with computer terminals instead of telephones. Alternatively, the temporary contract lawyer might work in a conference room or other utility space onsite at Law Firm B set up specifically for the project that is segregated from the rest of the firm's premises. The documents pertaining to the temporary contract lawyer's assignment would be accessed electronically by a secure line restricted to review of the documents only for the single unrelated matter. On the basis of these facts, the temporary contract lawyer asks whether his individual conflicts would be imputed to Law Firm B under D.C. Rule 1.10(b).

The Committee also recognizes that because of the imputation provisions of D.C. Rule 1.10(b), temporary contract lawyers often may have difficulty surviving a firm's conflict review process because they frequently move from one law firm to another and repeatedly go through the conflicts review process. As a result, their ability to find work may be significantly restricted. Therefore, we also provide some general guidance regarding the circumstances when a temporary contract lawyer may be "associat-

[4] Given the express, specific exception in Rule 5.4(a)(5) for payments to certain charitable organizations, though, we think the proposed payment would be prohibited by Rule 5.4(a) had it been agreed upon between Lawyer B and Client, an individual, or promised by Lawyer B, in advance. This is because a limited express exception ordinarily means that other, similar potential exceptions are not granted. The relevant legal maxim is *expressio unius est exclusio alterius* (i.e., the expression of one thing implies the exclusion of others).

[1] The temporary contract lawyer is personally prohibited from working on the same or substantially related matter for an adverse party under D.C. Rule 1.9, unless the former client consents. *See* D.C. Rule 1.9 ("A lawyer who has previously represented a client in a matter shall not 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.").

ed with" a hiring firm, and his conflicts accordingly imputed to the firm.

*Discussion*

In Opinion 284, the Committee defined a "temporary lawyer" as:

> one who is not a partner and who is employed by a practitioner or a law firm to work on either a specific project or matter or for a fixed or otherwise limited period of time. If the relationship is expected to last indefinitely, regardless of whether it actually does, the [lawyer is not considered to be a temporary lawyer].

D.C. Legal Ethics Opinion 284 (1998). The Committee noted that part-time lawyers who work exclusively with one firm for an indefinite period of time are not temporary lawyers. The Committee pointed out that a "temporary lawyer may be hired directly or through an employment agency for a fee, and may be paid directly by the law firm or by the agency." *Id.* The Committee also recognized that there is wide array of employment arrangements between hiring firms and temporary contract lawyers. *Id.* As a result, whether a temporary contract lawyer is "associated with" a firm will depend on the facts and circumstances of each situation.

D.C. Rule 1.10(b) governs the imputation of conflicts for lawyers moving from one firm to another. The rule provides in relevant part:

> When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer in fact acquired information protected by Rule 1.6 that is material to the matter.

Thus, typically, if a lawyer leaves one law firm to work at another law firm, the lawyer's new firm would be prohibited from representing a client with interests materially adverse to those of the lawyer's former client in the same or substantially related matter if the lawyer has material confidential information about the matter. *See* D.C. Rule 1.10, cmt. [17] ("[U]nder paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters."); D.C. Rule 1.10, cmt. [15] ("The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6."); D.C. Rule 1.6 ("Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.")[2]

D.C. Rule 1.10(b) applies only when a lawyer is "associated with a firm." Comment [1] to D.C. Rule 1.10 provides guidance regarding when lawyers are associated in a firm:

> [T]wo practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve.

D.C. Rule 1.10, cmt. [1].

The Committee previously has considered whether a contract lawyer would be associated with a firm under D.C. Rule 1.10(a)[3] where a law firm sought to hire a former firm lawyer on a contract basis to assist in providing legal services to some of the firm's clients. *See* D.C. Legal Ethics Opinion 255 (1995). In that situation, the former lawyer was not included on the firm's letterhead or in other listings of the firm's lawyers. The firm screened the lawyer from confidential information about firm clients on matters in which he was not employed as an independent contractor. *Id.* In addition, the firm's promotional materials and letters to clients that mentioned his availability would make clear that he was available to work on specific matters on a case-by-case basis and that he was not going to have a continuing relationship with the firm. *Id.* Based on these facts, the Committee concluded that:

> [T]he association of a lawyer with a firm on an ad hoc, case-by-case basis does not create that kind of continuing relationship, triggering imputation under Section 1.10 of the individual lawyer's disqualifications to the firm–except with respect to the individual matters on which the lawyer is associated with the firm–so long as the firm does not create the impression among its clients or the public at large that such a continuing relationship exists.

*Id.*

The Committee also has addressed whether attorneys who share office space and/or services are associated in a firm under D.C. Rule 1.10. *See* D.C. Legal Ethics Opinion 303 (2001). The Committee opined that attorneys participating in such arrangements must take all steps reasonably necessary to protect the confidentiality of their individual client information and the independence of their respective practices. *Id.* The Committee added that any sharing arrangements should be structured to avoid creating the impression that the attorneys are affiliated with one another. *Id.* The Committee concluded that office- and/or service–sharing arrangements could create imputed conflicts for the participating attorneys, but noted that any particular situation would have to be evaluated on a case-by-case basis.*Id.*

As the comment to Rule 1.10 and our prior opinions suggest, whether a temporary contract attorney is "associated with" a hiring firm will depend on the scope of the attorney's relationship with the firm, the length of the attorney's service to the firm, and the potential for his exposure to the firm's confidential client information. The analysis is not affected by whether the hiring firm or a contracting agency directly pays the temporary contract lawyer.

In the specific situation presented by this inquiry, the temporary contract lawyer does not have a past or ongoing association with Law Firm B. Law Firm

[2] The clients may waive a firm's disqualification under D.C. Rule 1.10. *See* D.C. Rule 1.10(d) ("A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.").

[3] D.C. Rule 1.10(a) provides that: "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: (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversly affecting the representation of the client by the remaining lawyers in the firm; or (2) the representation is permitted by Rules 1.11, 1.12, or 1.18."

B hired him to work on one project of limited duration. He will work in a separate location away from the firm's office space or in a segregated area within the firm. His electronic access to the firm and the confidential information of its clients is confined to the specific project on which he is working. We think that in this circumstance the temporary contract lawyer would not be "associated with" the hiring firm (Law Firm B), and thus, his conflicts would not be imputed to Law Firm B under D.C. Rule 1.10(b). Accordingly, the hiring firm must conduct a conflict check only for the matters on which the temporary contract lawyer will be working for the firm.

On the other hand, a temporary contract lawyer who is located in a firm's office space, works simultaneously on multiple projects for the firm, is listed on the firm's website or other directories, and has access to the firm's e-mail system and electronic documents would be "associated with" the contracting firm.

In contrast, a temporary contract lawyer who works intermittently with the same firm on a small number of projects or on one long-term assignment would not be "associated with" the contracting firm so long as the firm does not have an ongoing relationship with the temporary contract lawyer. The contracting firm also must avoid creating the impression that the temporary contract lawyer is "associated with" the firm by listing him on the firm's letterhead, website or other directories, permitting him to use the firm's business cards, or introducing him to clients and others as a long-term member of the firm. In addition, the firm must take all appropriate steps to ensure that the temporary contract lawyer has access only to the confidential client information for the matter on which he is working.[4]

In circumstances where a temporary contract lawyer is not "associated with" the hiring firm, the temporary contract lawyer and the hiring firm still have professional responsibility obligations. The temporary contract lawyer must preserve any confidential client information learned during his prior employment. *See* D.C. Rule 1.6(g) ("The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment."); D.C. Rule 1.10, cmt. [16] ("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* Rule 1.6.").

The law firm must institute safeguards to prevent the improper disclosure or misuse of the firm's confidential client information, including talking with the temporary contract lawyer about his duty to avoid obtaining such information and executing a confidentiality agreement memorializing this understanding. *See* D.C. Rule 4.4(a) ("In representing a client . . . a lawyer shall not knowingly use methods of obtaining evidence that violate the legal rights of . . . a [third] person."). If the temporary contract lawyer is located in the firm's office space, the firm must take extra precautions to ensure that the temporary contract lawyer will not have access to the firm's confidential client information. The firm should locate the temporary contract lawyer in a place that is plainly designated for the temporary contract lawyer so that firm personnel will not leave confidential information in that space. Other safeguards might include securing file cabinets and storage areas containing confidential client files, notifying attorneys and staff not to discuss the firm's cases with the temporary contract lawyer, instructing attorneys and staff about their obligations to preserve the confidential information of the firm's clients and maintaining appropriate oversight over firm employees to ensure that they comply with these obligations. *See, e.g.* D.C. Legal Ethics Opinion 279 (1998) (discussing elements of an effective screen to avoid imputed conflicts).

The hiring firm also must take steps to avoid obtaining any confidential client information the temporary contract attorney learned during his former employment. *See* D.C. Rule 4.4(a); D.C. Legal Ethics Opinion 285 (1998) (Rule 4.4 prohibits attorneys in law firms that hire former government employees with confidential government information from inducing the employee to disclose privileged or statutorily protected information); D.C. Legal Ethics Opinion 227 (1992) (opining that firm must not exploit any confidences or secrets paralegal obtained during her former employment).

*Conclusion*

Whether a temporary contract attorney is "associated with" the hiring firm pursuant to D.C. Rule 1.10(b) is a fact-bound inquiry and will depend on the scope and nature of the temporary contract attorney's relationship with the firm and the potential for his exposure to the confidences and secrets of the firm's clients for matters on which he is not working. When a temporary contract lawyer works on a single project for a firm, is physically segregated from the firm's office space, and has no access to the confidential information of the firm's other clients, he would not be associated with the contracting firm, and his conflicts would not be imputed under D.C. Rule 1.10(b).

The temporary contract lawyer and the hiring firm must preserve any confidential client information, and the firm should employ appropriate prophylactic measures to secure such information. The hiring firm also should take appropriate steps to protect the confidential information the temporary contract lawyer learned during his prior employment.

*Opinion 353*

**Whether a lawyer representing a client with diminished capacity can seek the appointment of a substitute surrogate decision-maker when the current surrogate decision-maker is making decisions for the client against the advice of the lawyer**

A lawyer representing an incapacitated person with a surrogate decision-maker should ordinarily look to the client's chosen surrogate decision-maker for decisions on behalf of the client and accord the surrogate decision-maker's choices the same weight as those of a client when the client is unable to express, or does not express, a contrary view. A lawyer may not substitute her judgment for the judgment of the surrogate decision-maker when the surrogate decision-maker is acting within the scope of the power afforded to her by law, was selected by the incapacitated person before becoming incapacitated, and is not engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to withdraw from representation of a client acting in the same manner. If the surrogate decision-maker is engaged in conduct creating a risk of substantial harm or acting in a manner that would otherwise require a lawyer to

[4] Some firms may not have off-site space for temporary contract lawyers, and the firm's premises may not be equipped to accommodate a segregated space for them. In this instance, a hiring firm may avoid imputation of the temporary contract lawyer's conflicts only if the firm can demonstrate that alternative physical arrangements were not feasible, and it employs the prophylactic measures discussed in this opinion or their functional equivalent.

withdraw from representation of a client acting in the same manner, then the lawyer may take protective action including seeking a substitute decision-maker. The lawyer may not withdraw because a withdrawal will substantially harm the client and no grounds for a prejudicial withdrawal under Rule 1.16(b) exist.

**Applicable Rules**

- Rule 1.2 (Scope of Representation)
- Rule 1.14 (Client with Diminished Capacity)
- Rule 1.16 (Declining or Terminating Representation)

*The Inquiry*

A lawyer has requested guidance for resolving the following dilemma: the lawyer was hired by a durable power of attorney agent (POA agent) to represent an elderly incapacitated individual in a foreclosure suit involving that individual's residence.[1] The client is unable to communicate. The POA agent is the client's granddaughter as well as the client's primary caregiver. The client selected her granddaughter to be her POA agent before the client became incapacitated. The lawyer filed suit on the client's behalf alleging that the mortgage was an unconscionable, predatory home loan. The mortgage company is defending against the suit claiming the mortgage was fair, the family knew about the terms, and the family, including the POA agent, spent the money on themselves. According to the inquirer the family denies the allegations but the allegations have tainted the litigation. To improve the atmospherics and maintain the focus of the litigation on the nature of the loan, the lawyer asked the POA agent to resign in favor of an independent agent to present a "clean" agent to the court. The POA agent refused. The lawyer asks if he can or must withdraw based on the POA agent's alleged bad acts or whether he may pursue a substitute guardianship in spite of the POA agent's refusal to step down.

The question of pursuing a substitute guardian under these circumstances is one for which there is no clear answer. Instead a lawyer in this situation must engage in reasonable deliberation employing the framework provided by Rule 1.14. The lawyer could use information derived from the allegations made by the defendants to present to the court an ex parte request for a substitute guardian for the limited purpose of pursuing the foreclosure litigation. Alternatively, the lawyer could pursue the litigation with the current POA agent in place. As we discuss below, the choice between the two options depends on a reasoned assessment of the risks attendant to proceeding with the current POA agent weighed against the previously expressed wishes of the incapacitated person when she selected her POA agent.[2]

*Discussion*

The D.C. Rules of Professional Conduct regulate most aspects of the attorney-client relationship. Most duties imposed run from attorneys to clients. In its simplest form, a legally competent client hires a lawyer or firm to perform a distinct legal task. In such instances, it is easy to identify the client, and the client has no difficulty communicating with the attorney and making decisions regarding the representation.

Rule 1.14 addresses circumstances, such as those presented by this inquiry, when this paradigm breaks down. The Rule does so by creating a framework for modifying the ordinary relationship. In the first instance, the Rule directs that a "lawyer shall, as far as reasonably possible, maintain a typical client-lawyer relationship with the client" when "a client's capacity to make adequately considered decisions in connection with a representation is diminished." D.C. Rule 1.14(a). As explained in the treatise The Law of Lawyering

> Rule 1.14(a) establishes a preference for maintaining client-lawyer relationships that are normal 'as far as reasonably possible.' At some point, however, the ability of a disabled client to communicate or to take action is so limited that assigning that person the role of 'client' is a mere formality . . . . At that point, Rule 1.14(b) permits a lawyer to seek guidance from a guardian or to take other 'protective action.'

Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, 18-4.1 (3rd ed. Supp. 2004-2).

Rule 1.14 does not specifically address the role of the surrogate decision-maker. The comments to the Rule, however, state that "[i]f a surrogate decision-maker has already been appointed for the client, the lawyer should ordinarily look to that person for decisions on behalf of the client. . .[but] the lawyer should consult with the represented person to the maximum extent possible, as indicated in comment [2] above." D.C. Rule 1.14, Comment [4].

Comment [2] instructs that

> [t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a surrogate decision-maker, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication. "Surrogate decision-maker" denotes an individual or entity appointed by a court or otherwise authorized by law to make important decisions on behalf of an individual who lacks capacity to make decisions in one or more significant areas of his or her life.

D.C. Rule 1.14, Comment [2]. Thus, as here, when a client who has a POA agent is incapable of communicating with the lawyer, the lawyer would "ordinarily" look to the POA agent for all decisions made by a client.

The question of whether to seek a change in the POA agent for purposes of

[1] We assume that the only client of the lawyer in this matter is the incapacitated person. In this instance, it is possible, absent clear instructions to the contrary, that the POA agent may believe she is also a client. The POA agent is not a lawyer and although the retainer agreement identifies the incapacitated person as the client, the verified complaint and discovery responses are signed and/or sworn to by the POA agent; the POA agent has been told that her communications with the lawyer are confidential; the communications between the POA agent and the lawyer have been treated as confidential by opposing parties; the POA agent lives in the residence that is the subject of the litigation; and the POA agent initiated the representation and signed the retainer on behalf of the client who is the owner of the home. If there is an attorney-client relationship with the POA agent as well as with the incapacitated person, a different analysis would apply and the rules governing conflicts would have to be analyzed. Because "[p]rinciples of substantive law external to [the D.C. Rules of Professional Conduct] determine whether a client-lawyer relationship exists" we do not assess whether the POA agent is also a client of the lawyer. D.C. Rule 1.6 Comment [9].

[2] For purposes of this opinion, we make several assumptions that shape the analysis. First, we assume that the POA agent has the legal authority under District of Columbia law to make the decisions discussed in this opinion for the client. *See* D.C. Code § 21-2001 *et seq.* (Guardianship, Protective Proceedings and Durable Power of Attorney). Second, we assume that the client is entirely unable to communicate her desires. Third, we assume that there is no other source of information about the client's desires with respect to the house or the litigation to prevent the foreclosure. For example, that she had not previously written out her desires about her home. And, finally, we assume as noted above that the only client of the lawyer in this matter is the incapacitated person.

pursuing this litigation is a decision for which, under a normal attorney-client relationship, the attorney must defer to the client. Rule 1.2 requires that a lawyer "abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued." D.C. Rule 1.2(a). Comment [1] to D.C. Rule 1.2 addresses the distinction between the objective and means:

> A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

D.C. Rule 1.2, Comment [1]. Though characterized by the inquirer as a means to advance the foreclosure litigation, replacing the POA agent is an objective of representation, as well as a means to advancing the foreclosure suit. As a means it is closer to "such questions as the expense to be incurred and concern for third persons who might be adversely affected" than it is to "technical and legal strategy." Thus in this circumstance the lawyer would typically "defer to the client," which, under these facts, means "ordinarily" looking to the POA agent for the decision.[3]

We are presented with the question of whether a disagreement between the lawyer and the surrogate decision-maker on a matter that is for the client to decide is an extraordinary circumstance in which the lawyer should not abide by the surrogate decision-maker's wishes on behalf of a client with diminished capacity. The tenor of Rule 1.14 and the comments to the Rule make clear that the drafters envisioned extraordinary circumstances as those in which the client disagrees with the surrogate decision-maker and may have the capacity to make decisions on the particular issue in dispute.[4] That is not the circumstance presented here.

Rule 1.14 and the comments also address the ability of a lawyer to take protective action for a client with diminished capacity who does not have a POA agent. Rule 1.14 permits protective action "when the lawyer reasonably believes that the client has diminished capacity" and "is at risk of substantial physical, financial or other harm unless action is taken . . ." D.C. Rule 1.14 (b). If this threshold is met, the lawyer may "consult[] with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seek the appointment of a surrogate decision-maker." *Id.* Neither the Rule nor the comments explicitly address the circumstance here, namely that there is a surrogate decision-maker who is acting within her authorized power but refuses to follow the advice of counsel.

The tension presented by this inquiry is described in *The Law of Lawyering.*

> When the three-way relationship is functioning properly, the guardian can be thought of as the "primary client", as described in §2,7, while the impaired person—or perhaps the best interests of the impaired person—becomes the "derivative" client. The lawyer functions appropriately by assisting the primary client in carrying out his "objectives," which the law assumes will usually be in the best interests of the disabled person. When the person's disability is so severe that there is not even an ability to formulate or communicate ideas, the lawyer should realize that the guardian is no more capable of ascertaining the person's best interests than is the lawyer, *but neither is he any less able to do so.* In this context the "best interest" of the disabled person is an abstraction, and the lawyer has no special ability to second-guess on behalf of the derivative client.
>
> On the other hand, there may be cases in which it is obvious where the disabled person's best interests lie, and that the guardian is acting contrary to them. In such cases (a conservator looting his ward's estate is the most obvious example), the lawyer may have a duty to act adversely to one client in order to serve the other, as in other situations involving primary and derivative clients.

Hazard & Hodes, *The Law of Lawyering*, 18-16 (emphasis in the original).

Is failing to follow the advice of the attorney in this circumstance obviously contrary to the incapacitated person's interests such that the lawyer can take action counter to the POA agent's direction? We think the answer comes from the guidance provided in Rule 1.14 for taking protective action.

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

D.C. Rule 1.14(b).

It could be argued that the POA agent has a conflict of interest with the client with respect to this decision and should remove herself as the surrogate decision-maker. On the other hand, the POA agent is the client's granddaughter. She lives with her grandmother. She has an interest in winning the litigation. She is the primary caregiver. The client selected her as the POA agent before the client became incapacitated. Maintaining her role as the POA agent is consistent with "respecting the client's family and social connections" and with "the wishes and values of the client to the extent known." D.C. Rule 1.14, Comment [5].[5] Although the surrogate decision-maker is not completely disinterested, this is not an instance of a conservator looting her ward's estate.

In this instance, while the inquirer expressed some concerns about the POA's past conduct, nothing in the inquiry sug-

[3] For clients with diminished capacity, Rule 1.2 directs a lawyer to Rule 1.14 – "In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to D.C. Rule 1.14" (D.C. Rule 1.2 Comment [2]) – which in turn directs a lawyer to the surrogate decision-maker.

[4] This opinion does not address circumstances in which the client can communicate his desires and those desires conflict with the direction being given by the POA agent. An analysis of a dispute between the client and the POA agent requires assessing the specific authority of the surrogate decision maker, *see* D.C. Code § 21-2001 *et seq.* (Guardianship, Protective Proceedings and Durable Power of Attorney), and assessing the capacity of the client to make the decisions in question, see comment [1] to Rule 1.14, (minors, the elderly, and the mentally ill "often [have] the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."). When a client with diminished capacity can communicate his desires, Rule 1.14 directs the lawyer to maintain a "typical client-attorney relationship" and thus may require that the lawyer advocate against the direction of the POA agent or seek a substitute agent. D.C. Rule 1.14(a).

[5] The District of Columbia's Guardianship Act also gives preference to the incapacitated person's choice. "Unless lack of qualification or other good cause dictates, the court shall appoint a guardian in accordance with the incapacitated individual's current stated wishes or his or her most recent nomination in a durable power of attorney." D.C. Code § 21-2043(b). *See also* D.C. Code § 21-2057 (a) (1) and (2) (appointment of a conservator).

gests that the POA agent is currently engaged in criminal conduct, intends to engage in criminal conduct, or intends to use the lawyer's services to engage in criminal conduct or perpetrate a fraud on the court. Nor is there any indication that the POA agent is currently failing to provide ongoing care to the client, or failing to pursue any legal recourse to prevent the foreclosure. As explained below, if any of these circumstances was present, the lawyer would be permitted to take protective action, including seeking a substitute decision-maker.

Thus, neither the POA agent's interest nor allegations of past bad conduct requires protective action by the lawyer. Instead, the determination of whether protective action is permitted comes down to one of reasoned judgment about the impact of the POA agent's decision not to withdraw and her ongoing presence in the litigation.

If the difference between the lawyer's recommended course of action for withdrawal and the course preferred by the POA agent does not rise to the circumstance that would allow a lawyer to take protective action on behalf of a client if the disagreement was between the lawyer and a client with diminished capacity, then it is not permissible for a lawyer to take action against the directive of the client's surrogate decision-maker. Thus, if the ongoing presence of the POA agent in the litigation does not create a risk of substantial harm, the lawyer cannot seek a new surrogate decision-maker.

On the other hand if, in the lawyer's judgment, the failure to secure a "clean agent" presents a substantial risk that the client will lose her residence, then protective action can be taken. That action should be narrowly fashioned.[6] In the instant case, the information used to pursue a new surrogate should be limited to the allegations made by the defendant and the scope of the substitute guardianship should be limited to the instant litigation.

The inquiry also asked if withdrawing from the matter was required or an available option. According to the inquirer, withdrawal at this stage in the litigation will likely result in the residence being lost. Withdrawal that would harm the client is only permitted in five enumerated circumstances:

> [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> (1) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
>
> (2) The client has used the lawyer's services to perpetrate a crime or fraud;
>
> (3) The client 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;
>
> (4) The representation will result in an unreasonable financial burden on the lawyer or obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult;
>
> (5) The lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

D.C. Rule 1.16(b).

None of these circumstances are present here. Further, it is difficult to imagine a circumstance under which permissive withdrawal causing substantial harm would be appropriate when representing a client with diminished capacity. Instead, if the client or the POA agent were to engage in the conduct described in Rule 1.16(b) that would ordinarily cause a lawyer to withdraw, that is a circumstance under which the lawyer should take protective action pursuant to Rule 1.14. This could include seeking the appointment of a surrogate decision-maker if the client does not have one, or seeking a substitute surrogate decision-maker where the client does have one.

*Conclusion*

Representation of incapacitated clients can be difficult. The Rule guiding the attorney-client relationship with clients with diminished capacity is permissive and a rule of reason. "When the lawyer reasonably believes that the client . . . is at risk . . . the lawyer may take reasonably necessary protective action . . . ." D.C. Rule 1.14 (b). These cases will turn on the specific circumstances and the reasonableness of the decisions made by the lawyer.

In this opinion, we address a narrow set of facts—a severely incapacitated client, a previously selected surrogate decision-maker acting within the scope of the power afforded to her by law, and a disagreement about one part of the litigation. In this instance, the lawyer should look to the surrogate decision-maker unless the surrogate decision-maker's choice creates a risk of substantial physical, financial, or other harm to the incapacitated person.

*Opinion 354*

**Providing Financial Assistance to Immigration Clients Through Lawyer's Execution of Affidavit of Support on Form I-864 as a Joint Sponsor**

Lawyers in immigration matters may not execute an Affidavit of Support (U.S. Citizenship and Immigration Services Form I-864) on the immigrant's behalf as a joint-sponsor while continuing to represent the immigrant in the matter. Typically, a person who signs an Affidavit of Support agrees to support the immigrant at an annual income that is not less than 125 percent of the federal poverty level so that the immigrant will not become a public charge. The ensuing contractual obligations continue for years after the immigrant is admitted on the basis of the Affidavit of Support. The Affidavit of Support is a guarantee of financial assistance to a client. Such guarantees are generally prohibited by Rule 1.8(d). Because the obligations continue long after the completion of the immigration proceeding, the undertaking does not fit within the narrow safe harbor of Rule 1.8(d)(2), which allows, but does not require, financial support strictly necessary to sustain the client during a proceeding. An Affidavit of Support undertaking by a lawyer to a client is also fraught with peril under Rule 1.7(b)(4) (conflicts of interest). Thus, a lawyer who wishes to serve as a joint sponsor for an immigration client by executing an Affidavit of Support on the immigrant's behalf must withdraw from the representation of that client before doing so.

**Applicable Rules**

- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.8(d) (Conflict of Interest: Advancing or Guaranteeing Financial Assistance to Client)
- Rule 1.16 (Declining or Terminating Representation)

[6] Comments [5] and [7] to Rule 1.14 address protective action and make clear that while the evaluation of the circumstances "is entrusted to the professional judgment of the lawyer," the actions taken should be the "least restrictive form of intervention" and should be guided by "the wishes and values of the client to the extent known, the client's best interest, 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."

*Inquiry*

In many immigration matters, federal law requires a U.S. relative who files an immigrant petition on behalf of an alien relative to sign an enforceable contract under which the sponsor agrees to maintain the sponsored immigrant at an annual income that is not less than 125 percent of the federal poverty line. That contract takes the form of an "Affidavit of Support" on U.S. Citizenship and Immigration Services ("USCIS") Form I-864, which also requires extensive financial disclosures to establish that the signer has the means to satisfy the obligations it imposes. If the U.S. relative does not have a sufficient level of income or assets, he or she may seek a joint sponsor to sign an Affidavit of Support on behalf of the intending immigrant. Those obligations assumed by the sponsor (the U.S. relative) or the joint sponsor (another person signing a Form I-864) may last for up to ten years and may be enforced against the sponsor(s) by the immigrant, by the federal government, by any state or political subdivision of a state, or by any other entity that provides any means-tested public benefit. By signing the Affidavit of Support, the sponsor and the joint sponsor also agree to submit to the jurisdiction of any federal or state court for the purpose of enforcing those obligations. We have been asked whether the Rules of Professional Conduct permit a lawyer who is representing the prospective immigrant in the immigration matter to sign an Affidavit of Support as a co-sponsor in support of the client's application, thereby undertaking significant and long-term financial obligations to the client.

*Analysis*

Under federal law, prospective immigrants who are "likely at any time to become public charges" are "inadmissible." 8 U.S.C. § 1182(a)(4)(2010). USCIS thus requires proof that intending immigrants will not require public support. For family-based and certain employment-based immigration applications, the required showing is made through the filing of an "Affidavit of Support" by one or more persons who are sponsoring the immigrant. 8 U.S.C. § 1182(a)(4)(C)(ii), 1182(a)(4)(D), 1183(a)(2010).[1]

The Affidavit of Support[2] is an enforceable contract in which the signing sponsor "agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable." 8 U.S.C. § 1183(a)(1)(A).[3] This is a significant financial obligation, as illustrated by the following chart on USICS Form I-864P based on the 2009 Poverty Guidelines for the 48 Contiguous States and the District of Columbia:

| Sponsor's Household Size | 100% of Poverty Guidelines<br>For sponsors on active duty in the U.S. Armed forces who are petitioning for their spouse or child | 125% of Poverty Line<br>For all other sponsors |
|---|---|---|
| 2 | 14,570 | $18,212 |
| 3 | 18,310 | $22,887 |
| 4 | 22,050 | $27,562 |
| 5 | 25,790 | $32,237 |
| 6 | 29,530 | $36,912 |
| 7 | 33,270 | $41,587 |
| 8 | 37,010 | $46,262 |
| | add $3,740 for each additional person | Add $5,675 for each additional person |

http://www.uscis.gov/files/form/i-864p.pdf (last visited January 7, 2010).[4]

The obligation "is legally enforceable against the sponsor by the sponsored alien, the Federal Government, any State (or any political subdivision of such State), or by any other entity that provides any means-tested public benefit." 8 U.S.C. § 1183(a)(1)(B). By signing the form, the sponsor also agrees to submit to the jurisdiction of "any federal or state court" for the purpose of enforcement of the obligations. 8 U.S.C. § 1183(a)(1)(C). Immigrants have successfully sued their sponsors to enforce these obligations.[5]

The sponsor must provide detailed information about the sponsor's own finances to show that he or she has the means to satisfy the support obligations. Should the immigrant ever apply for any means-tested public benefits, the sponsor's finances will be considered in determining whether the immigrant qualifies for the support. The same requirements apply to a joint sponsor who signs an Affidavit of Support on behalf of an intending immigrant.

The affidavit becomes enforceable against the sponsor(s) when the immigrant is admitted to the United States pursuant to the requested change in status. It expires only when the immigrant (1) becomes a U.S. citizen; (2) dies or permanently departs from the United States; or (3) is credited 40 quarters (or ten years) of work for Social Security purposes.[6]

Typically, the immigrant's sponsor is a spouse or another close relative (e.g., a parent or sibling) who can submit an immigrant petition on behalf of the intending immigrant. However, if that sponsor lacks the financial means to make the necessary showing, a "joint sponsor" may be enlisted to undertake the required support obligation. Our Committee has been asked whether the lawyer who is representing the immigrant with respect to the requested change of status from non-immigrant to U.S. permanent resident ("green card") status may also act as the immigrant's joint sponsor by executing an Affidavit of Support on the immigrant's behalf.

We assume that a lawyer would consider doing so only in extraordinary circumstances. The lawyer's own financial resources limit the lawyer's ability to do this. Moreover, each outstanding Affidavit of Support executed by the lawyer further limits the lawyer's ability to sponsor others for immigration to the United States, including the lawyer's own family members. Liability under the affidavit years after its signing could adversely affect the lawyer's ongoing ability to provide for the lawyer's personal and family needs.

Historically, lawyer conduct rules in many jurisdictions either prohibited or placed strict limitations on a lawyer's ability to provide or guarantee financial

[1] This Committee does not opine on questions of law outside of the Rules of Professional Conduct. The ethical question presented in this inquiry, however, demands a contextual understanding of certain requirements that arise under substantive immigration law. The accompanying discussion of immigration law reflects the Committee's understanding of relevant law for the sole purpose of analyzing the issues presented under the Rules of Professional Conduct.

[2] The form and its instructions are available at http://www.uscis.gov/files/form/i-864.pdf.

[3] Sponsors who are on active duty in the U.S. military and who are sponsoring a spouse or minor child need only show the ability to support at 100% of the federal poverty guidelines. However, the accommodation does not apply to joint or substitute sponsors.

[4] According to the instructions to Form I-864, the "household size" includes the signing sponsor, any spouse, any dependent children under the age of 21, any other dependents listed on the sponsor's most recent federal include tax return, all persons being sponsored in the affidavit of support, and any immigrants previously sponsored through an affidavit of support whom the signing sponsor is still obligated to support.

[5] *See, e.g., Younis v. Farooqi*, 597 Supp. 2d 552 (D. Md. 2009) (awarding summary judgment to immigrant in her Form I-864-based claim against her former husband).

[6] According to the form's instructions, "intending immigrants may be able to secure credit for work performed by a spouse during marriage and by their parent(s) while the immigrants were under 18 years of age."

assistance to a client.[7] The Affidavit of Support's guarantee to support the client at 125 percent of the federal poverty level is difficult to reconcile with such rules.

The District of Columbia has been more permissive in this area than some other jurisdictions. Rule 1.8(d) provides as follows:

> While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:
>
> (1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses or medical examination, costs of obtaining and presenting evidence; and
>
> (2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceedings.

Comment [9] to Rule 1.8 explains the rule's history and its intended scope:

> Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this court in 1980 in an amendment to DR 5-103(B) that eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the result of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client that are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The rule merely permits such payments to be made without requiring reimbursement by the client.

The District of Columbia's approach is more permissive than that of some other jurisdictions because it allows, but does not require, minimum payments necessary to sustain the client during the litigation or administrative proceeding.[8] Jurisdictions with more restrictive rules have disciplined lawyers for violations despite assertions that the payments were motivated by humanitarian concerns. *See, e.g., Mississippi Bar v. Shaw*, 919 So. 2d 51 (Miss. 2005); *Mississippi Bar v. Attorney HH*, 671 So. 2d 1293 (Miss. 1996); *Shea v. Virginia State Bar*, 236 Va. 442, 374 S.E.2d 63 (Va. 1988).[9]

While more permissive than similar rules elsewhere, the District of Columbia's Rule 1.8(d) does have limits. The Affidavit of Support is a guarantee of financial assistance to the client. Rule 1.8(d) thus prohibits its execution by the client's lawyer unless the undertaking fits within one of the two exceptions at Rule 1.8(d)(1) and (d)(2). The exception at 1.8(d)(1) is not available because the Affidavit of Support does not involve the expenses of litigation or administrative proceedings.

Nor do the substantial and long-lasting support obligations imposed by the Affidavit of Support fit within the narrow confines of the Rule 1.8(d)(2) exception for "other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." This exception is limited to payments which are "strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses." Rule 1.8 cmt. [9]. Its purpose "is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement." *Id.* It does not extend to offering "financial payments beyond those . . . necessary to sustain the client until the litigation is completed." *Id.*

The Affidavit of Support requires the sponsor to guarantee financial assistance to the immigrant for years after a change of status is granted. Because the guarantee extends far beyond the duration of the subject matter of the representation—the immigration application—the Rule 1.8(d)(2) exception does not apply. A financial guarantee that extends long after a proceeding does not meet the during-the-proceeding limitation that the comments to Rule 1.8 make clear.[10]

Moreover, such an undertaking to a client is fraught with peril under another provision of the Rules of Professional Conduct: A lawyer has a conflict of interest under Rule 1.7(b)(4) if "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." The significant financial obligations imposed by the Affidavit of Support can create exactly the kind of conflict

[7] For example, DR 5-103(B) of the ABA's former Model Code of Professional Responsibility provided that "[w]hile representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

[8] *Accord Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437, 446 (La. 1976)("If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount. We do not believe any bar disciplinary rule can or should contemplate depriving poor people from access to the court so as effectively to assert their claim."

[9] "There is an unmistakable undercurrent in Shea's argument to the effect that DR 5-103(B) is not really that important. The suggestion is that it prevents attorneys from being helpful and compassionate to clients who find themselves in dire financial straits during the course of litigation. The question which lurks below the surface of Shea's argument is this: Why can't a lawyer help a client who needs financial help so long as the client pays the money back from the proceeds of the litigation? The short answer to that question is that the disciplinary rule says that such conduct is improper. The broader answer is that the rule in question is intended and designed to maintain the independent judgment of counsel in the representation of clients." *Shea*, 236 Va. at 444-45, 374 S.E.2d at 64.

[10] The Affidavit of Support's financial guarantees are extraordinary in both their magnitude and duration. The fact that a particular financial commitment or guarantee by the lawyer might extend briefly beyond the duration of a litigation or administrative proceeding does not necessarily render that commitment or guarantee impermissible under Rule 1.8(d). For example, a lawyer whose impoverished client needs housing while awaiting a trial in three months could justify paying for a six-month lease on the client's behalf if no shorter term lease is available at a reasonable price.

addressed by this rule. A lawyer who has second thoughts or a change in financial circumstances, for example, may have an incentive to sabotage the client's immigration application so that the lawyer's support obligations never can take effect.

In addition, the circumstances that lead a lawyer to consider undertaking such extraordinary obligations on behalf of a particular client may suggest the presence of a different kind of personal interest conflict. Most rational lawyers would not—and financially, could not–undertake obligations like those imposed by the Affidavit of Support for any client. The fact that a lawyer would consider such an extraordinary undertaking for a particular, special client should cause the lawyer to question whether he or she can maintain the professional distance necessary to represent the client effectively and dispassionately.[11]

While conflicts under Rule 1.7(b)(4) can be waived under certain circumstances,[12] the enforceability of such a waiver from an individual immigration client in these circumstances is doubtful. *See generally* Rule 1.7 cmts. [28]-[29] (addressing elements of informed consent).

The Committee recognizes that a sponsor's execution of an Affidavit of Support on behalf of an intending immigrant is an act of extraordinary generosity and selflessness. This opinion should not be read to prohibit lawyers from engaging in such acts where their financial means and their relationships with particular immigrants enable and incline them to do so. Where a lawyer wishes to do so for a client in an immigration matter, however, the lawyer must first withdraw from that representation[13] and refer the client to other counsel. *See* Rule 1.16(a)(1).[14]

The other counsel to whom the matter is referred must not be in the same firm as the withdrawing lawyer. Under Rule 1.8(j), "while lawyers are associated in a firm, a prohibition [under Rule 1.8(d)] that applies to any one of them shall apply to all of them." This means that an individual attorney's disqualification on financial-support-to-client grounds is imputed to all other attorneys in the same law firm.[15]

This opinion does not address the situation in which the lawyer is also married or closely related to the intending immigrant, acting as the immigrant's primary sponsor, and required by law to execute an Affidavit of Support on the immigrant's behalf. Although we have not been asked to—and do not—reach a conclusion on that question, we note that, in other contexts, the Rules of Professional Conduct permit lawyers to provide services for close family members that would be prohibited for unrelated clients. *See* Rule 1.8(b).[16]

*Conclusion*

The District of Columbia's Rules of Professional Conduct do not permit a lawyer to execute an Affidavit of Support (USCIS Form I-864) as a joint sponsor on behalf of an immigration client. Lawyers who wish to sponsor an immigrant client by executing such an affidavit must withdraw from the representation before doing so.

**Inquiry No. 09-09-22**
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**Opinion 355**

Legal Ethics Opinion 355 is currently being revised. Please contact ethics@dcbar.org if you have any questions."

[11] For an extreme example of a personal interest conflict of this nature, *see* the discussion of sexual relations between lawyer and client at Comments [37] and [38] to Rule 1.7.

[12] Rule 1.7(c) provides that such conflicts can be waived if:

> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

[13] To avoid a violation of Rule 1.8(d), the lawyer must withdraw from the immigration matter as well as from any other representations of the client with respect to contemplated or pending litigation or administrative proceedings. In addition, withdrawal from representations of the client in matters that do not involve litigation or administrative proceedings may be required to avoid a violation of Rule 1.7(b)(4).

[14] Rule 1.16(a)(1) provides that "[e]xcept 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: . . . the representation will result in violation of the Rules of Professional Conduct or other law. . . ." Rule 1.16(c) requires lawyers to comply with applicable law regarding notice to or permission of a tribunal when terminating a representation before that tribunal.

[15] Rule 1.10(a)(1) provides a separate imputation rule for conflicts arising only under Rule 1.7(b)(4). Such conflicts are imputed to other lawyers in the same firm unless the particular lawyer's disqualifying interest "does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm." We need not consider whether that exemption from imputation might ever be satisfied in this context because Rule 1.8(j) does not contain a similar provision.

[16] Rule 1.8(b) prohibits lawyers from preparing wills or other instruments that give the lawyer (or a relative of the lawyer) any substantial gift from a client "except where the client is related to the donee." For the purposes of this rule, "related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close familial relationship."

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*Opinion No.356*

**Absence of Conflict of Interest When Lawyer Cannot Identify Affected Clients and Nature of Conflict; Applicability of "Thrust Upon" Exception Where Lawyer Cannot Seek Informed Consent.**

Where a lawyer considers representing a client in a specific and discrete matter, and, at the commencement of that matter, knows that an identifiable second client, whether unrepresented or represented by separate counsel, will take a position

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Court in *Mance* then goes on to analyze the disclosures made by the respondent and reviews the contents of the "conversation" between the respondent and the complainant. *See id*. at 1207. The result, in our view, is an ambiguity that does not overcome the Rules drafters' decision not to include a writing requirement in Rule 1.15(e).

adverse to the potential client, Rule 1.7(b)(1) requires the lawyer to disclose the conflict of interest and seek the informed consent of all potentially affected clients before undertaking the representation of the potential client. If the lawyer cannot identify the nature of the conflict or a specific client or clients who will take such an adverse position, however, there is no conflict of interest under Rule 1.7(b)(1) and the lawyer may undertake the representation of the potential client without seeking the consent of another client or clients.

Where a lawyer is engaged in the confidential representation of a client and a second client thrusts a conflict of interest upon the lawyer that was not reasonably foreseeable, under Rule 1.7(b)(1), the lawyer's obligation to maintain confidentiality prevents her from obtaining informed consent of the second client under Rule 1.7(d), but she need not withdraw from the representation of the first client, unless there is also a conflict under Rule 1.7(b)(2)-(4).

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)

*Inquiry*

The Committee has received an inquiry from a lawyer practicing in a highly specialized industry. One of her current clients, Client A, sought her advice in connection with its proposed acquisition of Company X. The transaction was subject to regulatory approval, and Client A, which is a foreign company, anticipated that its bid would generate scrutiny and opposition from the business and political communities. As a consequence, Client A asked the lawyer to keep the proposed bid confidential until the bid was formally announced.

The lawyer recognized that it was possible—and even likely—that one or more of her other industry clients might also bid to acquire Company X. The lawyer also believed that once Client A's bid became public, one or more of her other clients might intervene to oppose regulatory approval of Client A's bid. Importantly, the lawyer asserts that her industry experience was the *only* basis for her assumption that other industry companies might seek to acquire Company X or oppose Client A's bid, although she could not identify which of her clients, if any, might take either position.

As the inquiring lawyer explains, only a few lawyers practice in this specialized industry and those lawyers routinely represent multiple industry clients. Thus, if she had declined to represent Client A, other industry lawyers likely would confront similar dilemmas. Accordingly, the lawyer agreed to represent Client A in connection with its proposed transaction and worked intensely for several weeks to prepare its bid. Shortly before Client A was to announce its bid, another of the lawyer's industry clients, Client B, announced that it would submit a bid to acquire Company X. Client B uses the inquiring lawyer's services in other unrelated matters, but retained a different lawyer to represent it in connection with this proposed acquisition. Once Client A's bid is made public, Clients A and B will either compete directly for the right to acquire Company X, intervene with the regulator to prevent one another from obtaining regulatory approval for their respective bids, or both.

The inquiring lawyer believes that Client A lacks sufficient time to retain another lawyer, given the timing necessary for Client A to submit a successful bid. Further, the lawyer's representation of Client A remains confidential because Client A's bid has not yet been made public. Accordingly, she cannot disclose her representation of Client A to Client B.

The lawyer has submitted two inquiries to this Committee. First, the lawyer asks whether her agreement to represent Client A violated Rule 1.7(b)(1) of the District of Columbia Rules of Professional Conduct ("D.C. Rules"). With respect to her second inquiry, the lawyer notes that although Client B's announcement of a competing bid creates a conflict of interest that can be waived by the informed consent of Clients A and B, the confidential nature of her representation of Client A prevents her from seeking such consent from Client B. The lawyer asks whether the Rules therefore require her to withdraw from her representation of Client A or whether she can continue to represent Client A without seeking Client B's informed consent.

*Discussion*

**I. Absence of Conflict of Interest When Lawyer Cannot Identify Affected Clients and Nature of Conflict.**

The first inquiry is whether a lawyer may undertake the representation of a client in a specific matter when the lawyer has reason to believe that another client will take a position adverse to that client in that matter, but cannot identify the nature of the conflict or the specific clients who might be affected.

Rule 1.7 aims to safeguard the duty of loyalty to one's client. To that end, Rule 1.7(b)(1) directs that:

> Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
>
> (1) that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.

The Rules provide an exception to this prohibition, however, when "each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" and the lawyer reasonably believes that she can provide competent and diligent representation to each potentially affected client. D.C. Rule 1.7(c). Absent such disclosure and informed consent, the lawyer may not undertake the proposed representation.

Generally, the application of Rule 1.7(b)(1) is straightforward. The present inquiry, however, requires us to assess a lawyer's obligations when the proposed representation of one client (Client A) may lead to taking a position adverse to another client, but the lawyer cannot identify the nature of the conflict or all potentially affected clients. We conclude that under those circumstances, there is no conflict of interest under Rule 1.7(b)(1) and the lawyer may undertake the representation of Client A.

Rule 1.7(b)(1) does not explicitly address this question, but the text of the rule suggests that to be prohibited, a conflict must be clear, specific and not based on mere speculation. To obtain consent to a conflict of interest under Rule 1.7(b)(1), a lawyer must disclose to each potentially affected client "the existence and nature of the possible conflict and the possible adverse consequences of such representation." D.C. Rule 1.7(c) (1). The first part of this rule – *i.e.*, that the lawyer must disclose the conflict to *each potentially affected client* – assumes that the lawyer can, in fact, identify a *specific* client before she has an obligation to disclose the conflict and obtain informed consent from the appropriate parties. The

second part of the rule – *i.e.*, that the lawyer must disclose the existence and nature of the conflict and adverse consequences – assumes that the lawyer knows, or reasonably should know, that a specific client will, in fact, take a position adverse to another specific client before any obligation to disclose is triggered. We therefore read Rule 1.7(b)(1) to prohibit only those representations in which the lawyer can identify (i) the nature of the conflict and (ii) the specific client or clients who might be affected.

That the inquiring lawyer's speculation was ultimately proven correct does not alter our reading of the rule or the basis for our conclusion. In the present inquiry, the lawyer's industry experience was the only basis for her belief that other industry companies—including, perhaps, one of her clients—might seek to acquire Company X. (For purposes of this opinion, we accept and rely upon the inquiring lawyer's representation that her belief that one or more of her other clients might also bid to acquire Company X was not based on confidential information from any of her clients but solely on her industry expertise and experience.) The sophisticated industry lawyer may have a more nuanced, specific and detailed view of potential conflicts than the outside objective observer. But Rule 1.7(b)(1)'s prohibition cannot depend upon whether a lawyer's speculation about specific industry events, which are often based on unpredictable business judgments, is proven correct. Such expertise and instinct may serve clients well in transactional negotiations and litigation strategy, but it does not inform the test of what constitutes a conflict of interest under Rule 1.7(b)(1).

A lawyer's obligations under Rule 1.7(b)(1) are clear when specific, identifiable clients take or will take adverse positions in a specific matter, but the lawyer's representation of one client is confidential. Where a lawyer's "obligation to one or another client . . . precludes making such full disclosure to [a potential new client]" to obtain a waiver, "that fact alone precludes undertaking [a new] representation." D.C. Rule 1.7, cmt. [27]; *see* D.C. Legal Ethics Op. 309 (2001) (noting, in the context of advance waivers, that "if the lawyer cannot disclose the adversity to one client because of her duty to maintain the confidentiality of another party's information, the lawyer cannot seek a waiver and hence may not accept the second representation"); D.C. Legal Ethics Op. 276, n. 5 (1997) (noting that situations may arise in which the lawyer's confidentiality obligations preclude disclosure of relevant results of a conflicts check to the parties to a mediation and finding that in such cases, "the lawyer/mediator would have no choice but to resolve the problem by withdrawing as mediator without further comment").[1]

But the mere possibility, or even likelihood, of adversity between two clients does not create a conflict of interest under Rule 1.7(b)(1). "A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's . . . duties to another current client . . . ." Restatement (Third) of the Law Governing Lawyers § 121 (2000). As the Restatement notes, however, "[t]here is no conflict of interest . . . unless there is a 'substantial risk' that a material adverse effect will occur. . . . The standard requires more than a mere possibility of adverse effect." *Id.* cmt. c(iii).[2] Cf. D.C. Legal Ethics Op. 265 (concluding, in context of positional conflicts under Rules 1.7(b)(2) – (4), that "[t]he mere possibility that a result in one representation will affect the outcome of another is not enough to trigger a conflict as to which waiver must be sought"). Simply put, if the lawyer cannot know which clients to talk to and what conflicts to disclose, then there is no conflict of interest under Rule 1.7(b)(1).

Our reading of Rule 1.7(b)(1) is also in accord with our policy of protecting the ability of clients to obtain lawyers of their own choosing. *See, e.g.*, D.C. Legal Ethics Ops. 241; 181 ("[W]e are hesitant to announce views that . . . prevent or unduly hinder clients from obtaining legal representation from attorneys of their own choosing who may have formed new associations."); D.C. Rule 5.6, cmt. [1] (noting that "[a]n agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer"). In a specialized industry served by few lawyers, those lawyers will often represent multiple business competitors. Such representations increase the likelihood that a lawyer may undertake a representation for one client that later turns out to be adverse to plans of another client that had not been disclosed or perhaps not even formulated when the representation began. Sophisticated clients retaining their counsel of choice may be aware that such issues are likely to arise and, nevertheless, accept the risks of such issues in exchange for the benefits of her expertise. We do not read the rules to discourage that freedom of choice by clients. *Accord* D.C. Legal Ethics Op. 181.

The inquiring lawyer in this case did not obtain advance waivers from either Client A or B. As a general matter, it would have been prudent to do so, although her failure to do so did not violate the Rules. Where lawyers anticipate frequent conflicts between their clients, it is advisable to seek advance waivers. *See* D.C. Rule 1.7, cmts. [31] – [32]. Such waivers are particularly apt in a specialized industry, generally populated by sophisticated clients. *See* D.C. Legal Ethics Op. 309 (2001); *see also* Lauren Nicole Morgan, Note, *Finding Their Niche: Advance Conflicts Waivers Facilitate Industry-Based Lawyering*, 21 Geo. J. Legal Ethics 963, 980 (2008) (noting public policy considerations favoring the use of prospective waivers).

## II. Applicability of "Thrust-Upon" Exception When Lawyer Cannot Obtain Informed Consent.

The second inquiry is whether the lawyer must withdraw from the representation of Client A if the confidential nature of that representation precludes her from seeking the informed consent of Client B. In addressing this question, we assume that the conflict of interest at issue was not reasonably foreseeable, as explicitly required by Rule 1.7(d).

Rule 1.7(c) articulates an exception to the prohibition in Rule 1.7(b)(1) if a lawyer has obtained the informed consent of each potentially affected client after full disclosure of the existence and nature of the conflict. *See* D.C. Rule 1.7 & cmt. [27]. In the present case, however, the lawyer cannot disclose the conflict

[1] The inquiring lawyer must, of course, consider any other prohibitions to undertaking the representation, including the prohibitions in Rule 1.7(b)(2)–(4).

[2] "In the modern view, a conflict of interest exists whenever the attorney-client relationship or the quality of the representation is 'at risk,' *even if no substantive impropriety—such as a breach of confidentiality or less than zealous representation—in fact eventuates*. The law of lawyering then proceeds by assessing the risk and providing an appropriate response." Geoffrey A. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 10.4 (3d ed. 2001) (emphasis in original). See also Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics at 269 (3d ed. 2004) (noting that "the term conflict of interest refers to a situation where there is a reasonable possibility that you will not be able to fulfill all of the legitimate demands on your time, attention, and loyalty") (emphasis in original).

because her representation of Client A must remain confidential until after Client A has announced its bid. Rule 1.6 governs the confidentiality of a client's information, and identifies limited exceptions to the "fundamental principle . . . that the lawyer holds inviolate the client's secrets and confidences." *See* D.C. Rule 1.6, cmt. [4]. For purposes of this opinion, we assume that none of these exceptions applies and so the lawyer is prohibited from disclosing the fact of her representation of Client A.

Rule 1.7(d) addresses situations in which a lawyer represents multiple clients in unrelated matters and an unforeseen adversity—commonly referred to as a "thrust-upon" conflict—arises between the clients. The rule states:

> If a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

D.C. Rule 1.7(d).

For the inquiring lawyer, the principle of confidentiality prohibits disclosure of her representation of Client A, but without full disclosure, she cannot obtain informed consent to continue that representation. *See* D.C. Rules 1.6, 1.7(c). Under these circumstances, does Rule 1.7(d) require the lawyer to withdraw from the representation of Client A? We conclude that it does not. Where a conflict is thrust upon a lawyer, pursuant to Rule 1.7(d), and the confidential nature of a representation precludes the lawyer from seeking informed consent for that representation pursuant to Rule 1.7(c), the lawyer need not withdraw from the representation at issue unless the conflict also arises under Rule 1.7(b)(2)-(4).

The structure of Rule 1.7(d) informs our reading of the rule. The key requirement in that Rule is that the thrust-upon conflict was "not reasonably foreseeable at the outset of the representation." D.C. Rule 1.7(d). This element, set forth in the first phrase of Rule 1.7(d), establishes a predicate for application of the thrust-upon exception. If this predicate has been established, the lawyer must make a full disclosure to each potentially affected client, *but the clients' waiver of the thrust-upon conflict is not determinative*. Even if Client B (who has created the thrust-upon conflict) will not waive the conflict, Rule 1.7(d) does not require the lawyer to withdraw from the representation. The structure of Rule 1.7(d) therefore reflects that although the lawyer generally must seek the informed consent of the second client (Client B, in this case), the result of her efforts – *i.e.*, whether the second client (Client B) agrees to waive the conflict – does not, standing alone, preclude her continued representation of the first client (Client A). In our view, this approach reflects a considered policy judgment underlying Rule 1.7(d). Consistent with that policy, we believe that Rule 1.7(d) does not require withdrawal where a lawyer cannot seek the second client's waiver.

"The Rules of Professional Conduct . . . are rules of reason," D.C. Rules, Scope [1], and we employ a "common sense" approach to questions concerning the professional conduct of lawyers. *See* D.C. Legal Ethics Op. 272 (1997); *AmSouth Bank v. Drummond Company, Inc.*, 589 So.2d 715 (Ala. 1991). Rule 1.7(d) provides that the lawyer need not withdraw from any representation if the thrust-upon conflict "is not waived." A common sense reading of the phrase "is not waived" necessarily includes those circumstances in which the conflict is not waived because a waiver cannot be sought without violation of the Rules. Our conclusion assumes that the inquiring lawyer does not have a conflict under Rule 1.7(b)(2) – (4). If there is a conflict under Rule 1.7(b)(2) – (4), however, the thrust-upon exception does not apply and the lawyer must withdraw from at least one of the representations. *See* D.C. Rule 1.7(d).[3]

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*Opinion 357*

**Former Client Records Maintained in Electronic Form**

The question presented is whether a lawyer who maintains some or all of a former client's records solely in electronic form must provide the former client with paper copies of such records if requested by the former client and, if so, whether the lawyer may charge the former client for providing the files in paper form.

As a general matter, there is no ethical prohibition against maintaining client records solely in electronic form, although there are some restrictions as to particular types of documents. Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings. Assuming no such agreement was entered into prior to the termination of the relationship, however, a lawyer must comply with a reasonable request to convert electronic records to paper form. In most circumstances, a former client should bear the cost of converting to paper form any records that were properly maintained in electronic form. However, the lawyer may be required to bear the cost if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies. Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost) should be considered both from the standpoint of a reasonable client and a reasonable lawyer and should take into account the technological sophistication and resources of the former client.

**Applicable Rules**

- Rule 1.4(a)—Communication
- Rule 1.6(a)(1) and (f)—Confidentiality of Information
- Rule 1.15(c)—Safekeeping Property
- Rule 1.16(d)—Declining or Terminating Representation

*Inquiry*

After the termination of a lawyer's representation of a client, the former client requested that the lawyer deliver to the former client all of the former client's files. The lawyer stated that the files were maintained solely in electronic form and offered to deliver them to the former client in electronic form on a CD-ROM. The former client responded by requesting that the lawyer produce the files in paper form, with the lawyer bearing the cost of converting the files from electronic to paper form. The lawyer asks whether (a) he must convert the electron-

[3] In this regard, we emphasize that throughout her representation of Client A, the lawyer has an ongoing obligation not to disclose or use Client B's confidential information. See D.C. Rule 1.6. If the preservation of that confidentiality would adversely affect her representation of Client A, she cannot continue the representation of Client A unless Client A consents. *See* D.C. Rule 1.7(b)(2) – (4).

ic files to paper form; and (b) if so, whether the lawyer must bear the cost of converting the files to paper form.

*Discussion*

**1. Maintenance of Client Records in Electronic Form**

Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form. For example, a lawyer may require that a client seeking representation consent, as a condition of the representation, to the lawyer's maintenance of his or her records solely in electronic form, so long as this method of maintaining the files would not result in foreseeable prejudice to the client. *See* Virginia Ethics Opinion 1818 (Sept. 30, 2005). (A prospective client, of course, is free to seek out counsel who does not impose such a requirement.) As with other aspects of the lawyer-client relationship, it is prudent to address such issues in advance where possible in order to avoid later misunderstandings and disputes.

The inquiry here, however, does not state how the lawyer's files came to be in electronic form only, or whether this was the result of any discussions or agreement with the former client. Accordingly, we begin with some discussion of the use of electronic records for current and former clients. We see nothing in the ethics rules that prohibits establishing and maintaining most types of client records in electronic form. While the rules contemplate that lawyers will establish and maintain appropriate files relating to the representation of a client, the rules do not prescribe the form in which files must be kept. *See, e.g.*, D.C. Rules 1.8(i), 1.16(d).

Indeed, it is common today for lawyers to maintain many records relating to a client representation solely in electronic form. By way of example:

- *Emails and attachments:* Much communication between lawyers and clients and between lawyers and opposing counsel takes place by email. Emails and attachments to emails may or may not be printed out for a paper file.
- *Pleadings:* Many courts now require that pleadings be filed electronically, usually in PDF format, and lawyers may maintain the pleadings file in electronic form. A lawyer may draft a pleading electronically in a word processing program, convert it to PDF, and file it without ever printing out the pleading. Similarly, a lawyer served with a pleading electronically may elect to save it solely in electronic form.
- *Document production:* It is very common for documents produced in litigation to be provided solely in electronic form, commonly in PDF format or as .tif images. A lawyer receiving documents produced in electronic form may review them electronically as well. Similarly, many corporate clients gathering documents for possible production in response to document requests will provide such documents to their lawyers in electronic form, after which the lawyers may review the documents in electronic form for possible responsiveness to the requests.
- *Databases:* Particularly in cases involving large volumes of documents, it is common for electronic databases to be created containing information about those documents. Lawyers may run searches and generate reports based on those searches, but it would be unusual for the entire contents of such a database to be printed out in hard copy form.

Use of electronic records can reduce costs for lawyers and clients through reduced file maintenance and storage costs and through the increased efficiency that may result from being able to access the records electronically rather than through physical access. Clients may maintain their own records solely in electronic form as well, and some clients require their lawyers to provide them with pleadings and other documents in electronic form wherever possible.

Electronic client records are also sometimes created when the records are initially received or created in paper form, but the paper files are later converted to electronic form, typically by scanning them. Such conversion raises the question whether the paper documents may be destroyed or discarded after the electronic versions are created. Initially, we note that certain types of documents should not be destroyed. For example,

- A lawyer must retain in paper form a client's intrinsically valuable, original paper documents, such as securities, negotiable instruments, deeds, settlement agreements, and wills. *See* D.C. Rule 1.15(a) (client property other than funds "shall be identified as such and appropriately safeguarded"); D.C. Legal Ethics Op. 283 (1998) (stating that "it would be unethical for a lawyer to destroy valuables contained in a client file" and identifying "securities, negotiable instruments, deeds, settlement agreements, and wills" as property "that has intrinsic value or directly affects valuable rights").[1]
- "A lawyer should use care not to destroy any document which the lawyer has a legal obligation to preserve." *Id.*
- "A lawyer should use care not to destroy or discard original documents provided by the client when they are not otherwise filed or recorded in the public records." *Id.*
- A lawyer should preserve the original paper document if an electronic version of the document would fail to "protect the [current or former] client's interests." D.C. Rule 1.16(d).
- Paper documents that the client has provided to the lawyer should not be destroyed unless the current or former client does not want the documents returned and consents to their destruction.[2] *See* D.C. Rule 1.4(a) – Communication ("A lawyer shall keep a client reasonably informed about the status of a matter").[3] However, such documents should not be destroyed if they fall in one of the first four categories of documents set forth above.

Subject to the above exceptions, a lawyer may convert a client's file into electronic form and destroy the paper files if he has reasonably concluded that the paper version is not needed for his

[1] As noted in D.C. Legal Ethics Op. 283 (1998), if a former client cannot be located, the lawyer may be able to turn valuable property over to a third party in certain circumstances.

[2] Consent is generally not required if the representation of the client terminated more than five years earlier and the former client either cannot be found or refuses to respond to requests for instructions on disposition of the files. D.C. Legal Ethics Op. 283 (1998). *See id.* for further guidance on specific categories of documents that must be retained or may be destroyed.

[3] It would also be prudent for a lawyer to consult with the client before making a decision to destroy large quantities of paper documents received from other sources (*e.g.*, documents produced by another party in discovery) that the lawyer has converted to electronic form.

ongoing representation of a current client.[4] The lawyer should bear in mind that if he or she does destroy paper files, he may in some cases, absent agreement with the client to the contrary, be required in the future to provide the electronic records in paper form at the client's request and possibly at the lawyer's expense, as discussed further below.

Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained[5] and (2) to guard against the risk of unauthorized disclosure of client information. *See* D.C. Rule 1.6(a)(1); *see also* D.C. Rule 1.6(f) ("A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client.").

**2. A Lawyer's Obligations Regarding Providing a Former Client with Records Maintained Solely in Electronic Form**

A lawyer is ethically obligated, upon reasonable request, to provide a former client with the former client's files. *See* D.C. Rule 1.15(c) ("Except as stated in this rule or otherwise permitted by law or by agreement, 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.C. Rule 1.16 ("In connection with any termination of representation, a lawyer shall take timely steps to the extent *reasonably practicable* to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . .") (emphasis added). *See generally* D.C. Legal Ethics Op. 283 (1998). As discussed above, client files often include electronic records, so the duty to provide the former client's files will often extend to electronic records. (When turning over electronic records, care must be taken to avoid providing documents or metadata that would reveal confidences of a different client.[6]) The inquiry here relates to the lawyer's obligation when some or all of the former client's files are maintained solely in electronic form and the former client requests that they be provided in paper form. Specifically, must the lawyer provide such records in paper form, and if so, who must pay for the conversion to paper?[7]

As noted earlier, lawyers and clients may enter into reasonable agreements regarding issues such as how records will be kept, how copies may be provided to the client, and who will pay the costs of converting electronic records if the client seeks to get them in paper form. The inquiry here, however, suggests that there was no such agreement between the inquirer and the former client.

In the absence of an agreement, whether the lawyer must provide the electronic records in paper form depends on whether the request for the paper version is reasonable. In general, such requests will be reasonable, though there will doubtless be instances where it would impose an unreasonable burden on the lawyer, even if the former client is willing to pay for the conversion to paper form.

If the request to provide the electronic records in paper form is reasonable, the issue of who should pay for the conversion to paper form depends on the facts and circumstances, and the answer may vary for different categories of records. In most cases, if the records were properly maintained in electronic form, but the former client has requested the records in paper form, the former client should bear the cost of converting the records to paper form. This is particularly so with respect to records that are "not necessary to protect [the] client's interests," as to which the former client should bear the cost of conversion. *See* D.C. Legal Ethics Op. 283 (1998). With respect to other types of electronic records, the lawyer should bear the cost of providing the records in paper form if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies.[8]

Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost) should be considered from the standpoint of both a reasonable client and a reasonable lawyer. The technological sophistication and resources of the client should also be taken into account.[9] It is not possible to provide a bright line test, but the analysis can be illustrated with some examples:

- In litigation, 25 million pages of documents were produced to the lawyer in electronic form by another party. The electronic records are a standard format, such as .tif. The lawyer never received the documents in paper form. Although the lawyer printed some documents for specific purposes (such as for use as exhibits), the lawyer had no occasion to print the entire set of documents in paper form. The former client requests that the lawyer print all of the documents in paper form. The costs of printing would be substantial. In addition, printing all of the documents would require substantial time of the lawyer's staff and would be extremely disruptive to the operations of the lawyer's office. The former client's request is not reasonable, even if the former

[4] Opinions in several other jurisdictions have similarly concluded that, with certain exceptions, a lawyer may convert paper documents to electronic form and maintain the client's file solely in electronic form without requiring client consent. *See* Missouri Ethics Opinion 127 (May 19, 2009); Maine Ethics Opinion 183 (Jan. 2004); New Jersey Ethics Opinion (April 24, 2006).

[5] *See generally* D.C. Legal Ethics Op. 283 (1998) for guidance on the requirements for maintaining files relating to former clients.

[6] It is common for lawyers to draft documents for one client by using, as a starting point, documents prepared for another client. When a lawyer turns over a former client's file to the former client, the lawyer must take reasonable steps to make sure that any such material prepared for a different client or that would reveal confidences or secrets of a different client are first removed from the file. In the case of electronic records, the lawyer must also take reasonable steps to make sure that no metadata is being provided that would reveal confidences or secrets of a different client. *See generally* D.C. Legal Ethics Op. 341 (2007) (discussing other issues relating to metadata).

[7] The inquirer does not mention any unpaid fees. Accordingly, we do not address any issues with respect to exercise of a retaining lien under Rule 1.8(i). *See* D.C. Legal Ethics Ops. 230 (1994), 250 (1992), 333 (2005).

[8] Similar principles would apply to a request from a former client to convert electronic records from one electronic format to another. If the request is reasonable, the lawyer should convert the records, but in most cases the former client should pay the cost of doing so unless the burden analysis dictates otherwise.

[9] *See* Arizona Ethics Opinion 07-02 (June 2007) ("A lawyer who has chosen to store his or her client files digitally cannot simply hand a disk or other storage medium to a client without confirming that the client is able to read the digitized images. If the client does not have either the technological knowledge or access to a computer on which to display the electronic images, or if the client has hired substitute counsel who is in the same position as the client, the original lawyer may need to provide paper copies of the documents.")

client offers to pay for the costs of printing. Rather, it would be sufficient for the lawyer to provide a copy of the documents in electronic form to the former client,[10] after which the former client could arrange and pay for printing if the former client so desired.

- The lawyer created an extensive database containing information relating to millions of pages of documents produced in litigation. The lawyer generated certain reports from the database in paper form, but never had any reason to print the entire database in paper form. The database was created using proprietary software developed for the lawyer's firm. The former client requests that the database be provided in paper form. As with the other examples, there is no agreement between the lawyer and the former client with respect to converting electronic records to paper form or with respect to converting electronic records from one electronic format to another. Because the database is only accessible with proprietary software, the lawyer offers to convert it to a format that can be used with non-proprietary database software, at the lawyer's expense. Because the database is voluminous and the former client would have the ability to access it in a non-proprietary format, the lawyer need not provide the database in paper form.
- The former client is an individual who has not retained substitute counsel because she intends to represent herself pro se in a pending proceeding in which a hearing is scheduled in the near future. The former client needs the lawyer's file to represent herself but has no access to a computer. The lawyer's electronic file, if printed, would consist of several hundred pages. Under these circumstances, the former client's need for the paper copies is significant and the burden on the lawyer to provide the records in paper form appears to be minimal. Therefore, the lawyer should bear the cost of providing the file to the former client in paper form.[11]
- The lawyer has provided the former client with the client's file in electronic form. The former client has a computer and printer, but does not have the software necessary to view the lawyer's electronic records. The former client has a significant need for the records. The lawyer offers to provide the former client with the necessary software at the lawyer's expense. The former client is capable of installing the software, and the former client's computer is capable of running the software. Under these circumstances, the lawyer is not obligated to pay the cost of converting the any of the electronic records to paper form.

Even if the lawyer must bear the cost of converting the electronic records to paper form, however, the lawyer may charge the former client for the reasonable time and labor expense associated with locating and reviewing the electronic records where such time and expense results from special instructions or requests from the former client. *See* D.C. Legal Ethics Op. 283 (1998) ("review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee").[12]

In circumstances where the lawyer is permitted to charge the former client either for time and expense associated with either converting electronic records to paper form at the former client's request or for time and expense associated with locating, reviewing, and preparing records in accordance with the former client's instructions, the lawyer should inform the former client in advance that the former client will be charged and explain the basis on which the former client will be charged.

*Conclusion*

Lawyers may maintain many types of client records solely in electronic form, but need to be aware of restrictions as to particular types of documents. Lawyers and clients may agree to reasonable provisions relating to electronic records and requests for conversion to paper form. Absent such an agreement, a lawyer must comply with a reasonable request by a former client to provide electronic records in paper form. In most cases, the former client should bear the cost of converting to paper form any records that were properly maintained in electronic form, but in certain circumstances the lawyer may be required to bear the cost.

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*Opinion No. 358*

**Subpoenaing Witness When Lawyer for Congressional Committee Has Been Advised that Witness Will Decline to Answer Any Questions on Claim of Privilege; Legal Ethics Opinion 31 Revisited.**

D.C. Legal Ethics Opinion 31 (1977) concluded that it was a violation of the former Code of Professional Responsibility for a congressional staff lawyer to require a witness to appear before a congressional committee when the committee has been informed that the witness will invoke the self-incrimination privilege as to all substantive questions "and the sole effect of the summons will be to pillory the witness." The committee declines a request to vacate Opinion 31 but notes that under the D.C. Rules of Professional Conduct, as under the former Code of Professional Responsibility, a violation occurs only where the summons serves no substantial purpose "other than to embarrass, delay, or burden" the witness.

[10] It is common in litigation for the court to enter a protective order restricting use and disclosure of documents produced in discovery that contain confidential business information or are sensitive for other reasons. Sometimes such orders allow only counsel and experts to see the confidential documents and do not permit lawyers to share the documents with their clients. In addition, such orders often require that the adverse party's documents be returned or destroyed when the litigation has ended. For purposes of this opinion, we assume that there are no such restrictions on the lawyer's ability to provide documents to the former client.

[11] The District of Columbia Court of Appeals recently addressed the timeliness of a lawyer's response to a former immigration client's request for his file. Although the lawyer delayed only five days in providing the file, the Court found this delay to violate Rule 1.16(d) under the circumstances, because "the five-day delay represented a significant proportion of the thirty days respondent's client had to appeal his deportation order." *In re Thai*, 987 A.2d 428, 430 (2009). Moreover, during the five-day delay, the former lawyer "repeatedly denied requests for the files and actively obstructed the efforts of his former client and the successor attorney to obtain the file." *Id.* The Court reiterated its prior statements that "a 'client should not have to ask twice' for his file," that "the client is owed an 'immediate return' of his file 'no matter how meager,'" and that "Rule 1.16(d) 'unambiguously requires an attorney to surrender a client's file upon termination of the representation.'" *Id*. at 430-31 (citations omitted).

[12] Wisconsin Legal Ethics Opinion E-00-03 (2003) advises that, although a lawyer must provide electronic documents to a client at the lawyer's expense (which is minimal), "a lawyer may charge a client for staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request."

**Applicable Rules**

- Rule 3.4—Fairness to Opposing Party and Counsel
- Rule 3.5—Impartiality and Decorum of the Tribunal
- Rule 3.8—Special Responsibilities of a Prosecutor
- Rule 4.4—Respect for Rights of Third Person
- Rule 5.2—Subordinate Lawyers
- Rule 8.4—Misconduct

*Inquiry*

*The Request*

The Legal Ethics Committee ("Committee") has received a request ("Request") to vacate Legal Ethics Opinion No. 31 ("Opinion 31" or "the Opinion"), which the Committee rendered in 1977 under the former D.C. Code of Professional Responsibility ("D.C. Code"). The Request explains that witnesses subpoenaed to appear before congressional committees have on occasion interpreted Opinion 31 as concluding that compelling the public appearance of a witness who had declared that he would assert his self-incrimination privilege in response to all questions constituted a per se violation of the D.C. Code. Based on this interpretation, some witnesses have refused to appear before Congress.

The Request asserts that various legal authorities "establish that there are legitimate reasons for a congressional committee and its staff to summon a witness even when the witness indicates in advance an intent to invoke the Fifth Amendment privilege." Among these, according to the Request, are the committee's right to evaluate the privilege assertion, the possibility that the witness will waive or not assert the privilege, the possibility that the committee will agree to hear the witness in executive session, and the possibility that the committee will immunize the witness's testimony under 18 U.S.C. § 6005.

The Request also states that Opinion 31 did not take into account the Supreme Court's 1976 decision in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), which the Request asserts permits the finder of fact in a civil proceeding to draw an adverse inference from a witness's invocation of the privilege.[1] According to the Request, this law "make[s] absolutely clear that, given the inferences that can appropriately be drawn in civil contexts from a refusal to testify [on self-incrimination grounds], there are legitimate reasons for attorneys for congressional committees to call witnesses even if it appears such witnesses plan to assert the Fifth Amendment privilege." The Request concedes that calling a witness solely to harass or embarrass that person "is not appropriate."

Finally, the Request notes that the Opinion was decided under the now-superseded D.C. Code and states that—

> [a]lthough the ethical considerations against calling a witness solely to harass remain [under the D.C. Rules of Professional Conduct], Opinion No. 31's apparent assumption that there can be no legitimate purpose for calling a witness who has indicated he or she will assert the Fifth Amendment privilege simply cannot stand in light of the clear legal authority set forth above.

*D.C. Legal Ethics Opinion No. 31*

In Opinion 31, the Committee described the inquiry before it as follows:

> We have been asked to advise whether it is proper for a congressional committee whose chairman, staff and several members are attorneys to require a witness who is a "target" of a pending grand jury investigation to appear at televised hearings to be questioned when the committee has been notified in advance that the witness will exercise his constitutional privilege not to answer any questions.

Op. 31. The Opinion began its analysis by conceding that "[i]t is *not per se improper* . . . to cause a witness to be summoned in furtherance of a legitimate legislative function of Congress, even though the resultant attending publicity will be damaging to the witness' reputation and possibly prejudicial to him in a future criminal trial." *Id.* (emphasis added). The Opinion continued, however, that "the inquiring power of a congressional committee is limited to obtaining information in aid of Congress' legislative function" and that "[t]here is no congressional power to expose for the sake of exposure." *Id.*

Acknowledging that this Committee's jurisdiction is confined to rendering opinions on the applicability of the ethics rules to the conduct of staff attorneys acting in their capacities as attorneys, the Opinion stated that "the inquiry before us poses the issue whether it is ethical to summon a witness [before a congressional committee] when it is known in advance that no information will be obtained *and the sole effect of the summons will be to pillory the witness*." Op. 31 (emphasis added).

The Opinion discussed rulings and standards to the effect that calling a witness in a criminal proceeding, when it is known that the witness will invoke, across the board, his privilege against self-incrimination, constitutes prosecutorial misconduct.[2] Analogizing to those authorities, the Opinion concluded that such conduct by a lawyer for a congressional committee "appears to be in conflict with at least the spirit of" D.C. Disciplinary Rule ("DR") 7-106(C)(2). That rule barred a lawyer from asking a witness before a tribunal any question "that [the lawyer] has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness." D.C. Code DR 7-106(C)(2) (superseded 1991). The Opinion concluded that although a congressional committee arguably is not a "tribunal," the principle that an attorney should not ask a witness questions that are "intended to degrade" him was applicable and that a question to which the inquiring lawyer knows the response will be the witness's invocation of his privilege against self-incrimination is by definition irrelevant. *Id.*

Opinion 31 also considered whether such conduct would constitute "conduct . . . prejudicial to the administration of justice," in violation of D.C. Code DR 1-102(A)(5). A majority of the committee concluded that "the language of this standard is too vague to permit its application as a disciplinary rule," Opinion 31 n. 3, though a few months later, the District of Columbia Court of Appeals upheld the rule against a claim of unconstitutional vagueness, *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977).[3]

[1] The Request cites *Rad Services v. Aetna Casualty & Surety Co.*, 808 F. 2d 271, 275-77 (3d Cir. 1986), *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983), and *In re Vitamin Antitrust Litigation*, 120 F. Supp. 2d 58, 68 (D.D.C. 2000), as progeny of *Baxter*.

[2] *United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973); *San Fratello v. United States*, 340 F.2d 560, 564 (4 Cir. 1965); *United States v. Tucker*, 267 F.2d 212, 215 (3d Cir. 1959); *see* ABA Project on Standards for Criminal Justice ¶ 5.7(c) (unprofessional to call witness under such circumstances "for the purpose of impressing upon the jury the fact of the claim of privilege").

[3] The Opinion also concluded that such conduct violated several D.C. Ethical Considerations ("ECs"). These were D.C. EC 7-10, which called upon lawyers to treat persons involved in the legal process with consideration and to avoid inflicting needless harm, D.C. EC 7-14, which exhorted government lawyers not to harass parties, and D.C. EC 7-25, which said that a lawyer should not ask a witness a question "solely for the purpose of harassing or embarrassing him." Under the D.C. Code, the Ethical Considerations were "aspirational in character," whereas the Disciplinary Rules were mandatory. D.C. Code Preliminary Statement. The

*Discussion*

The D.C. Rules of Professional Conduct ("D.C. Rules" or "Rules") superseded the D.C. Code effective January 1, 1991.[4] Several provisions of the Rules are relevant to the issue presented by the Request.

Rule 4.4(a) states that "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." The comments observe that it is not possible to catalog all the third-party rights that the rule might implicate. D.C. Rule 4.4, cmt. [1].

Rule 8.4(d) prohibits a lawyer from "engag[ing] in conduct that seriously interferes with the administration of justice." Comment [2] states that this prohibition is intended to include conduct proscribed by the similarly worded provision of the D.C. Code, which was DR 1-102(A)(5).[5] Comment [3] to Rule 8.4, which was among the 2007 amendments to the Rules, states that "offensive, abusive, or harassing conduct that seriously interferes with the administration of justice" violates Rule 8.4(d). Moreover, at least one ethics opinion issued under the D.C. Rules admonishes lawyers not to harass opponents. D.C. Op. 258 n. 4 (1995).[6]

Filing a frivolous lawsuit violates Rule 4.4, *Attorney Grievance Comm'n v. Richardson*, 712 A.2d 525 (Md. 1998), and Rule 8.4(d), *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515 (Iowa 1996). Unjustified personal attacks on opponents violate both rules. *In re Golden*, 496 S.E.2d 619 (S.C. 1998); *In re Vincenti*, 704 A.2d 927 (N.J. 1998). Moreover, the misuse of official authority by a prosecutor—a position akin to counsel for an investigative congressional committee—violates Rule 8.4(d). *In re Christoff*, 690 N.E. 2d 1135 (Ind. 1997).

Finally, a violation of Rule 8.4(d) "does not have to be affiliated specifically with the judicial decision-making process; the conduct simply must bear on the administration of justice." *In re Mason*, 736 A.2d 1019, 1023 (D.C. 1999). Moreover, "'conduct that is prejudicial to the administration of justice' can be equated to 'conduct unbecoming a member of the bar.'" *Id.* (quoting *In re Solerwitz*, 575 A.2d 287, 292 (D.C. 1990)); *see In re Keiler*, 380 A.2d 119 (D.C. 1977) (finding violation of predecessor to Rule 8.4(d) where lawyer conducted sham arbitration proceeding).

Opinion 31 does not establish a *per se* rule that compelling a witness to testify before a congressional committee when it is known in advance that the witness will invoke the Fifth Amendment privilege violates the ethics rules. Opinion 31 provides that an attorney violates the ethics rules only when he knows that summoning a witness to appear (1) will provide no information to the committee *and* (2) is intended merely to degrade a witness. Specifically, the Opinion states that the issue is "whether it is ethical to summon a witness when it is known in advance that no information will be obtained *and the sole effect of the summons will be to pillory the witness*." The Opinion further notes that "DR 7-106(C)(2) prohibits only questions that the lawyer has no reasonable basis to believe are relevant *and that are 'intended to degrade' as well*." Op. 31 (emphasis added).

The Request has not persuaded us that the revised Rules of Professional Conduct, or other governing law, require us to vacate the Opinion. First, the Request concedes the critical point that calling a witness solely to harass or embarrass that person is not appropriate. We agree and conclude, as we did in Opinion 31, that such conduct violates the Rules.

Second, the Request suggests that the Opinion assumes that there can be no legitimate purpose for calling a witness before Congress when it is known that the witness will assert the privilege. We do not read Opinion 31 as making that assumption. The Opinion asserts that where an attorney has some question whether the witness will assert the privilege, there is no need to test that claim of privilege in public and the claim can be resolved by calling the witness in executive session. We do not read the Opinion to mean, however, that the *only* legitimate purpose for calling a witness is to determine whether he will assert the privilege.

Third, the Request relies heavily on the Supreme Court's decision in *Baxter*, which held that an adverse inference properly may be drawn from an inmate's silence at his disciplinary proceedings. *Baxter*, 425 U.S. at 320. *Baxter* and its progeny allow fact-finders to draw an adverse inference in civil proceedings from the invocation of the Fifth Amendment privilege. It is not clear, though, how that rule alters the threshold ethical question presented in Opinion 31. The Request asserts that this case law undermines "Opinion No. 31's apparent assumption that there can be no legitimate purpose for calling a witness who has indicated he or she will assert the Fifth Amendment privilege." As explained above, however, that assertion is based on a misreading of the Opinion. Only where the sole purpose of proceeding is to degrade the witness is there a violation of the Rules of Professional Conduct.

Opinion 31 correctly asserted that when an attorney causes a witness to be called for the sole purpose of harassing or degrading that witness, that attorney violates our rules. *See* Rules 4.4, 8.4(d). Similarly, a lawyer would violate Rule 8.4(d) by engaging in abuse or harassment of the witness. Further, such conduct by a staff lawyer might constitute assisting another in violating the rules. *See* D.C. Rule 8.4(a). In addition to par-

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Code added, though, that an agency applying the Disciplinary Rules "may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations." *Id.* The D.C. Rules of Professional Conduct, which superseded the D.C. Code in 1991, do not contain "aspirational" guidelines akin to the Code's Ethical Considerations.

[4] There have been a number of subsequent changes to the D.C. Rules but aside from the new comment [3] to Rule 8.4, which took effect February 1, 2007, none is material to this opinion.

[5] As noted above, when this committee issued Opinion 31, a majority of the members found the language of the predecessor provision "too vague to permit its application as a disciplinary rule," D.C. Ethics Op. 31 n. 3 (citing D.C. Code DR 1-102(A)(5)), but the D.C. Court of Appeals subsequently upheld the cited Code provision against a vagueness challenge, *see In re Keiler*, 380 A.2d at 126.

[6] Instructive, though not literally applicable, are Rules 3.4, 3.5, and 3.8. Rule 3.4(e), whose predecessor rule Opinion 31 applied by analogy to the conduct at issue here, prohibits a lawyer from, "[i]n trial, allud[ing] to any matter that the lawyer does not reasonably believe is relevant." Rule 3.5(d) prohibits a lawyer from engaging in "conduct intended to disrupt any proceeding of a tribunal." A congressional committee ordinarily is not a "tribunal" because it is not adjudicatory in character. *See* D.C. Rule 1.0(n) (defining "tribunal"). Such a committee might be a tribunal, though, when deliberating and voting on whether to recommend to its house of Congress that a witness be cited for contempt of Congress. *See id.*

Comment [2] to Rule 3.8, which sets forth special responsibilities of prosecutors, permits public release of an indictment but condemns—

> extrajudicial comment by a prosecutor that serves unnecessarily to heighten public condemnation of the accused without a legitimate law enforcement purpose before the criminal process has taken its course. When that happens, even if the ultimate trial is not prejudiced, the accused may be subjected to unfair and unnecessary condemnation before the trial takes place. Accordingly, a prosecutor should use special care to avoid publicity, such as through televised press conferences, which would unnecessarily heighten condemnation of the accused.

ticipation in the hearing itself, such related activities as preparing subpoenas also could subject a lawyer to sanctions, though we note that Rule 5.2 protects a subordinate lawyer who acts at the direction of a supervising attorney so long as there is a reasonable argument that calling the witness is permitted by the Rules. *See* D.C. Rule 5.2 & com. [2].[7]

*Conclusion*

The Request correctly observes that there may be legitimate reasons for a congressional committee to summon a witness who expresses an intention to assert her privilege against self-incrimination. Because the Opinion is consistent with that fact and because the Rules of Professional Conduct are violated only if there is no substantial purpose in calling a witness other than embarrassment, burden, or delay, we decline to vacate Opinion 31.

**Published: January 2011**

*Opinion No. 359*

## Disposition of Missing Client's Trust Account Monies in the District of Columbia

Following reasonable but unsuccessful efforts to locate a missing client or former client, a lawyer should presume the missing client's trust account monies abandoned and, if the circumstances fall within D.C.'s Unclaimed Property Act, must dispose of the property as directed by that statute.

**Applicable Rules**

- Rule 1.6—Confidentiality of Information
- Rule 1.14—Client with Diminished Capacity
- Rule 1.15—Safekeeping Property

*Inquiry*

The D.C. Bar's Legal Ethics Helpline regularly receives calls from lawyers seeking to learn what they can and should do with client trust account monies when the client's whereabouts are unknown. Often, the lawyer is retiring from legal practice, his or her firm is closing, or he or she otherwise wants to close an outstanding trust account, but cannot locate the client.

*Discussion*

The inquiry raises questions that relate to both D.C. Rule of Professional Conduct 1.15 and the D.C. Unclaimed Property Act.

*D.C. Rule 1.15*

A central tenet in legal ethics is that a lawyer must safeguard property of clients and third parties that is in the lawyer's possession as a result of a representation. D.C. Rule 1.15(a) specifically requires that a lawyer hold property of a client (or a third person), including intangible property, separate and apart from the lawyer's own funds, in a trust account, and Comment [1] instructs that a lawyer should exercise the care of "a professional fiduciary" in managing client funds. Rule 1.15(c) requires that when a lawyer receives funds in which a client or third party has an interest the lawyer must promptly 1) notify the client or third party; and 2) deliver to the client or third person any funds or other property that the client or third person is entitled to receive except as stated in this Rule or otherwise permitted by law or by agreement with the client. Rule 1.15 is silent, however, on the specific issue of what is required or permitted if a lawyer is unable to locate a client, but is nonetheless in possession of trust funds belonging to the missing client.[1]

*D.C. Unclaimed Property Act*

While the Committee does not opine on questions of law outside of the Rules of Professional Conduct, we set forth our understanding of the D.C. Unclaimed Property Act for the purpose of analyzing the issues presented under the D.C. Rules of Professional Conduct. Section 103(a) of the District of Columbia Unclaimed Property Act provides that:

> All intangible personal property …, including any income …, that is held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 3 years after it became payable or distributable is presumed abandoned.[2]

The Act by its terms applies to intangible personal property owned by individuals whose last known address is in the District of Columbia or where the holder is domiciled[3] in the District.[4]

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[7] We express no opinion on the propriety of a witness invoking an opinion of this committee as a basis for refusing to comply with a congressional subpoena.

[1] Rule 1.15(d) addresses the situation when a lawyer is in possession of property in which an interest is claimed by "two or more persons to each of whom the lawyer may have an obligation." In Legal Ethics Opinion 293, the Committee clarifies that an obligation under Rule 1.15(d) arises when a third party has a "just claim" to the property that the lawyer has a duty under applicable law to protect *against wrongful interference by the lawyer's client*. In such circumstances, under Rule 1.15(d), the disputed funds must be kept separate by the lawyer until there is "an accounting and severance of interests in the property."

The Committee doubts that Rule 1.15(d) is implicated in the current inquiry. As an initial matter, the lawyer here is not protecting the funds from wrongful interference of the client; indeed, the District's interest arises only in the absence of the client. Significantly, the interest claimed by the District is one of "custodian" and not creditor. Surrendering the property to the District is not fundamentally adverse to the interests of the client, who even years later, pursuant to the Act, can reclaim the property from the District and indeed the District is legally obligated to return such funds. A lawyer's duty of loyalty to the client is therefore not compromised in following the Act's directives. Such a duty is the underlying rationale for Rule 1.15(d)'s directive to the lawyer to merely "preserve" disputed funds and not to unilaterally assume to "arbitrate a dispute" between a client and a third party. (See D.C. LEO 293). Even if Rule 1.15(d) were to apply, the Act "by operation of law" constitutes a severance of the interests in the property by deeming the property "presumed abandoned." We think, the lawyer, commits no ethical violation in complying with the Act. Of final import is the recognition that as custodian of the missing client's funds, the lawyer effectively transfers his or her fiduciary obligation to safeguard the property to the District as required by law.

[2] D.C. Code sec. 41-103(a). Section 41-103, by its terms, applies to intangible property. Though the Act is entitled "Unclaimed Property," its "Purpose" section speaks of "personal property" and not just "intangible personal property" (sec. 41-101), and its reporting section refers to "property, tangible or intangible, presumed abandoned" (sec. 41-117), the reference to "tangible" property appears to be limited to property contained within safe-deposit boxes or other "safekeeping repositories." Underscoring the Act's focus on intangible property, its "Definitions" section defines "property" as an "interest in or right in an intangible property." (sec. 41-102(16A))

D.C. Legal Ethics Opinion 283, "Disposition of Closed Client Files," should be consulted on questions of what can be done with tangible property, such as client files, under analogous circumstances. Opinion 283 noted that lawyers could invoke state law procedures for unclaimed property, where applicable, but also pointed out that "[t]he availability of such procedures is a matter of state law." As with intangible property, lawyers need to determine for themselves under what circumstances tangible property is subject to the unclaimed property laws of one or more jurisdictions.

[3] "Domicile" is defined under D.C.'s Unclaimed Property Act as an individual's principal place of business. D.C. Code sec. 41-102(6)(B). Accordingly, there may be choice of law issues involved here. The Committee notes that most jurisdictions have an unclaimed property act and that a lawyer will want to check his or her jurisdiction's act.

[4] *See* D.C. Code sec. 41-104. Lawyers should be aware that if the last known address of the owner of

Section 41-117 of the Act provides that "[e]very person holding funds or other property … presumed abandoned under this chapter shall report to the Mayor with respect to the property …"[5] The Act further provides that "the holder of property presumed abandoned shall send written notice to the owner, not more than 120 days or less than 60 days before filing the report, stating that the holder is in possession of property subject to this chapter."[6] Section 41-119 requires that the holder of the abandoned property transfer such property to the Mayor upon the filing of the report required by section 41-117. After the funds are transferred, D.C. Code sec. 41-132 mandates that the lawyer is obliged to maintain "a record of the name and address of the owner for 10 years after the date the property may have become reportable." The Act contains no exemption for lawyers.

Applying Rule 1.15 and the Unclaimed Property Act to the present inquiry, this Committee concludes that a lawyer must make reasonable efforts to locate a missing client whose last known address is in the District or where the lawyer's principal place of business is in the District to return that client's trust account monies. Reasonable efforts to locate a missing client might include using available internet technologies and on-line directories, sending a certified letter with return receipt requested to the client's last known address, contacting friends or relatives, or posting a notice in a newspaper of general circulation in the vicinity of the last known address of the property owner.

Under Rule 1.15, such efforts should take place promptly after the funds become due to the client. Rule 1.15(c) states "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." Typically, unused funds from the client held in trust to pay legal fees and costs are due and payable to the client when the representation concludes.[7] Funds received in settlement from a third party are typically due the client when received by the lawyer. Accordingly, the lawyer presumably has already attempted to locate the client. Prior to reporting the property as abandoned to the Mayor and tendering the property to the Mayor's custody, however, the lawyer should undertake renewed efforts to locate the client and tender the property to the client. Indeed, under the Act, the lawyer is required to send written notice to the missing client "not more than 120 days or less than 60 days" before the transfer of the missing client's monies to the Mayor.[8]

Given the mandatory nature of the Act's directive and the absence of an exemption for lawyers under the Act, we conclude that a lawyer does not violate Rule 1.15 if the lawyer files the report required by the Act and similarly transfers a missing client's funds that are deemed to be abandoned to the Mayor's Office, when the monies have been unclaimed by a client for "more than 3 years after [they] became payable or distributable."[9] Our conclusion is limited and rests upon our reading of the plain language of the Act. We do not mean to foreclose a lawyer from challenging the application of the Act to a particular scenario or even the Act's general applicability to lawyers. *Cf.* D.C. Rule 3.4(c) (no ethics violation if lawyer disobeys obligation to a tribunal with "an open refusal based on an assertion that no valid obligation exists").

Our conclusion that a lawyer has a duty to transfer a missing client's funds that are deemed to be abandoned to the Mayor is supported by the D.C. Court of Appeals' recent decision in *Bergman v. District of Columbia*, holding that the D.C. Rules of Professional Conduct do not trump a duly enacted D.C. statute,[10] such as the D.C. Unclaimed Property Act, especially where, as in the present case, the D.C. statute is mandatory in nature, and the D.C. professional responsibility rules are silent on the issue. Indeed, we note that substantial fines can be assessed for failure to transfer abandoned property to the Mayor under these circumstances – up to $25,000 plus 25% of the value of the abandoned property.[11]

*D.C. Rule 1.6*

We note that the Act can implicate client confidentiality under D.C. Rule 1.6 because the requirement to transfer a missing client's funds to the Mayor's office and provide identifying information for same involves disclosure of the client's identity.[12] Of course, Rule 1.6(e)(2)(A) contains an exception for disclosures required by law. In matters where the information is required under D.C. Code 41-117, the lawyer should take care to craft the disclosure in such a way as to minimize disclosure of Rule 1.6 information.[13]

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the intangible property is in another state that also has an unclaimed property act, then that state's unclaimed property act may apply. See D.C. Code Sec 41-104(4).

[5] D.C. Code sec. 41-117(a).

[6] D.C. Code sec. 41-117(e)(1).

7 D.C. Rule 1.16(d).

[8] D.C. Code sec. 41-117(e)(1). The Mayor is obligated to "cause notice to be published at least once each week for 2 consecutive weeks in a newspaper of general circulation in the District," D.C. Code sec. 41-118(a), and, if the value of the abandoned property is $50 or more, to "mail a notice to each person having an address listed who appears to be entitled to property of a value of $50 or more presumed abandoned under this chapter." D.C. Code sec. 41-118(d).

[9] D.C. Code sec. 41-103.

[10] 986 A.2d 1208, 1230 (D.C. 2010).

[11] D.C. Code sec. 41-135. More specifically, section 41-135 provides:

> (a) Any person who fails to pay or deliver property within the time prescribed by this chapter shall be required to pay interest at the rate of 1½% per month or fraction of a month on the property or value of the property from the date the property should have been paid or delivered.
>
> (b) Except as otherwise provided in subsection (c) of this section, a holder who fails to report, pay, or deliver property within the time prescribed under this chapter, or fails to perform other duties imposed by this chapter, shall pay to the Mayor, in addition to the interest as provided in subsection (a) of this section, a civil penalty of $200 for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maximum of $10,000.
>
> (c) A holder who willfully fails to report, pay, or deliver property within the time prescribed under this chapter, or fails to perform other duties imposed by this chapter, shall pay to the Mayor, in addition to the interest as provided in subsection (a) of this section, a civil penalty of $1000 for each day the report, payment, or delivery is withheld, or the duty is not performed, up to a maxim [sic] of $25,000, plus 25% of the value of any property that should have been paid or delivered.

[12] *See* D.C. Code sec. 41-117.

[13] We note that the Act's confidentiality provision, section 41-131, states:

> Any information or records required to be furnished to the Mayor as provided in this chapter shall be confidential and shall not be disclosed to any person except the person who furnished the same to the Mayor and except as provided in sections 41-118 (notice of abandoned property) and 41-123 (deposit of funds) or as may be necessary in the proper administration of this chapter alone.

The Act potentially implicates client confidentiality under Rule 1.6 because the Act's requirement to transfer a missing client's funds to the Mayor's office and provide identifying information for same involves disclosure of the client's identity. We rec-

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Finally, we note the possibility that the missing client might have been a minor at the time of the representation and that he or she might not learn of the trust account monies until reaching the age of majority. Pursuant to Rule 1.14 regarding clients with diminished capacity (here, by age), the lawyer should consider moving the relevant court for a protective order authorizing the continued safekeeping of the missing client's trust account monies until three years after the client has reached the age of majority, drawing on the Act's three-year period for deeming property abandoned.

*Conclusion*

A lawyer who is in possession of funds (or other intangible personal property) belonging to a client who cannot be located, and whose last known address is in the District of Columbia (or where the lawyer is domiciled in the District), must exhaust reasonable efforts to locate the client as described more particularly above. Thereafter, it is not a violation of the D.C. Rules of Professional Conduct for a lawyer in such circumstances to report to the Mayor and transfer client funds that are deemed to be abandoned as required by the D.C. Unclaimed Property Act.

**Published: June 2011**

*Opinion No. 360*

## Contact With Non-Party Treating Physician Witness

The principal question presented is whether a lawyer may ask his or her client's treating physician not to have ex parte communications with opposing counsel in a medical malpractice case where legal restrictions on such communications based on privacy laws and/or physician-patient privilege have been removed.

Under D.C. Rule 3.4(f), the lawyer may inform his or her client's treating physician that the treating physician has no obligation to speak with opposing counsel and that the treating physician may decline to speak to opposing counsel without the lawyer also present. To the extent that privacy laws or applicable privileges may restrict the scope of information that the treating physician may disclose, the lawyer may also demand that the physician comply with confidentiality obligations that have not been removed and may state his or her client's position as to the scope of information that may be legally disclosed. The lawyer may not, however, request or instruct the physician not to have communications with opposing counsel or request or instruct that any communications take place only if the lawyer is present.

**Applicable Rules**

- Rule 3.4(a), (f)—Fairness to Opposing Party and Counsel
- Rule 4.4(a)—Respect for Rights of Third Persons
- Rule 4.3—Dealing with Unrepresented Person

*Inquiry*

The Committee has received an inquiry from a lawyer who handles medical malpractice cases. In at least one case, the court has entered a qualified protective order which the lawyer describes as lifting restrictions on ex parte communications between defense counsel and the plaintiff's treating physician under the Health Insurance Portability and Accessibility Act (HIPAA). In such a situation, the plaintiff's counsel would prefer that the treating physician not have ex parte communications with defense counsel. The lawyer asks three questions about the information or requests the plaintiff's counsel may ethically convey to the client's physician. First, may the plaintiff's counsel request that the physician decline to speak with defense counsel? Second, if the answer to the first question is negative, may the plaintiff's counsel inform the treating physician that he or she is not required to speak with defense counsel if the physician does not want to? Third, may plaintiff's counsel request that the physician decline to speak with defense counsel unless plaintiff's counsel is also present?

*Discussion*

The question presented is primarily governed by Rule 3.4(f) of the D.C. Rules of Professional Conduct. Before addressing the applicability of Rule 3.4(f), however, we address briefly a threshold issue. Because the person who would be providing information is a treating physician, there is an initial issue regarding whether defense counsel's communications with the treating physician are restricted by Rule 4.4(a), which prohibits a lawyer from "knowingly us[ing] methods of obtaining evidence that violate the legal rights of [a third] person." Comment [1] to Rule 4.4(a) states that the lawyer's responsibility to a client

> 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.

Such rights would also include legal protections applicable to the physician-patient relationship arising from privacy laws or any applicable physician-patient privilege.[1] Thus, Rule 4.4(a) would prohibit defense counsel from asking the treating physician questions eliciting information that would be privileged or otherwise legally protected.

In the scenario presented, we assume that any absolute bars to the treating-physician's disclosure to defendant's counsel of medical information relating to the plaintiff have been removed as a result of the qualified protective order referred to by the inquiring lawyer and/or by waivers of privilege resulting from the institution of the malpractice litigation. At the same time, however, we assume that there still may be legal restrictions

ognize that there are situations in which the client's name and/or the fact that the client consulted a particular attorney could be a client confidence. *See, e.g.* D.C. Legal Ethics Op. 312 (2002); Conn. Ethics Op. 99-35 (1999) (lawyer participating in referral program that offers services to bankruptcy clients and pays lawyer for each referral must obtain client consent before disclosing client's name to program); Ill. Ethics Op. 97-1 (lawyer may provide bank with names of clients as potential bank customers only with clients' consent).

Rule 1.6(e) permits disclosure of confidential information when required by law. In this situation, disclosing a client's name is permissible because it is required by the Act. (Our conclusion might differ if another state's unclaimed property act applied.) Nevertheless, a lawyer may consider advising his or her client that his or her identity may be divulged when the lawyer has to report it to the Mayor's office.

[1] The Committee does not opine on legal issues, but offers the following two examples of potential legal restrictions. First, under federal law, privacy rules under the Health Insurance Portability and Accessibility Act (HIPAA) generally prevent the unauthorized disclosure of "protected health information" of a patient, which is defined broadly. 45 C.F.R. § 160.103 (2011). Second, the District of Columbia has codified a physician-patient privilege, and a physician may not be permitted to disclose confidential patient information without the patient's consent, depending on the circumstances of a given case and a plaintiff's potential waiver of the privilege by placing her physical condition at issue in litigation. *See* D.C. Code § 14-307; *Street v. Hedgepath*, 607 A.2d 1238, 1246 (D.C. 1992).

that would preclude the physician from disclosing information unrelated to the litigation.[2]

Based on those assumptions, we now turn to the application of Rule 3.4(f), which provides as follows:

> A lawyer shall not:
> (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.

The first issue is whether the treating physician falls within any of the exceptions in Rule 3.4(f), which are limited to the lawyer's client, a client's relative, and a client's employee or other agent. Comment [9] to Rule 3.4 explains that "[p]aragraph (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." None of these exceptions would apply here. There is no indication that the treating physician is a relative or employee of the plaintiff; nor are any facts presented that would establish an agency relationship between the client and the physician.[3]

Accordingly, other than the possible legal restrictions on the scope of what the treating physician may disclose (an issue discussed further below), the treating physician is no different from any other witness who is neither a client nor a relative, employee, or other agent of a client, and the answer to the inquiring lawyer's first question is clear. Rule 3.4(f) prohibits plaintiff's counsel from requesting that the physician decline to speak with defense counsel.

As to the second question, although plaintiff's counsel may not *request* that the treating physician not communicate with opposing counsel, it is permissible for plaintiff's counsel to inform the treating physician that he or she is not required to speak with defense counsel if the physician does not want to do so. *See* Restatement (Third) of The Law Governing Lawyers § 116 cmt. e (2000) ("A lawyer may inform any person of the right not to be interviewed by any other party . . . .").

The third question is whether plaintiff's counsel may request that the treating physician not communicate with defendant's counsel unless plaintiff's counsel is also present. In other words, plaintiff's counsel would not be seeking to preclude communications entirely, but would be requesting that a condition be attached to any such communications – *i.e.*, that they only occur if plaintiff's counsel is present. We conclude that, although plaintiff's counsel may *inform* the treating physician of the right to insist on the presence of plaintiff's counsel during any communications with defendant's counsel, plaintiff's counsel may not *request* that the physician communicate with defendant's counsel only if plaintiff's counsel is present. Although Rule 3.4(f) expressly prohibits only a request "to refrain from voluntarily giving relevant information to another party," it would be inconsistent with the intent of the rule to permit a lawyer to request that conditions be imposed on communications with opposing counsel that could discourage the witness from allowing the communication. Comments to Section 116(4) of the Restatement (Third) of The Law Governing Lawyers, which is generally similar to Rule 3.4(f), support this conclusion:

> A lawyer may inform any person of the right not to be interviewed by any other party, but a lawyer may not request that a person exercise that right or attempt otherwise to induce noncooperation, except as permitted under Subsection (4).[4] A lawyer may also advise of the right to insist on conditions, such as that the lawyer or the person's own lawyer be present during any interview or that the interview be recorded.

Restatement (Third) of The Law Governing Lawyers § 116 cmt. e (2000). *See also* D.C. Rule 3.4(a) ("A lawyer shall not: (a) obstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so, if the lawyer reasonably should know that the evidence is or may be the subject of discovery or subpoena in any pending or imminent proceeding . . . .").

We recognize that allowing lawyers to inform witnesses that they have no obligation to speak with opposing counsel, or that they can insist on the presence of other counsel as a condition, may result in a decision by the witness not to speak with opposing counsel. That possible result, however, is consistent with the intent of Rule 3.4(f), which is to allow the witness to make that decision based on what the witness perceives to be in his or her best interest. On the other hand, Rule 3.4(f) does not permit the lawyer to request that the witness make a particular decision.

We believe our conclusion is also consistent with and supported by *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966). In *Gregory*, the prosecutor in a capital case acknowledged that "I instructed all the witnesses that they were free to speak to anyone they like. However, it was my advice that they not speak to anyone about the case unless I was present." *Id*. at 187. The court held that this conduct deprived defendant of a fair trial. *Id.* at 189; *see also id.* at 188 ("we know of nothing in the law which gives the prosecutor the right to interfere with the preparation of the defense by effectively denying defense counsel access to the witnesses except in his presence"). *Gregory* was decided primarily on the basis of criminal law and procedure in the context of a capital case and long before the D.C. Rules of Professional Conduct went into effect in 1991, so it has no direct applicability to the question before the Committee; however, our conclusion would preclude the same conduct that the *Gregory* holding precludes.[5]

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[2] Lawyers involved in a case such as that presented by the inquiry will need to determine the extent to which there may be legal restrictions on a witness's disclosure of information and the extent to which any such restrictions may have been waived, removed by court order, or otherwise lifted. Such legal issues are beyond the scope of this opinion.

[3] We do not rule out the possibility that in a particular case, a treating physician may have become an agent of his or her patient for particular purposes, but we have found no basis for treating the physician-patient relationship as an agency relationship as a general matter for purposes of Rule 3.4(f). *See* Restatement (Third) of the Law Governing Lawyers § 116 cmt. e (2000) (implying that physicians generally do not fall within any of the exceptions to Section 116, which includes an exception for agents of the client).

[4] Section 116(4) states as follows: "A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless: (a) the person is the lawyer's client in the matter; or (b) (i) the person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and (ii) the lawyer reasonably believes compliance will not materially and adversely affect the person's interests." Section 116(4) of the Restatement (Third) of the Law Governing Lawyers.

[5] We also note that there was some discussion of *Gregory* in the context of Rule 3.4(f) when the D.C. Rules of Professional Conduct were being developed. The D.C. Court of Appeals asked Robert E. Jordan, III, Chair of the D.C. Bar Model Rules of Professional Conduct Committee that was responsible for the original version of these rules, to review the comments submitted on the proposed rules in 1988. He responded as follows to one of the comments on proposed Rule 3.4(f):

There are several other issues raised by the scenario presented by the inquiry. First, if (as assumed) there are still some legal limits on the scope of information that the treating physician may disclose to defendant's counsel based on privacy laws and/or applicable privileges (notwithstanding the fact that legal impediments to the disclosure of certain information have been removed), it is proper for plaintiff's counsel to demand that the treating physician comply with legal confidentiality obligations and to inform the treating physician of plaintiff's position regarding the extent of those obligations. Restatement (Third) of The Law Governing Lawyers § 116 cmt. e (2000) ("A lawyer may properly demand that a person who is not otherwise excepted from the Subsection observe a legal obligation of confidentiality to the lawyer's client. For example, a physician or member of the clergy who is considered to be an independent contractor may nonetheless owe a legal duty of confidentiality to the client, which the client's lawyer may properly insist that the person observe."). Second, as noted earlier, defendant's counsel should not solicit information the disclosure of which remains restricted. *See* D.C. Rule 4.4(a). Third, counsel for both sides should comply with Rule 4.3 in dealing with unrepresented persons.[6] *See generally* D.C. Ethics Opinion No. 287 (discussing Rules 4.3 and 4.4 in the context of ex parte contact with former employees of party-opponents).[7]

*Conclusion*

Under Rule 3.4(f), a lawyer may not request the client's treating physician to refrain from having ex parte communications with opposing counsel where legal impediments to such communications have been removed. The lawyer may, however, inform the physician that the physician has no obligation to speak with opposing counsel and that the physician may insist on the lawyer being present. The lawyer may also demand that the physician comply with any confidentiality obligations still in effect and may state his or her client's position regarding the scope of information that may be legally disclosed.

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*Opinion No. 361*

## Lawyer's Acceptance of Compensation From Non-Lawyer Entity for Referring Client to Such Entity; Opinion 245 Overruled in Part

A lawyer who refers a client to a non-lawyer service provider such as a financial services firm may accept compensation from the provider for the referral so long as the criteria of Rule 1.7(c) and, if applicable, Rules 1.8(a) and 5.7 are satisfied. Those criteria are exacting, however, and the arrangement may be beyond the lawyer's malpractice coverage even if permitted by the Rules.

**Applicable Rules**

- Rule 1.7—Conflict of Interest: General
- Rule 1.8(a)—Conflict of Interest: Specific Rules
- Rule 5.7—Responsibilities Regarding Law-Related Services

*Inquiry*

The committee has been asked whether a lawyer who refers her client to a non-lawyer service provider[1] may accept compensation from the provider or potential partner for such a referral. Although this issue can arise in various contexts, the particular scenario presented is whether a lawyer may refer her client to a financial services firm in exchange for a referral fee. The inquirer advises that the referral arrangement would be disclosed to the client in writing and is permissible under the federal securities laws.[2]

*Discussion*

The foregoing scenario offers one of the many contexts in which fee-for-referral situations can arise. Variables include whether the transaction with the other entity will involve "law-related services" (e.g., title insurance for a real estate purchase versus the purchase of an automobile), whether the lawyer's representation of the client is related to the client's transaction with the other entity, whether the lawyer represents the other entity in unrelated matters, and whether the lawyer owns or controls the other entity.

For the reasons set out below, we believe that the D.C. Rules of Professional Conduct ("Rules" or "D.C. Rules") permit such arrangements if certain criteria are satisfied. We caution, however, that the prerequisites for such an arrangement are exacting and that even when permitted by the Rules, the arrangement

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The *Courts/Lawyers Section* expresses concern that Rule 3.4(f), as written, does not reflect the limitation imposed on lawyers representing the government in a criminal case by *Gregory v. United States,* 125 U.S. App. D.C. 140, 369 F.2d 185 (1966), *cert. denied*, 396 U.S. 865 (1969). That decision concludes that it is improper for the government to interfere with defense efforts to obtain information, and the Section expresses concern that Rule 3.4(f) might be read as permitting a prosecutor to request that government employees such as investigative personnel or medical examiners not speak to defense counsel.

I doubt that government prosecutors would take the ethics rule as freeing them from such obligations as *Gregory* imposes, and I would not agree that a specific black letter addition be made to deal with the perceived problem. Furthermore, if any such addition were made, it should be to Rule 3.8, which lays out special rules applicable to prosecutors.

I suggest that the problem perceived by the Section can be remedied by adding to the Comment paragraph 10 the following:

Paragraph (f) does not alter any limitations, imposed upon prosecutors in criminal cases by judicial decisions or other law, with respect to impeding access to government employees who may have information relevant to defending against criminal charges.

If the Court wishes to deal with this problem, I recommend this solution.

Analysis of Comments Submitted to the District of Columbia Court of Appeals in Response to the Court's Order of September 1, 1988 (May 3, 1989), at 66-67. The D.C. Court of Appeals did not make any changes to the text of proposed Rule 3.4(f) or proposed comment [10] (now comment [9]) in response to the referenced comments.

[6] Rule 4.3 states:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(1) give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possiblity of being in conflict with the interests of the lawyer's client; or

(2) state or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

(b) When the lawyer knows or reasonable should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[7] We assume from the inquiry that the treating physician is not represented by counsel and that Rule 4.2 is therefore not implicated.

[1] This opinion does not address compensation for referrals between lawyers, which is governed by Rule 1.5(e), or payments to non-lawyers for referring potential clients to lawyers, which are governed by Rules 5.4 and 7.1.

[2] This committee does not opine on compliance with legal requirements, such as those under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 through 80b-21 (2006), and its District of Columbia analog, the Securities Act of 2000, D.C. Code §§ 31-5601.1 through 5608.04 (2001), aside from those imposed by the D.C. Rules of Professional Conduct.

may fall outside the coverage of the lawyer's professional malpractice insurance.

Rules 1.7 and 1.8, which govern conflicts of interest, and Rule 5.7, which deals with the provision of law-related services, are relevant to this inquiry. No reported decision of the District of Columbia Court of Appeals or the District of Columbia Superior Court appears to have addressed this issue since the D.C. Rules of Professional Conduct took effect in January 1991.[3] This committee addressed the issue in a 1993 opinion (Opinion No. 245) but an intervening change in the Rules makes reconsideration in order.

The 1993 inquiry was whether a company offering services as a registered agent for corporations could pay commissions to lawyers who referred their clients to the company. Following a brief discussion that cited Rule 1.7(b)(4) of the D.C. Rules and several ethics opinions from this and other jurisdictions, the opinion concluded that—

> a lawyer may not retain a referral fee or commission from a third party for referring legal clients. Any payment offered to the lawyer for referral of a client's business must be disclosed to the client. The client must consent to the payment, and the payment must be turned over to the client directly or as a credit to the bill for legal services. A lawyer's judgment in referring a client for services from third parties must be based on assessment of the quality of the third party's services and fairness of the price, not on a potential financial benefit to the lawyer.

D.C. Legal Ethics Op. 245 (1993) ("Opinion 245"). Most of the precepts set forth in the above quotation—notably, those respecting disclosure, consent, and impairment of the lawyer's independent professional judgment—apply with equal force today. Under the current D.C. Rules, however, such a fee need not be turned over to the client if—

- the client—following full disclosure as contemplated in Rule 1.7(c)(1)—gives his informed consent (as contemplated in Rules 1.7(c)(1) and 1.0(e)) to retention of the fee by the lawyer; *and*
- notwithstanding the lawyer's personal conflict under Rule 1.7(b)(4), "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to [the] client," as required by Rule 1.7(c)(2); *and*
- the requisites of Rule 1.8(a), which governs business transactions between lawyer and client, are satisfied; *and*
- if Rule 5.7, which addresses the provision of "law-related services," applies, the requisites of that rule are satisfied.

*Rule 1.7*. Rule 1.7 is the general rule relating to conflicts of interest and waivers of such conflicts. One type of conflict arises when "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." D.C. Rule 1.7(b)(4).

This type of conflict can be waived if (A) the client "provides informed consent" "after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" and (B) "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to [the] client." Rule 1.7(c).

Opinion 245 was issued in 1993. In 1995, the Court of Appeals promulgated rules revisions that included a new comment to Rule 1.7:[4]

> [36] Lawyers, either alone or through firms, may have interests in enterprises that do not practice law but that, in some or all of their work, become involved with lawyers or their clients either by assisting the lawyer in providing legal services or by providing related services to the client. Examples of such enterprises are accounting firms, consultants, real estate brokerages, and the like. The existence of such interests raises several questions under [Rule 1.7]. First, a lawyer's recommendation, as part of legal advice, that the client obtain the services of an enterprise in which the lawyer has an interest implicates paragraph 1.7(b)(4). The lawyer should not make a recommendation unless able to conclude that the lawyer's professional judgment on behalf of the client will not be adversely affected. Even then, the lawyer should not make such a recommendation without full disclosure to the client so that the client can make a fully informed choice. Such disclosure should include the nature and substance of the lawyer's or the firm's interest in the related enterprise, alternative sources for the non-legal services in question, and sufficient information so that the client understands that the related enterprise's services are not legal services and that the client's relationship to the related enterprise will not be that of a client to attorney. * * * Third, the lawyer should be aware that the relationship of a related enterprise to its own customer may create a significant interest in the lawyer in the continuation of that relationship. The substantiality of such an interest may be enough to require the lawyer to decline a proffered client representation that would conflict with that interest; at least Rule 1.7(b)(4) and (c) may require the prospective client to be informed and to give informed consent before the representation could be undertaken. Fourth, a lawyer's interest in a related enterprise that may also serve the lawyer's clients creates a situation in which the lawyer must take unusual care to fashion the relationship among lawyer, client, and related enterprise to assure that the [client's] confidences and secrets are properly preserved pursuant to Rule 1.6 to the maximum extent possible.

D.C. Rule 1.7, cmt. [36]. Comment [36] makes clear that a lawyer's profit-motivated financial or managerial involvement with another entity to which she refers clients is not per se prohibited but is subject to the waiver provisions of Rule 1.7(c).

We view the instant inquiry—in which the other entity pays a commission to the referring lawyer—as an example of the type of lawyer interest described in comment [36] and hence as not per se prohibited by the Rules. Instead, an arrangement for such a referral fee or commission is subject to the waiver provisions of Rule 1.7(c). To exemplify, we do not believe the Court of Appeals intended to permit waiver for a referral to an accounting firm owned by the referring lawyer but to forbid waiver, even with full disclosure to and informed con-

[3] A 2007 Court of Appeals decision stated that a lawyer referring a client to a non-lawyer entity owned by the lawyer must comply with the requirements of Rule 1.8(a), which governs business transactions between lawyer and client. *In re Brown,* 930 A.2d 249 (D.C. 2007), *aff'g* 2006 D.C. Super. LEXIS 5 (D.C. Super. Ct. Feb. 22, 2006) (Adm. No. 1374-03). Perforce the Rules permit a lawyer to refer a client to a non-lawyer entity in which the lawyer has less than a complete ownership interest.

[4] The comment originally was promulgated as comment [25] but currently is comment [36].

sent by the client, for a referring lawyer's receipt of a $100 gift card from a court reporting service.

Accordingly, Opinion 245 is overruled insofar as it erects a per se bar to the receipt of compensation by a lawyer for referring her client to a non-lawyer entity. We emphasize, though, that the requirements of "[d]isclosure and consent are not mere formalities," D.C. Rule 1.7 cmt. [27], that "the lawyer bears the burden of proof that informed consent was secured," *id.* cmt. [28], and that a waiver is ineffective unless "the lawyer reasonably believes"—i.e., the test is objective—"that he or she will be able to provide competent and diligent representation" despite the conflict, *id.* cmt. [30]; *accord* D.C. Rule 1.7(c)(2). The disclosure should include the fact that the lawyer stands to benefit from the referral, the amount and manner[5] of the benefit, that other providers of the services might do so more capably, at a lower cost or both, and that the fact of the benefit conceivably could affect the lawyer's independent professional judgment. *See* Ariz. Ethics Op. 05-01 (2005) (requiring disclosure of amount and manner of benefit); Calif. Formal Op. 1995-140 (1995) (requiring disclosure that better and less costly services may be available elsewhere). Moreover, "the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent." D.C. Rule 1.7, cmt. [28]; *accord* Phila. Bar Ass'n, Joint Ethics Op. 2000-100 (2000). Finally, the quantum of the benefit to the lawyer is a factor in whether the lawyer reasonably can conclude that the arrangement will not affect adversely the lawyer's ability to provide competent and diligent representation. *See* D.C. Rule 1.7, cmt. [30] (noting that "it is doubtful that a lawyer could [so conclude] where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation"); Phila. Bar Ass'n, Joint Ethics Op. 2000-100 (2000); Utah Ethics Advisory Op. 99-07 (1999) (noting difficulty, under Rule 1.8, of satisfying requirement that lawyer's judgment not be affected); Wisc. Ethics Op. E-00-04 (2000) (stating that disclosure requirements of Rule 1.8 can be satisfied only if benefit to lawyer not unduly substantial).

[5] By "manner," we include whether the fee is a one-time or recurring payment. *See, e.g.,* Phila, Bar Ass'n, Joint Ethics Op. 2000-100 (2000) (requiring that the client be advised of this fact).

The disclosures mandated in connection with a request to waive a lawyer's conflict under Rule 1.7 are not required to be in writing. The same is true for the client's informed consent. D.C. Rule 1.7(c) & cmt. [28]. The comments note, however, that "[i]t is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent." D.C. Rule 1.7, cmt. [28].

*Rule 1.8.* The D.C. Rules impose special waiver requirements when a lawyer enters into a business transaction with a client. The transaction must be "fair and reasonable to the client" and must be fully disclosed in writing "in a manner which can be reasonably understood by the client." D.C. Rule 1.8(a). The disclosure should, "[w]hen necessary, [include] the material risks of the transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and, where appropriate, should explain that the client may wish to seek the advice of independent counsel. D.C. Rule 1.8, cmt. [2]. Also, the client must be accorded a reasonable chance to obtain independent legal advice and the client must give informed written consent to the transaction. D.C. Rule 1.8(a). A lawyer-client transaction is subject to this rule even if unrelated to the legal representation but—

> 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 adversely affected by the lawyer's financial interest in the transaction.

D.C. Rule 1.8, cmts. [1], [3]; *accord* N.J. Ethics Op. 688 (2000). Moreover, "[t]he 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 the existing clients of the lawyer's legal practice." *Id.* cmt. [1].

The D.C. Rules provide expressly that Rule 1.8(a) applies if the other entity is *controlled* by the lawyer—a criterion that includes the lawyer's ability to direct the entity's operation. D.C. Rule 5.7, cmts. [4], [5]; *see In re Brown*, 930 A.2d 249 (D.C. 2007) (applying Rule 1.8(a) where real estate brokerage handling sale of decedent's property was wholly owned by lawyer for personal representative).

No published opinion of the D.C. Court of Appeals, nor the D.C. Rules, nor any of our previous opinions (including Opinion 245) addresses whether Rule 1.8(a) (or its predecessor under the D.C. Code of Professional Responsibility, Disciplinary Rule 5-104(A)) applies where the lawyer does not control or have an ownership interest in the other entity but, as here, stands to profit directly from the referral. Most other jurisdictions that have addressed the question, though, have concluded that Rule 1.8(a) does apply in such circumstances. *See, e.g.*, Ariz. Ethics Op. 05-01 (2005) (rule applies; noting "heavy burden" of demonstrating compliance); Calif. Formal Op. 1995-140 (1995) (rule applies); Conn. Ethics Op. 94-25 (1994) (same); Ill. State Bar Ass'n Op. 97-04 (1998) (same); Ky. Ethics Op. E-390 (1996) (rule applies but difficult to satisfy informed consent requirement); Mich. Op. RI-317 (2000) (rule applies); N.J. Ethics Op. 688 (2000) (same); Ohio Op. 2000-1 (2000) (rule applies); Phila. Bar Ass'n, Joint Ethics Op. 2000-100 (2000) (rule applies); Va. Legal Ethics Op. 1564 (rev. 1995) (same); Utah Ethics Advisory Op. 99-07 (1999) (same; noting difficulty of satisfying requirement that lawyer's judgment not be affected); Wisc. Ethics Op. E-00-04 (2000) (rule applies but can be satisfied only if benefit not unduly substantial); *see also* Mo. Informal Advisory Op. 960124 (n.d.) (disapproving arrangement without referring to rule on business transactions with clients); N.Y. State Bar Ass'n Op. 682 (1996) (same); Vt. Advisory Ethics Op. 1998-08 (1998) (same).

Although numerous, these opinions offer little in the way of reasoning. We think that a somewhat more nuanced approach is in order. Rule 1.8(a) applies where there is a "business transaction" between lawyer and client. Where the lawyer has an ownership interest or management role in the other entity, such a transaction is present and the lawyer accordingly must comply with Rule 1.8(a) as well as with Rule 1.7(c). Where the lawyer has no such interest or role in the other entity, however, there is no "business transaction" between the lawyer and her client even if the lawyer is to receive a commission or similar benefit from the other entity. In that circumstance, Rule 1.7(c) applies but Rule 1.8(a) does not.

The waiver requirements under D.C. Rule 1.8(a) are outlined above. Lawyers preparing disclosures contemplated by this rule also may wish to take note of the following opinions from other jurisdic-

tions. The Illinois ethics opinion cited above states that full disclosure should include "informing the client . . . that the lawyer would not be involved in any way to protect the client's interest but would continue to receive a portion of the advisor's fee." Ill. Advisory Op. 97-04 (1998). Michigan cautions that where the lawyer has an ongoing, as opposed to a one-time, interest in the fees paid to the advisory firm, disclosure "should include . . . that the lawyer cannot render legal advice to the client if disputes or differences arise between the advisory firm and the client." Mich. Op, RI-317 (2000). Wisconsin advises the lawyer to disclose "such factors as relative cost; suitability to the client's needs; and the competence, character, and reputation of the person to whom the lawyer refers the client." Wisc. Ethics Op. E-00-04 (2000).

*Rule 5.7.* The D.C. Rules expressly address the responsibilities of a lawyer when "law-related services" are provided by an entity "controlled by the lawyer individually or with others" in circumstances that are distinct from the lawyer's provision of legal services to her client. D.C. Rule 5.7(a)(2). "Law-related services" are those "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." D.C. Rule 5.7(b). Examples 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." Rule 5.7, cmt. [9].

The facts before us are insufficient to determine whether this rule, which was added in February 2007, applies to the instant inquiry. For example, the rule does not apply if the lawyer lacks "the ability to direct [the] operation" of the non-lawyer entity to which she refers her client, Rule 5.7, cmt. [4], nor does it apply if the services provided by the non-lawyer entity are unrelated to the provision of legal services. The inquiry does not indicate whether the lawyer has a controlling, ownership, or management interest in the non-lawyer entity, nor does it indicate the relationship, if any, between the services being provided by the lawyer and those to be provided by the non-lawyer entity. As to the latter criterion, it is one thing if the lawyer is defending the client against a reckless driving charge and the referral is to an entity that would manage the assets of the client's business, but quite another if the lawyer represents the client in an inheritance matter and the referral is to an entity that would manage the inherited assets.

If Rule 5.7 does apply, however, the lawyer will be subject to the Rules of Professional Conduct in respect of the services provided by the non-lawyer entity unless the lawyer takes "reasonable measures to assure that [the client] knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." Rule 5.7(a)(2). The communication should be made before the client enters into an agreement for the law-related services, Rule 5.7 cmt. [6], and the burden is on the lawyer to show compliance with the notification requirement, *id.* cmt. [7].

*Malpractice coverage.* Although we do not opine on legal questions arising other than under the Rules of Professional Conduct, we offer a final caveat: Compliance with the D.C. Rules aside, a "business enterprise exclusion" is a standard feature of lawyers' professional liability insurance policies, *American Guarantee & Liab. Ins. Co. v. Timothy S. Keiter, P.A.*, 360 F.3d 13, 16 (1st Cir. 2004), and courts have interpreted this exclusion broadly, *e.g., Minnesota Lawyers Mut. Ins. Co. v. Antonelli, Terry, Stout & Kraus, LLP*, 2010 U.S. Dist. LEXIS 122836, *28 (E.D. Va. Nov. 18, 2010) (Civil No. 1:08-CV-1020) (holding that exclusion extends not only to claims "arising from" lawyer's other business but also claims "relating to" such business). One purpose of the exclusion is "to avoid the circumstance where an insured so intermingles his business relationships with his law practice that an insurance carrier incurs additional risk of having to cover the insured for legal malpractice claims relating to the conduct of business, rather than solely out of the professional practice." *Id.* at 17 (quoting *Jeffer v Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 703 A.2d 316, 322 (N.J. Super. 1997).) One application of the exclusion is where a lawyer has an interest in a business that becomes involved in the services the lawyer is providing to her client. *E.g., Darwin Nat'l Assurance Co. v. Hellyer*, 2011 U.S. Dist. LEXIS 60592 (N.D. Ill. June 7, 2011) (No. 10 C 50224). "[T]he [insurance] policy makes it clear that it will not extend coverage to an insured sued for professional malpractice outside of legal matters conducted between the firm and its clients." *Jeffer*, 703 A.2d at 322. The upshot is that even where the D.C. Rules permit a lawyer to accept a commission from the non-lawyer entity to which she refers a client, the lawyer's malpractice insurance might not cover a claim that relates to the referral or to the services rendered by the other entity, particularly where the lawyer has a financial interest involving the other entity. Ill. Advisory Op. 97-04 (1998).[6]

*Conclusion*

If the criteria of Rule 1.7(c) and, if applicable, Rules 1.8(a) and 5.7 are satisfied, a lawyer who refers a client to a non-lawyer service provider such as a financial services firm[7] may accept compensation from the provider for such a referral. The prerequisites for such an arrangement are exacting, however, and the arrangement may be outside the coverage of the lawyer's professional malpractice insurance even if permitted by the Rules.

**Published November, 2011**

*Opinion No. 362*

**Non-lawyer Ownership of Discovery Service Vendors**

*Summary*

Discovery service vendors, such as e-discovery vendors, cannot both practice law within the District of Columbia and be partially or entirely owned by passive non-lawyer investors consistent withD.C. Rule 5.4(b). This Committee's jurisdiction does not include the definition of the practice of law, but the Committee on Unauthorized Practice of Law has recently issued a detailed opinion explaining what activities by these vendors constitute the practice of law.

The Rules of Professional Conduct do not reach non-lawyer owners of discovery service organizations; they are not

[6] We do not mean to suggest that the simple act of referring a client to a non-lawyer service provider, where the lawyer receives no economic benefit from the referral, is beyond the scope of standard legal malpractice coverage.

[7] As noted above, this opinion does not address compensation for referrals between lawyers, which is governed by Rule 1.5(e), or payments to non-lawyers for referring potential clients to lawyers, which are governed by Rules 5.4 and 7.1.

subject to bar discipline. The Rules do reach lawyers who co-own or manage such vendors with or on behalf of non-lawyer passive investors. The Rules also could reach lawyer employees of such vendors who know of facts that constitute a violation of Rule 5.4(b) or lawyers who, with similar knowledge, retain such vendors.

In addition, lawyers who own, manage, work for or retain a discovery service vendor that engages in the practice of law in the District of Columbia and has passive non-lawyer investment may violate the prohibition in Rule 5.5(b) against assisting others in the unauthorized practice of law.

**Applicable Rules**

- Rule 5.2—Subordinate Lawyers
- Rule 5.4(b)—Professional Independence of a Lawyer
- Rule 5.5(b)—Unauthorized Practice
- Rule 5.7—Law Related Services
- Rule 8.4(a)—Misconduct

*Inquiry*

Discovery service vendors have become an increasingly important part of the legal marketplace. They can provide an efficient and effective way for clients and lawyers to handle the complex and expensive process of discovery (electronic and otherwise), providing technical expertise, facilities and trained personnel at rates that often are less than those charged by lawyers and law firms for similar services. When such organizations operate in conformity with the ethical mandates discussed herein, they may present a viable alternative to traditional marketplace offerings.

The Committee has received an inquiry from a lawyer familiar with the services provided by discovery service vendors to lawyers and clients. The inquirer states that these vendors provide temporary attorneys, manage the services of software providers, and supervise the review and production of documents in their own review centers. The inquirer asserts that some such vendors are owned and operated entirely by attorneys, others are partly owned by attorneys, and the remainder are owned and controlled by corporations and other non-attorneys. The inquirer asks whether these vendors are operating consistent with Rule 5.4's prohibition on passive investment in law firms. Although the inquirer did not raise Rule 5.5's prohibition on engaging or assisting in the unauthorized practice of law or Rule 5.7's discussion of the provision by lawyers of law related services, we consider those issues as well.

*Discussion*

The threshold question is whether the discovery service vendors are, in fact, engaged in the practice of law. The practice of law is not defined in the District of Columbia Rules of Professional Conduct. See Comment [2] to Rule 5.5 ("The definition of the practice of law is established by law and varies from one jurisdiction to another.").

**A. The UPL Committee's Opinion Addressing Discovery Service Vendors**

District of Columbia Court of Appeals Rule 49 ("Rule 49") governs who may practice law within the District of Columbia. The District of Columbia Committee on Unauthorized Practice of Law (the "UPL Committee") has recently examined when e-discovery companies or discovery service vendors are engaged in the practice of law in the District of Columbia and therefore subject to Rule 49. We accept, as we must, the conclusions of the UPL Committee and its Opinion, described in more detail below.

In its Opinion 21-12, issued January 12, 2012, the UPL Committee reviewed the activities of discovery service vendors.[1] It noted that "some companies offer not only attorneys to staff document review projects, but also offer the physical space where the document review will take place, computers for conducting the review, and servers for hosting the documents to be reviewed." Op. 21-12 at 4. Additionally, some vendors offer other services ranging from "e-discovery consulting to database management to the eventual production of documents." *Id.* Some vendors describe their services as "'one-stop shopping, comprehensive review and project management, [and] fully managed document review.'" *Id.* (also noting descriptions of "soup-to-nuts document project from process to production" and "comprehensive project planning, on-site review team supervision, privilege log preparation, e-vendor selection and more"). Finally, some vendors also tout the qualifications of the lawyers they employ (e.g., describing them as "seasoned litigators"), or promote the vendor's expertise in various areas of the law such as intellectual property, patent litigation, class action lawsuits, and mergers and acquisitions. *Id*. at 5.

[1] The full text of the UPL Committee's opinion can be found at http://www.dccourts.gov/internet/appellate/unauthcommittee/main_jsf.

Opinion 21-12 provides guidance to allow discovery service companies to promote and provide services without falling afoul of Rule 49. First, the UPL Committee concluded that Rule 49 covers discovery service companies that are located in, use an address in, or otherwise conduct activities in the District of Columbia. In addition, Rule 49 covers those entities that "advertise themselves as available to assist with discovery projects in the District." *Id.* at 7.

Second, the UPL Committee, reiterating prior guidance from its Opinion 6-99, concluded that discovery service companies could handle "the administrative aspects of hiring and supervising a document review attorney" without violating Rule 49.[2] However, "the final selection of attorneys to staff a document review project must be made by a member of the D.C. Bar with an attorney-client relationship [and] the attorney's legal work must be directed or supervised by a D.C. Bar member who represents the client." *Id.* at 8. The "discovery services company may not . . . attempt to supervise the document review attorney['s legal work]." *Id.*

Third, the UPL Committee stated that "[t]o avoid running afoul of the holding out prohibition, discovery services companies must avoid" terms such as "document review" or "the discovery process" or other broad statements, such as "soup-to-nuts" or "end-to-end" services, implying that "a company can manage the entire document review or discovery process." *Id.* at 9. The UPL Committee also stated that any vendor making "such broad statements . . . at a minimum must include a prominent disclaimer stating that the company is not authorized to practice law or provide legal services in the District of Columbia and that the services offered by the company are limited to the non-legal, administrative aspects of document review and discovery projects." *Id.* Statements about the legal expertise of staff must be accompanied by a similar disclaimer. *Id.*

**B. Rule 5.4: Non-Lawyer Ownership and Discovery Service Companies.**

Rule 5.4(b) permits non-lawyer ownership of law firms under certain conditions. The entity in which the interest is

[2] The administrative matters "could include interviewing individuals to create roster of attorneys available...providing the lawyer's working space and equipment, ensuring that he or she works a regular day and works at an acceptable pace, providing salary and benefits, and similar supervisory activities that do not require the application of professional legal judgment." *Id.* at 8.

held by the non-lawyer must have "as its sole purpose" the provision of legal services. Rule 5.4(b)(1). The non-lawyer owners must undertake to abide by the Rules of Professional Conduct. Rule 5.4(b)(2). The lawyers in the organization must accept supervisory authority over the non-lawyer as provided by Rule 5.1. Rule 5.4(b)(3). All of these conditions must be set forth in writing. Rule 5.4(b)(4).

Rule 5.4(b) does not allow for passive investment in law firms or the like by "a corporation, investment banking firm, an investor or any other person or entity" that seeks to "entitle itself to all or any portion of the income or profits of a law firm or similar organization." Comment [8] to Rule 5.4. To hold an interest in a law firm, a non-lawyer must be "an individual performing professional services within the law firm or other organization." *Id*.; *see also* Rule 5.4(b) (limiting non-lawyers who may own an interest in a law firm to those "who perform[] professional services which assist the organization in providing legal services to clients").

As stated above, we are bound by the conclusions stated in the UPL Committee's Opinion 21-12 regarding those activities that do or do not constitute the practice of law. To the extent that discovery service vendors observe the limits on their work and related promotional activities set forth in that opinion, such vendors are not practicing law and the provisions of Rule 5.4(b) therefore do not apply.[3] To the extent, however, that the discovery service organization is, in fact, engaged in the practice of law as set forth in Opinion 21-12, passive ownership of that organization violates Rule 5.4(b).[4] Of course, the Rules of Professional Conduct only reach the conduct of lawyers, not corporations or non-lawyer investors. As a result, D.C. Bar admitted lawyers may not practice law within the District of Columbia or hold themselves out as able to do so for discovery service organizations when such organizations have passive non-lawyer investors. Under such circumstances, a D.C. Bar admitted lawyer cannot, consistent with Rule 5.4(b), share ownership in or participate in the management of a discovery service organization with non-lawyer passive investors.[5]

We do not find a basis to conclude that lawyer employees of a discovery service organization, whose sole or principal function is document review, have a duty to investigate how the organization promotes itself or whether the organization has passive non-lawyer ownership. However, where such a lawyer employee knows that the discovery service organization is (a) practicing law within the District of Columbia or holding itself out as prepared to do so and (b) owned, in whole or in part, by non-lawyer passive investors, such lawyer's continued work for that entity may be inconsistent with Rule 5.4(b). *See also* Rule 8.4(a) ("It is professional misconduct for a lawyer to 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.") (emphasis added). Under the Rules, the term *knows* "denotes actual knowledge of the fact in question." The definition also states, however, that "[a] person's knowledge may be inferred from the circumstances." Rule 1.0(f).

Note, however, that whether an entity, either in a particular matter or generally, is practicing law is an issue that often may be unclear. Under Rule 5.2(b), subordinate lawyers do not violate the Rules of Professional Conduct when they "act[] in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."[6] "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." Comment [1] to Rule 5.2.

As we stated in Opinion 358, Rule 5.2 "protects a subordinate lawyer who acts at the direction of a supervising attorney so long as there is a reasonable argument that" the actions at issue are "permitted by the Rules."[7] In this regard, it may be prudent for the management of a discovery services organization to explain to its employees, preferably in writing, how its operations are consistent with the restrictions on the practice of law by non-lawyers and on the prohibition of passive non-lawyer ownership of entities that do practice law. Such a statement, when issued in good faith by a supervisory lawyer, can fulfill the requirements of the safe harbor described in Rule 5.2(b). Of course, if the subordinate lawyer knows that the statement issued by the discovery organization is or has become materially inaccurate, such lawyer may no longer come within the safe harbor of Rule 5.2(b).

Finally, a lawyer who is contracting for discovery services on behalf of a client can similarly risk falling afoul of Rule 5.4(b) if the lawyer knows that the discovery services organization has passive non-lawyer ownership. *See* Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing] or induc[ing]" another lawyer to violate the Rules). A D.C. Bar admitted lawyer who retains a discovery organization with passive non-lawyer ownership and abdicates to that organization responsibilities that include the practice of law, without appropriate supervision or oversight, violates Rule 5.4(b). For example, a lawyer who simply gives a group of documents and a discovery request to a discovery service vendor and asks the vendor to select and organize responsive documents, produce a privilege log, and

[3] If a lawyer is involved in the provision of discovery services that do not constitute the practice of law, the lawyer may still be required to comply with the provisions of Rule 5.7. Discovery services that are not legal services are likely "law related services" under Rule 5.7. As a result, a lawyer providing such services would be subject to the Rules of Professional Conduct with respect to such services unless the lawyer took steps to inform the person or entity obtaining the law related services that the "protections of the client-lawyer relationship do not exist." *See* Rule 5.7(a)(2).

[4] A discovery services organization could practice law and still have a non-lawyer owner if such owner were an active participant in the business and made the certifications required by Rule 5.4(b)(4).

[5] A recent opinion of the New York State Bar Association concluded that New York's version of Rule 5.4 prohibits New York-admitted lawyers from practicing law in New York as employees of a United Kingdom entity that included non-lawyers in supervisory and ownership positions. NYSBA Ethics Opinion 911 (March 2012). Although New York's version of Rule 5.4 differs from that of the District of Columbia, and does not permit non-lawyer ownership of any kind, the New York opinion nevertheless supports our broader conclusion that a lawyer cannot practice law with an entity that is constituted in a manner not authorized by Rule 5.4.

[6] Rule 5.2 states in full:

"(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 resolution of an arguable question of professional duty."

[7] D.C. Legal Ethics Opinion 358 (2011); *See also* Comment [2] to Scope Note ("The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of facts and circumstances as they existed at the time of conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presupposes that whether or not discipline should be imposed for a violation, and the severity of the sanction, depend on all of the circumstances, such as willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.")

prepare the response to the request itself may put the discovery service organization in the position of practicing law under Opinion 21-12. Under such circumstances, instead of the broad delegation of work and responsibility described above, the lawyer hiring the discovery service vendor should ensure that the services being provided for that lawyer will not extend to the practice of law as outlined in Opinion 21-12. That is, the lawyer seeking to retain a discovery services organization should satisfy herself that the organization will not be engaged in the practice of law with respect to the matter for which the lawyer seeks to hire the organization. Alternatively, a lawyer seeking legal services from a discovery services organization could assure herself that such organization either is owned and controlled solely by lawyers or does not engage in the practice of law.

**C. Rule 5.5: Discovery Services Organizations and Unauthorized Practice of Law**

Rule 5.5(a) prohibits a lawyer from "practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." Rule 5.5(b) prohibits assistance to a "person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law." Comment [1] to Rule 5.5 indicates that these prohibitions "concern[] the unauthorized practice of law by District of Columbia Bar members in other jurisdictions and assistance by District of Columbia Bar members in the unauthorized practice of law by lawyers not admitted in this jurisdiction or by non-lawyers."

A lawyer who works for, partially owns, or engages a discovery service organization with passive non-lawyer ownership may be assisting another "person" or "non-lawyer" in the unauthorized practice of law. Although "person" is not defined in the Rules, Rule 49 defines the term to include entities. *See* D.C. Ct. App. Rule 49(a) (1). Moreover, Rules 4.1 through 4.4 use the term "person" or "third person" in ways that include entities as well as individuals. For example, it would be anomalous to conclude that Rule 4.4(a)'s prohibition on the use of "means that have no substantial purpose other than to embarrass, delay or burden a third person," applies only to individuals. The same logic applies to the provisions of Rule 4.3.[8] See generally D.C. Code § 45-604 ("The word 'person' shall be held to apply to partnerships and corporations unless such construction would be unreasonable....")

*Conclusion*

If discovery service organizations follow the guidelines set forth in the UPL Committee Opinion 21-12 and do not practice law, the activities of such organizations and the lawyers who work for them are consistent with the restrictions on non-lawyer ownership stated in Rule 5.4(b). However, the combination of the practice of law in the District of Columbia and passive non-lawyer ownership is not consistent with Rule 5.4(b). The noncompliance with the limitations on entities owned in part by non-lawyers should be particularly evident to those lawyers who create, own, and manage such organizations in conjunction with passive investors, but also may be evident to those lawyers who work at such organizations or the lawyers who engage such organizations. Lawyers in any of these circumstances should understand how Rule 5.4(b)'s requirements, and Opinion 21-12's definition of the practice of law may affect their ability to own, manage, work for, or retain such an entity. Finally, a lawyer who partially owns a discovery service vendor with passive non-lawyer ownership engaged in the practice of law in the District of Columbia assists in the unauthorized practice of law in violation of Rule 5.5(b). Lawyers who knowingly work for or retain such an entity may also violate Rule 5.5(b).

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*Opinion No. 363*

**In-House Lawyer's Disclosure or Use of Employer/Client's Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge**

An in-house lawyer may not disclose or use her employer/client's confidences or secrets in support of the lawyer's claim against the employer/client for employment discrimination or retaliatory discharge unless expressly authorized by Rule 1.6. If the employer/client puts the lawyer's conduct in issue, however (e.g., by lodging an affirmative defense or a counterclaim), the lawyer may disclose or use the employer's confidences or secrets insofar as reasonably necessary to respond to the employer/client's contention. An in-house lawyer is not prohibited from bringing such a claim against her employer/client merely because the employer/client may find it necessary or helpful to disclose its confidences or secrets in defending against the lawyer's claim.

**Applicable Rule**

• Rule 1.6 (Confidentiality of Information

*Inquiry*

The committee has been asked whether an in-house lawyer may disclose or use her employer/client's confidences or secrets in a claim against the employer/client for employment discrimination or retaliatory discharge. The inquirer also asks whether an employer/client's perceived need to use its confidences or secrets in defending against such a claim limits the in-house lawyer's right to bring the claim.

*Discussion*

***Claim by in-house lawyer***

As a general matter, an employee in the District of Columbia may pursue a claim against her employer for prohibited discrimination, *see, e.g.*, 42 U.S.C. § 2000e—2000e-17 (2006) (Title VII of 1964 Civil Rights Act); D.C. Code § 2-1401.1—2-1404.04 (2001) (DC Human Rights Act), or retaliatory discharge, *Carl v. Children's Hospital*, 702 A.2d 159 (D.C. 1997) (en banc); *Liberatore v. Melville Corp.*, 168 F.3d 1326 (D.C. Cir. 1999).[1] We know of no District of Columbia decisions on whether such a cause of action is available to an in-house counsel[2] but assume *arguendo* that such a lawyer possesses such a right. We address here whether the D.C. Rules of Professional Conduct ("D.C. Rules")

[8] Rules 4.1 and 4.2 specifically define "person" or "third person" to include entities. *See* Comment [1] to Rule 4.1 and Rule 4.2(c). The failure to repeat a similar definition in Rules 4.3, 4.4, and 5.5 does not appear to have been by design or otherwise to have been intended to distinguish the meaning of the term as between different Rules.

[1] This committee does not opine on laws or regulations aside from the D.C. Rules of Professional Conduct ("D.C. Rules"). It may discuss such law, however, where appropriate to put its opinions in context.

[2] *See Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 883-86 (D.C. 1998) (assuming that retaliatory discharge of lawyer by law firm can give rise to cause of action against firm).

prohibit an in-house counsel from disclosing or using the employer/client's confidences or secrets in furtherance of such a claim.[3]

With certain exceptions, a D.C. Bar member may not knowingly reveal, or use to the lawyer's advantage or the client's disadvantage, a "confidence or secret" of the lawyer's client. D.C. Rule 1.6(a). In this context, "confidences" are information protected by the attorney-client privilege, while "secrets" are "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." D.C. Rule 1.6(b). "Secrets" include information gained from third parties that otherwise comes within this definition. D.C. Rule 1.6 cmt. [8]. The prohibitions of Rule 1.6 continue after termination of the lawyer-client relationship. D.C. Rule 1.6(g).

A lawyer may reveal or use client confidences or secrets in some circumstances. Among these is—

> to the extent reasonably necessary to *establish a defense* to a criminal charge, disciplinary charge, or *civil claim*, formally instituted against the lawyer, based upon conduct in which the client was involved, or to the extent reasonably necessary to *respond* to specific allegations by the client concerning the lawyer's representation of the client.

D.C. Rule 1.6(e)(3) (emphasis added). Read literally, this provision is limited to *defensive* use of client information. It does not authorize *offensive* use of client confidences or secrets by the lawyer in the context of a lawyer-client controversy. Another exception in Rule 1.6 permits a lawyer to use or reveal such information offensively, but only "to the minimum extent necessary in an action instituted by the lawyer to *establish or collect the lawyer's fee*." D.C. Rule 1.6(e)(5) (emphasis added).

The former D.C. Code of Professional Responsibility ("D.C. Code") took a similar approach, permitting a lawyer to disclose a client's confidences or secrets where "necessary to establish or collect his fee or to *defend* himself . . . against an accusation of wrongful conduct." D.C. Code, Disciplinary Rule 4-101(C)(4) (emphasis added).

The history of D.C. Rule 1.6(e)(3) further demonstrates its availability solely for defensive purposes. The American Bar Association's Model Rules of Professional Conduct ("Model Rules") were adopted in 1983. As their name implies, the Model Rules are recommendations. *General Dynamics Corp. v. Superior Court* , 876 P.2d 487, 503 n. 6 (Calif. 1994). They have the force of law in a given jurisdiction only if adopted by that jurisdiction's bar governance authority—typically the highest court.

The District of Columbia Court of Appeals ("Court of Appeals") has disciplinary and regulatory authority over the D.C. Bar. D.C. Code § 11-2501 (2001). Soon after the ABA promulgated the Model Rules, the D.C. Bar, with the approval of the Court of Appeals, established a special committee, the Model Rules of Professional Conduct Committee ("Jordan Committee"), to review the Model Rules and make suitable recommendations to the D.C. Bar Board of Governors.

In contrast to the D.C. Rules, the Model Rules permit a lawyer, in a controversy with her client, to reveal information relating to representation offensively as well as defensively—

> 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.

Model Rule 1.6(b)(5) (emphasis added); ABA Formal Op. 01-424 (Sept. 22, 2001) (approving offensive use of information in in-house lawyer's action against client/employer for wrongful discharge).[4] Unlike the D.C. Rules, *see* D.C. Rule 1.6(e)(5), the Model Rules do not expressly authorize disclosure in an action for a lawyer's fee. Such an action is subsumed, however, within the first clause of Model Rule 1.6(b)(5).

The Jordan Committee discussed Model Rule 1.6(b)(5) on several occasions. The issue as framed by the committee, though, was not whether to permit generalized use of client confidences and secrets in lawyers' claims against clients but whether even to permit suits to collect fees.[5] The Jordan Committee's minutes reflect the removal of the first clause of the model rule provision quoted above but aside from the discussion on whether suits for fees should be permitted, do not reflect the reasoning behind the removal.[6]

The Bar Board of Governors transmitted its recommendations to the D.C. Court of Appeals in November 1986. *Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar* (Nov. 19, 1986) ("Yellow Book"). The Yellow Book discussed various elements of what now are D.C. Rules 1.6(e)(3) and 1.6(e)(5) but did not explain the reasons for retaining the D.C. Code approach of limiting a lawyer's offensive use of client confidences and secrets to fee collection actions.

In March 1990, the Court of Appeals adopted what now are D.C. Rules 1.6(e)(3) and 1.6(e)(5), as proposed by the Board of Governors.[7] Subsequent D.C. Bar reviews of the D.C. Rules in the early 1990s and in 2001-05 did not recommend changes,[8] and the two provisions remain in force as originally adopted. As noted above, we are unaware of any relevant D.C. judicial decisions—either on the issue presented by the inquiry or on whether any particular

[3] Two D.C. Court of Appeals decisions involving lawyers' actions against their former law firms for retaliatory discharge do not address disclosure of confidences or secrets of the law firms or the firms' clients. *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334 (D.C. 2000); *Wallace*, 715 A.2d 873.

[4] The former ABA Model Code of Professional Responsibility, like the former D.C. Code, limited permissible revelations to those necessary to collect a lawyer's fee. *Spratley v. State Farm Mut. Automobile Ins. Co.*, 78 P.3d 603, 608 (Utah 2003) (citing ABA Annotated Model Rules of Professional Conduct 68 (5th ed. 2003)). By comparison, the Model Rule "'*enlarges* the [Model Code] exception to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee; for example, recovery of property from the client.'" *Id.* (quoting ABA Annotated Model Rules of Professional Conduct 68 (5th ed. 2003) (emphasis in original); *accord Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1041 (Mont. 2000).

[5] Jordan Committee Minutes (July 10, 1984; Nov. 17, 1984).

[6] *Id.* (As noted herein, the former D.C. Code permitted only defensive use of such information except in the fee collection context).

[7] The rules took effect January 1, 1991.

[8] *E.g.*, D.C. Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct, Report and Recommendations* 30 (Jan. 31, 2005) ("The Committee . . . saw no compelling policy reasons to change any of the disclosure options currently included in [Rule 1.6]").

cause of action might overcome or preempt the prohibitions of D.C. Rule 1.6(a).

Thus, the legislative and judicial history of the provisions is consistent with their text. Taken together, these guideposts compel the conclusion that an in-house lawyer may not reveal or use employer/client secrets or confidences offensively in making a claim for employment discrimination or retaliatory discharge—unless, of course, such disclosures are authorized by another exception to D.C. Rule 1.6 (e.g., the crime/fraud exceptions in subsection (d)).

***Employer/client's defense against in-house lawyer's claim***

On the second branch of the inquiry, we see nothing in the D.C. Rules that would limit an in-house lawyer's right to bring a discrimination or retaliation claim against her employer/client because that defendant might perceive a need to reveal its secrets or confidences in order to defend against the claim. As many decisions have noted, courts do not lack tools to protect such information from inordinate disclosure.[9]

Moreover, if the employer/client calls the lawyer's conduct into question in the context of such a lawsuit, the lawyer may disclose the employer/client's confidences and secrets as a defensive matter—but only "to the extent reasonably necessary" to respond to the employer/client's allegations. D.C. Rule 1.6(e)(3).

*Conclusions*

A D.C. Bar member may not reveal or use the confidences or secrets of her employer/client in connection with the lawyer's offensive lawsuit against that client, other than in an action for the lawyer's fee[10] and then only "to the minimum extent necessary." D.C. Rules 1.6(e)(3), 1.6(e)(5).

We express no opinion on whether there may be instances where a statute or case law dealing with employment discrimination or retaliatory discharge overcomes the prohibitions of D.C. Rule 1.6(a).[11] The D.C. Rule, however, does not provide for such preemption within its four corners and the District of Columbia courts have yet to rule on the issue.[12]

A lawyer may disclose such information defensively, however, "to the extent reasonably necessary" to respond to specific allegations by the client or to defend against a civil claim. D.C. Rule 1.6(e)(3). The former context could include responding to affirmative defenses to a discrimination or retaliatory discharge action; the latter could include responding to a client counterclaim in such a lawsuit.[13] D.C. Rule 1.6 cmt. [25]. Moreover, other exceptions in Rule 1.6, such as the crime-fraud exceptions of subsection (d), might be available in appropriate instances. Nothing in the D.C. Rules limits an in-house lawyer's right to bring such a claim because the client/employer might perceive a need to reveal its secrets or confidences in order to defend against the claim.

We are mindful of the important public policy that encourages redress in cases of employment discrimination and retaliatory discharge. We note, however, that this committee's jurisdiction is limited to interpreting the D.C. Rules—which are promulgated by the Court of Appeals—as we find them. Whether Rule 1.6(e)(3) is overcome in such a case or, if not, should be revised to permit a lawyer to reveal or use employer/client confidences or secrets offensively in such a case, necessarily remains a matter for the courts.

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*Opinion No. 364*

## Confidentiality Obligations When Former Client Makes Ineffective Assistance of Counsel Claim

When a former client challenges a criminal conviction or sentence on the grounds of ineffective assistance of counsel ("IAC"), D.C. Rule 1.6(e)(3) permits the lawyer to disclose client confidences and secrets only insofar as reasonably necessary to respond to the client's specific allegations about the lawyer's representation. Where appropriate, the lawyer should take steps, such as seeking a judicial protective order or entering into an agreement with the prosecutor, to limit the use of such disclosures to the IAC proceeding.

**Applicable Rule**

• Rule 1.6 (Confidentiality of Information)

*Inquiry*

This Committee has been asked what a lawyer may and may not do when a former client asserts a claim of ineffective assistance of counsel under the District of Columbia's Rules of Professional Conduct ("D.C. Rules" or "Rules") in light of an opinion on the same subject issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility. This opinion specifically addresses to what extent and under what circumstances D.C. Rule 1.6(e)(3) permits a lawyer to disclose information protected by D.C. Rule 1.6 ("protected information") to the prosecutor defending the IAC claim or to others?

[9] *E.g., Van Asdale v. International Game Technology*, 577 F.3d 989, 995-96 (9th Cir. 2009); *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852, 864 (Tenn. 2002); *Spratley v. State Farm Mut. Automobile Ins. Co.*, 78 P.3d 603, 609-10 (Utah 2003); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1041-42 (Mont. 2000).

[10] We do not think that an in-house lawyer's salary constitutes a "fee" within the meaning of Rule 1.6(e)(5). *See O'Brien v. Stolt-Nielsen Transp. Group, Ltd.*, 838 A.2d 1076, 1084, 1086 (Conn. Super. 2003) (by implication).

[11] *See, e.g., Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009) (Sarbanes-Oxley whistleblower provision preempts attorney-client privilege); *Willy v. Administrative Review Bd., U.S. Dep't of Labor*, 423 F.3d 483 (5th Cir. 2005) (same; whistleblower provisions of federal environmental laws); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) (same; title VII of Civil Rights Act of 1964); *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994) (same; Age Discrimination in Employment Act); *Rand v. CF Indus., Inc.*, 797 F. Supp. 643 (N.D. Ill. 1992) (same); *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (same; common-law retaliatory discharge).

[12] A lawyer who believes she has a cause of action against her former employer/client that might overcome the strictures of Rule 1.6(e)(3), but does not want to risk violating Rule 1.6(a), presumably could file a bare-bones complaint that does not disclose protected information and then seek a ruling that her cause of action overcomes the Rule 1.6 restriction against disclosure. If she obtained a favorable ruling from the court, she then could file an appropriate amended complaint.

[13] The requirement that disclosure be limited to what is "reasonably necessary" to respond to an allegation of impropriety, D.C. Rule 1.6(e)(3), is one of proportionality. Thus, an employer/client's discharge letter to the in-house lawyer that makes what the lawyer believes are inaccurate assertions about the lawyer's conduct quite possibly would not justify the filing of a lawsuit, available to the public, that reveals client/employer confidences or secrets; filing a complaint under seal might be a different story. See D.C. Rule 1.6 cmt. [23] ("[D]isclosure should be no greater than . . . necessary to vindicate innocence [and] should be made in a manner that limits access to the information to . . . 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"); *Eckhaus v. Alfa-Laval, Inc.*, 764 F. Supp. 34 (S.D.N.Y. 1991) (negative internal performance review not a sufficient basis for revealing employer/client information in ensuing slander action).

In July 2010, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion No. 10-456, entitled "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim," which analyzed the "self-defense exception" in the ABA's Model Rule of Professional Conduct 1.6 to address "whether a criminal defense lawyer whose former client claims that the lawyer provided constitutionally ineffective assistance of counsel may, without the former client's informed consent, disclose confidential information to government lawyers prior to any proceedings on the defendant's claim in order to help the prosecution establish that the lawyer's representation was competent." Applying the Model Rules, that opinion concluded that although a—

> lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel . . . , it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.

The D.C. Rules differ from the ABA Model Rules. Importantly, the Model Rule allows disclosure of protected information only in the context of an actual or contemplated proceeding, while the D.C. Rule allows such disclosure (assuming its requisites otherwise are satisfied) regardless of whether a proceeding is pending or even contemplated. *Compare* Model Rule 1.6(b)(5) *with* D.C. Rule 1.6(e)(3). As discussed further below, the committee disagrees with the ABA's conclusion that "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable."

*Analysis*

An IAC claim pits a lawyer's broad confidentiality obligation to a former client[1] against the lawyer's limited right of self-defense. The target of the IAC claim is not the lawyer personally but the constitutionality of a criminal conviction or sentence in a case where the lawyer represented the defendant. An IAC claim differs from a criminal charge, disciplinary charge, or civil claim filed directly against the lawyer because the lawyer is not a party to the proceeding. In an IAC claim, the lawyer is a mere witness, albeit an important one who might have an independent professional interest in responding to the allegations made in the IAC claim.

To prevail on an IAC claim, a former client must prove that the lawyer's performance was deficient (*i.e.*, that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment") and that the deficient performance prejudiced the defense (*i.e.*, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."). *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Given the waiver of attorney-client privilege that typically accompanies the assertion of an IAC claim, it is tempting to assume that the ethical confidentiality obligation under Rule 1.6 is also waived. However, such an assumption erroneously conflates the lawyer's ethical obligation under the Rules of Professional Conduct with the attorney-client privilege under the rules of evidence.

Under D.C. Rule 1.6, protected information includes not only information within the attorney-client privilege ("confidences," in the parlance of the rule) but also "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client" ("secrets," in the parlance of the rule). Rule 1.6(b). Thus, even if there is no enforceable privilege, Rule 1.6 precludes the lawyer from voluntarily revealing protected information other than in accordance with an explicit exception to Rule 1.6. Moreover, even if the confidentiality obligation under Rule 1.6 were congruent with the evidentiary attorney-client privilege, the effective scope of any privilege waiver is not always clear.[2]

D.C. Rule 1.6(e)(3) will allow lawyers to reveal some protected information in response to an IAC claim in some instances. Under that rule, however, the lawyer's discretion to voluntarily reveal information is limited to the extent to which the disclosure is "*reasonably necessary to respond to specific* allegations by the [former] client concerning the lawyer's representation of the client" D.C. Rule 1.6(e)(3) (emphasis added). "Reasonably" means "the conduct of a reasonably prudent and competent lawyer." Rule 1.0(j).

The fact that a successful IAC claim may result in a new trial or sentencing for the original underlying charge or offense further complicates the analysis. In assessing what can reasonably be disclosed without seeking a protective order or reaching an agreement with the prosecutor limiting the disclosure and use of the protected information to the IAC proceeding, the lawyer should consider the extent to which information provided in response to the IAC claim could help convict the former client in a new trial.

What can or should be done in a particular case will depend on the specific facts of that case. Extreme facts illustrate the pressure points in an analysis that ultimately turns on reasonableness:

1. Suppose a former client brings an IAC claim attacking his conviction for a robbery in the Georgetown neighborhood. The former client alleges that the lawyer failed to interview and subpoena potential witness X, whose testimony, the former client alleges, would have contradicted a key element of the prosecution's robbery case. The lawyer's case file contains protected information about the lawyer's handling of issues relating to X, but it also contains protected information tying the former client to an unsolved murder in the Capitol Hill neighborhood. Assume initially that the murder has nothing to do with X or the robbery.

In such a scenario, the lawyer would violate Rule 1.6 by sharing with prosecutors or others information about the murder. Because the information tying the former client to the murder is not relevant to the specific allegations of IAC, the self-defense exception does not authorize its disclosure. Moreover, even if unprivileged,[3] disclosure of information implicating a former client in a murder would

[1] An IAC claim typically is made by a former client of the accused lawyer. If the lawyer is still representing the client, the resulting conflict of interest likely will require the lawyer to withdraw from the representation. *In re Ponds*, 888 A.2d 234, 239 (D.C. 2005) (applying Maryland Rules of Professional Conduct pursuant to choice of law provisions of D.C. Rule 8.5(b)(1)).

[2] This opinion uses the phrase "protected information" to describe the information protected from voluntary disclosure by Rule 1.6. Other short-hand phrases were considered but rejected because of a risk of confusion with the "confidence" and "secret" concepts so carefully defined by Rule 1.6.

[3] The incriminating information might have come to the lawyer directly from the former client in a communication protected by the attorney-client privilege. However, the lawyer might also have obtained the information in communications with third parties to which the attorney-client privilege

be "embarrassing" and "detrimental" to the former client, thereby falling within the Rule 1.6 definition of a "secret" that the lawyer cannot reveal voluntarily.

2. At the other end of the spectrum, consider a former client's IAC claim that the lawyer failed to file an appeal despite the client's instruction to do so. The client pleaded guilty but now alleges that the sentence he received was too harsh and should have been appealed. If true, the lawyer's failure to file a client-requested appeal breached an important duty to a client. The lawyer is the only witness who can rebut or confirm the allegation, which is both serious and specific. The lawyer's account is that the former client never directed her to file an appeal. Further, the lawyer would say she told the former client that there was no basis for such an appeal because the sentence was the one to which the client had agreed as part of the plea bargain. The lawyer also has a confirming letter sent to the former client stating, "per our conversation today, I will not be filing an appeal in your case." Such disclosure relates solely to the former client's IAC allegation of a clear breach of duty. Thus, as discussed below, the Committee does not believe that a lawyer in this situation must await a court order compelling the lawyer to reveal confidential information about the appeal. Nor must the lawyer seek a protective order confining use of the information to the IAC proceeding because the disclosure does not implicate the former client in uncharged criminal activity, and will have no foreseeable adverse effects on any retrial or resentencing if the conviction or sentence is reversed.

3. In some cases, the appropriate response may be no response because the allegations simply will not be believed by anyone who reads them. Imagine a sealed juvenile proceeding in which the record will be known only to the judge and the involved lawyers. The former client makes an IAC claim founded on unsubstantiated and palpably incredible allegations of a vast and sinister conspiracy between prosecution and defense lawyers. The accused lawyer knows that the presiding judge, before whom she appears on a regular basis, is going to recognize the allegations for what they are, namely the product of a troubled mind. In that situation, there may be no response that is reasonably necessary to respond to the allegations in the IAC claim.

4. A slight variation in the facts of the first hypothetical can be used to create a difficult case in the middle. As before, the former client challenging the robbery conviction alleges that the lawyer committed IAC by failing to call witness X. In fact, the lawyer had two reasons for not calling witness X. First, X's expected testimony as to the robbery was cumulative of that given by other defense witnesses. In other words, the testimony that X could give as to the robbery would not add materially to what was already in the record and the lawyer was concerned that the court might exclude it for that reason. Second, the lawyer feared that a vigorous cross-examination into X's relationship with the client might lead prosecutors to evidence implicating the client in the uncharged and unrelated murder.

How can this lawyer explain why she did not call X without (1) misleading the court and prosecutors by suggesting that there was only one reason for not calling X or (2) implicating the former client in an uncharged murder unrelated to the robbery conviction at issue in the IAC proceeding? Should the former client be given an opportunity to reconsider pursuing an IAC claim that opens the door to disclosures in this area? Is it prudent for a lawyer in this situation to voluntarily respond to prosecutor's requests for information without court approval? If compelled to respond, should the lawyer seek a protective order so that the information she provides cannot be used against the client in other proceedings? We address these specific questions below.

Disclosure questions in the IAC context are necessarily fact-bound, and careful reflection may reveal them to be more complicated than they first appear. Further complicating a lawyer's analysis is the emotional reaction that the lawyer may have upon learning that a former client has accused her of IAC. Feelings of anger and betrayal may impede an objective analysis of these issues.

This opinion offers a framework for the analysis, beginning with a brief review of the law governing IAC claims in Part A below. Part B summarizes the lawyer's typical role as a witness in an IAC claim. Part C reviews the ABA's analysis of IAC disclosure issues under the Model Rules of Professional Conduct. Part D analyzes the relevant provisions of the District of Columbia Rules, which differ from the Model Rules in significant respects.

### A. Using an Ineffective Assistance of Counsel Claim to Overturn a Criminal Conviction or Sentence on Sixth Amendment Grounds.[4]

A criminal defendant's constitutional right to counsel, see U.S. Const., amend. VI, "is the right to the effective assistance of counsel," *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970)). A conviction or sentence may be reversed if the defendant can show that her lawyer provided "ineffective assistance of counsel." *Strickland* imposes a two-pronged test for ineffective assistance.

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The court's review of the lawyer's performance "must be highly deferential," with "counsel . . . strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 689-90. "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011).

A showing of incompetence alone does not require that the underlying conviction or sentence be vacated: "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

did not apply. Such information might still be protected by the work product doctrine. Even in the absence of an enforceable evidentiary privilege, however, the information would still be protected from voluntary disclosure by the broader confidentiality obligation imposed by Rule 1.6.

[4] Although this Committee does not opine on questions of law outside the Rules of Professional Conduct, ethical issues rarely arise in a vacuum. Here, as in many cases, the ethics analysis benefits from an understanding of the legal context in which the question arises. The accompanying discussion of ineffective assistance of counsel jurisprudence under the Sixth Amendment reflects the Committee's understanding of relevant law.

confidence in the outcome." *Id.* at 694.

In this jurisdiction, "[t]here is a presumption in favor of holding [an evidentiary] hearing" on an IAC claim "that requires an inquiry into matters outside of the record" but the trial court may rule without a hearing "[w]here the existing record provides an adequate basis for disposing of the motion." *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993) (citation omitted); *see also Lanton v. United States*, 779 A.2d 895 (D.C. 2001) (reversing denial of IAC claim and remanding for a hearing). In the District of Columbia courts, "a hearing is unnecessary when the motion consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true." *Ready*, 620 A.2d at 234.

**B. Former Counsel as Witness to Conduct at Issue in IAC Claim.**

When an IAC claim is filed, the lawyer becomes a witness respecting the former client's allegations about the representation:

> Where the defendant's allegations of fact, if credited, would support a finding of ineffective assistance, the court is required to obtain testimony from the attorney, either to support the former client's claim or to undermine it, and (if there is a conflict in the testimony of the movant and his former attorney) to make any needed credibility findings.

*Douglas v. United States*, 2011 WL 335861, at *1 (S.D.N.Y. Jan 28, 2011).

Attorney-client privilege often prevents lawyers from disclosing information that prosecutors and others would deem relevant. For example, a client's confession to a lawyer of involvement with a past crime would be relevant to an investigation of that crime. Attorney-client privilege, however, would normally preclude lawyers from revealing – or being forced to reveal – that confession to prosecutors or others. *See, e.g. In re Public Defender Service*, 831 A.2d 890, 906 (D.C. 2003). A client's assertion of an IAC claim, though, generally waives the attorney-client privilege.[5] The waiver allows a court to compel an attorney to testify about the otherwise privileged information that the client has placed in issue.

When an IAC claim is filed, prosecutors may want information from the defense lawyer to help them respond to the claim.[6] Anecdotal evidence suggests that different defense lawyers react differently to prosecutors' requests for information. At one end of the spectrum are lawyers who are angered by the claim and eager to beat it back. Attorneys have a reputational interest in having IAC claims defeated. *E.g., SEC v. Forma*, 117 F.R.D. 515, 524-25 (S.D.N.Y. 1987). They may also fear future civil claims by the former client.[7]

At the other end of the spectrum are attorneys who police themselves for potential IAC issues. When such lawyers or their supervisors spot such an issue, they withdraw, refer the client to other counsel, and cooperate with the new counsel. If new counsel tells them that the client objects to any voluntary disclosure to prosecutors, they do not disclose until a court requires them to do so.

Between those extremes are understandably concerned lawyers who do not want to jeopardize their licenses, their reputations, or their ability to continue doing defense work but who may not want to assist the prosecution against a former client. Court-appointed lawyers under the Criminal Justice Act may be especially uncomfortable because their livelihoods depend on continued appointments by the court that will be considering the IAC claim.

In many places, informal practices developed within the prosecution and defense bars prior to the issuance of ABA Ethics Opinion 10-456. The following was common in at least one jurisdiction:

> Because the need for the attorney's testimony was patent and the waiver of privilege plain, it has become the practice for attorneys to supply the required testimony (in the form of an affidavit or declaration, which qualifies as testimony and so perfectly acceptable) without obtaining express written consent from the former client. Formal consent was deemed unnecessary because the client had waived the privilege simply by making the motion. Additionally, some attorneys have given their testimony without being formally ordered to do so by a court, knowing that the waiver would be given effect and that a court order was guaranteed to issue. In most instances, the testimony was solicited by and given to the prosecutor's office that originally indicted and prosecuted the defendant, since it is the prosecutor that assembles the record in opposition to the [28 U.S.C.] § 2255 motion.

*Douglas v. United States*, 2011 WL 335861, at *1.

**C. ABA Ethics Opinion 10-456, Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim.**

The ABA Opinion addresses whether and the conditions under which a defense lawyer may disclose confidential information to prosecutors in the wake of an IAC claim by the lawyer's former client. The last sentence of the opinion concludes that "it will be extremely difficult for defense counsel to conclude that there is a reasonable need in self-defense to disclose client confidences to a prosecutor outside any court-supervised setting."

The ABA Opinion states that a client's waiver of privilege by bringing an IAC claim "has the legal effect of forgoing the right to bar disclosure of the client's prior confidential communications in a judicial or similar proceeding. Standing alone, however, that does not constitute 'informed consent' to the lawyer's voluntary disclosure of client information outside such a proceeding." *Id.* Thus, a client might agree that the lawyer could testify at an adjudicatory hearing "to the extent the court requires but not agree that the former lawyer voluntarily may disclose the same client confidences to the opposite party prior to the proceeding." *Id.* at 2-3.

Although Model Rule 1.6(b)(5) has several provisions allowing lawyers to reveal confidential information to defend themselves in certain situations,[8] the only

[5] *Eldridge v. United States*, 618 A.2d 690, 693 n. 3 (D.C. 1992); *Doughty v. United States*, 574 A.2d 1342, 1343 (D.C. 1990); *see also Bittaker v. Woodford*, 331 F.3d 715, 722 (9th Cir. 2003); *United States v. Wiggin*s, 184 F. Supp. 673, 677-78 (D.D.C. 1960).

[6] The former client or any new defense lawyer for the former client will also want information from the lawyer about the conduct at issue in the IAC claim. That lawyer may, after all, end up becoming a witness for the former client and give testimony that helps the former client's allegations of IAC. The analysis that governs the lawyer's ability to talk to the former client or the former client's new counsel is quite different from the analysis that governs the lawyer's ability to share information about the representation with prosecutors.

[7] In some cases, the rejection of a post-conviction IAC claim may collaterally estop a later malpractice claim against the attorney for the same alleged conduct. *Johnson v. Sullivan*, 748 F. Supp. 2d 1, 9-12 (D.D.C. 2010); *Smith v. Public Defender Serv.*, 686 A.2d 210, 211-12 (D.C. 1996). *But see Brown v. Jonz*, 572 A.2d 455, 457 n.7 (D.C. 1990).

[8] Model Rule 1.6(b)(5) provides that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a

one that the ABA Opinion found potentially relevant to an IAC claim was that allowing disclosure "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client."[9] The ABA Opinion states that "the exception is a limited one." *Id.* at 3. "A lawyer may act in self-defense under [the exception] only to defend against charges that imminently threaten the lawyer or the lawyer's associate or agent with serious consequences." *Id.* (quoting *Restatement (Third) of the Law Governing Lawyers* § 64 cmt. c (2000)) (emphasis added by ABA Ethics Committee).

The ABA Opinion states that this provision might be read to apply to an IAC claim seeking to set aside a criminal conviction. *Id.* However—

> a lawyer may respond to allegations only insofar as the lawyer reasonably believes it is *necessary* to do so. It is not enough that the lawyer genuinely believes the particular disclosure is necessary; the lawyer's belief must be objectively reasonable. The Comment explaining Rule 1.6(b)(5) cautions lawyers to take steps to limit "access to the information to the tribunal or other persons having a need to know it" and to seek "appropriate protective orders or other arrangements … to the fullest extent practicable." [Model Rule 1.6 cmt. 14.] Judicial decisions addressing the necessity for disclosure under the self-defense exception to the attorney-client privilege recognize that when there is a legitimate need for the lawyer to present a defense, the lawyer may not disclose all information relating to the representation, but only particular information that reasonably must be disclosed to avoid adverse legal consequences. These limitations are equally applicable to Rule 1.6(b)(5).
>
> Permitting disclosure of client confidential information outside court-supervised proceedings undermines important interests protected by the confidentiality rule. Because the extent of trial counsel's disclosure to the prosecution would be unsupervised by the court, there would be a risk that trial counsel would disclose information that could not ultimately be disclosed in the adjudicative proceeding. Disclosure of such information might prejudice the defendant in the event of a retrial. Further, allowing criminal defense lawyers voluntarily to assist law enforcement authorities by providing them with protected client information might potentially chill some future defendants from fully confiding in their lawyers.
>
> Against this background, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable. . . .

*Id.* at 4-5 (emphasis in original, footnotes and most citations omitted).

### D. Confidentiality Under D.C. Rule 1.6.

District of Columbia lawyers have an ethical duty of confidentiality under Rule 1.6 that is separate from, and broader than, the attorney-client privilege under the law of evidence. *See Adams v. Franklin*, 924 A.2d 993, 999 n. 6 (D.C. 2007). D.C. Rule 1.6 commands that "except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly . . . reveal a confidence or secret of the lawyer's client." A "confidence" is "information protected by the attorney-client privilege under applicable law," while a "secret" is "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client." Rule 1.6(b).[10] "These definitions and comment [6] to Rule 1.6 make it clear that the lawyer's ethical duty to preserve a client's confidences and secrets is broader than the attorney-client privilege." *Adams*, 924 A.2d at 996-97.

The ethical obligation is broader than the privilege because a protected "secret" under Rule 1.6 is, by definition, not subject to the attorney client privilege. Thus, it is not sufficient for a lawyer to conclude that information she wants to disclose is outside the attorney-client privilege. The lawyer will still violate the ethical confidentiality obligation if she voluntarily reveals a "secret" other than in accordance with an exception in subsection (c), (d), or (e) of Rule 1.6. Information gained in the professional relationship that the former client does not want revealed or that would be embarrassing or detrimental to the client is a protected "secret" even if it is not subject to any enforceable evidentiary privilege.

This expansive confidentiality obligation "[t]ouch[es] the very soul of lawyering." *In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001) (quoting *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 607 (8th Cir. 1977)). "Disclosure of client confidences is 'contrary to the fundamental principle that an attorney owes a fiduciary duty to his client and must serve the client's interests with the utmost loyalty and devotion.'" *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002) (quoting *In re Gonzalez*, 773 A.2d at 1031).

Violations of the confidentiality rule have consequences. The Court in *In re Gonzalez* sanctioned a lawyer for revealing too much in a motion to withdraw from representation of a difficult client.[11]

> We think it obvious that a public allegation by a client's own lawyer that the client deliberately lied to him would be "embarrassing" to the client and "would be likely to be detrimental" to her . . . . Indeed, it is difficult to understand how a reasonable person could conclude otherwise.

*In re Gonzalez*, 773 A.2d at 1030.[12]

Even had the disclosure been justified, the court noted, the lawyer "could have submitted his documentation *in camera*, . . . [with] appropriate redactions of the material most potentially damaging to his clients (e.g., his allegations that [the client] had misrepresented facts to him and his suggestion . . . that a demand of $90,000 by the plaintiffs in the underlying litigation might be reasonable)." *Id.* at 1032. A few years after *Gonzalez* was

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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."

[9] The ABA Opinion found that the other two clauses of Model Rule 1.6(b)(5) did not apply. As to the first clause, an IAC claim is not a legal "controversy" between the lawyer and the client. ABA Opinion, at 3-4. As to the second, an IAC claim is neither a "criminal charge" nor a "civil claim" against which the lawyer must defend. *Id.* at 4.

[10] This is one area where D.C. Rule 1.6 differs from Model Rule 1.6. The former requires confidentiality as to any "confidence" or "secret," while the latter compels confidentiality as to "information relating to the representation of a client." In the IAC context, however, this appears to be a distinction without a difference.

[11] The Committee has not found any cases or bar opinions holding that a defense attorney relying on the self-defense exception disclosed more than was reasonably necessary in response to an IAC claim. This, of course, does not mean that such overly broad disclosures do not occur or that they will go unsanctioned if they do.

[12] Because the lawyer's conduct was before a Virginia court, the D.C. Court of Appeals was applying Virginia's confidentiality rule. *See* D.C. Rule 8.5(b)(1) (choice of law rule). Virginia's confidentiality rule, however, shared the "confidences and secrets" approach of D.C. Rule 1.6. *In re Gonzalez*, 773 A.2d at 1029.

decided, the Court of Appeals sanctioned another lawyer for saying too much while withdrawing from the representation of a another difficult client. *In re Ponds*, 876 A.2d 636 (D.C. 2005).

D.C. Rule 1.6(e)(3) contains two exceptions that allow lawyers to reveal certain confidential client information in order to defend themselves. Client confidences and secrets may be disclosed:

(1) "to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved," or

(2) "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client."

The first exception does not apply to an IAC claim because such a matter is not "a criminal charge, disciplinary charge, or civil claim formally instituted against the lawyer." The target of the ineffective assistance claim is the defendant's criminal conviction rather than the lawyer personally. The lawyer is not a party to the proceeding in which the claim is made.

The second exception does apply to an IAC claim.[13] This exception allows a lawyer to reveal protected information "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." One court has said that information is "reasonably necessary" if it would "seem likely to provide significant assistance" to the lawyer's response. *First Fed. Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 110 F.R.D. 557, 567 (S.D.N.Y. 1986).

The use of the second exception is circumscribed in three ways. First, voluntary disclosure can be made only "to the extent reasonably necessary to respond" to the allegations. "Reasonably" in this context "denotes the conduct of a reasonably prudent and competent lawyer." D.C. Rule 1.0(j). This is an objective test; the lawyer's subjective belief is not relevant to the inquiry.

The analysis of what is reasonably necessary to respond to any particular IAC claim will depend on the facts and circumstances surrounding the claim. As with any proposed disclosure of confidential information, a lawyer will want to carefully consider (1) whether to disclose, and (2) how much to disclose. The resolution of both questions may depend on, among other things, the nature of the claim and the content of the lawyer's file. Because the exception is permissive, not mandatory, the lawyer may choose not to respond because, for example, the lawyer may think the disclosure may harm the client, the prosecutor already has the information necessary to respond to the claim, and the disposition of the IAC claim solely on "lack of prejudice" grounds will sufficiently protect the lawyer from reputational or other harm that might arise from the specific allegations of deficient performance.

The lawyer also may consider whether it is necessary to respond outside the IAC proceeding (in addition to responding within that proceeding) in order to protect her reputation or other interests. Unlike the Model Rule, D.C. Rule 1.6(e)(3) authorizes lawyers to respond to a client's "specific allegations" concerning the lawyer's representation even if those allegations are not made in a "proceeding." As the "Jordan Committee" report recommending adoption of the current rules noted, "public allegations concerning the lawyer's representation of the client may be responded to publicly if they have been made 'by the client,' even if those charges have not been instituted formally. Thus, the client (but no one else) can waive the client's right to confidentiality by opening the issue to public discussion." *Proposed Rules of Professional Conduct and Related Comments Showing the Language Proposed by the American Bar Association, Changes Recommended by the D.C. Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar*, at 53, ¶ 44 (Nov. 19, 1986).

Second, "[t]he requirement . . . that there be 'specific' charges of misconduct by the client precludes the lawyer from disclosing confidences or secrets in response to general criticism by a client; an example of such a general criticism would be an assertion by the client that the lawyer 'did a poor job' of representing the client." Rule 1.6 cmt. [25]. As a matter of substantive law, general criticisms lack the specificity necessary to state a viable IAC claim. *See, e.g., Ready v. United States*, 620 A.2d at 234 ("vague and conclusory" allegations insufficient). More fundamentally, however, D.C. Rule 1.6(e)(3) precludes former defense lawyers from responding because "general" allegations are outside the scope of the only potentially applicable self-defense exception.

Third, comment [25][14] cautions that—

> disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

The *Restatement* describes the operative concept as one of "proportionate and restrained use." *Restatement (Third) of the Law Governing Lawyers* § 64 cmt. (e) (2000). "The lawyer must reasonably believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy. *Id.*

Courts in other jurisdictions have endorsed the use of protective orders in order to prevent, for example, prosecutors from using information obtained during the adjudication of the IAC claim in a subsequent prosecution. In 2003, the Ninth Circuit affirmed a protective order precluding use of privileged attorney-client materials obtained in discovery for any purpose other than litigating the instant federal habeas petition.

> If a prisoner is successful in persuading a federal court to grant the writ, the court should aim to restore him to the position he would have occupied, had the first trial been constitutionally error-free. Giving the prosecution the advantage of obtaining the defense case file—and possibly even forcing the first lawyer to testify against the client during the second trial—would assuredly not put the parties back at the same starting gate.

*Bittaker v. Woodford*, 331 F.3d 715, 722-23 (9th Cir. 2003) (en banc); *accord United States v. Nicholson*, 611 F.3d 191,

[13] The permissive disclosure exception in D.C. Rule 1.6(e)(3) differs from its Model Rule counterpart in three respects. D.C. Rule 1.6(e)(3) applies only to "specific" allegations, and only when made "by the client." By contrast, Model Rule 1.6(b)(5) does not condition disclosure on the allegations being "specific," and does not require that the "allegations" come from the lawyer's client. Finally, D.C. Rule 1.6(e)(3), unlike Model Rule 1.6(b)(5), does not require that the disclosure be made in the context of a "proceeding."

[14] Comment [25] to D.C. Rule 1.6 is somewhat confusing because it conflates the two exceptions of subsection (e)(3). For example, the first sentence discusses "specific allegations," a phrase that appears only in the second exception, and "establish[ing] a defense," a phrase that appears only in the first exception. In any event, it is "the text of each Rule [that] is controlling"; the comments are only "guides to interpretation." D.C. Rules, Scope [6].

216-217 (4th Cir. 2010) (applying *Bittaker* to preclude use at resentencing of privileged material revealed in connection with the successful IAC claim).[15]

In the first hypothetical above, for example, a client convicted of robbery has alleged that the lawyer failed to interview and subpoena a key witness named X. The lawyer's case file has information about X. It also has information from the client that links the client to an uncharged murder that is unrelated to the robbery conviction that the client is attacking with the IAC Claim. Obviously, disclosure of the incriminating evidence as to the murder is not required to vindicate the lawyer's handling of matters involving witness X. That alone takes the murder evidence outside the second self-defense exception of Rule 1.6(e)(3).

The self-defense exception in Rule 1.6(e)(3) does not require defense lawyers to share information with prosecutors when an IAC claim is filed. Instead it gives lawyers discretion ("may use or reveal") to share information voluntarily, but only "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." Moreover, even where disclosure of protected information is authorized, the defense lawyer should seek to protect the information against use against the former client in other contexts to the fullest extent practicable. D.C. Rule 1.6, cmt. [25]; *accord Nicholson*, 611 F.3d 191; *Bittaker*, 331 F.3d 715. In the context of an IAC proceeding, a lawyer can seek this protection from the tribunal hearing the case, through a litigated motion or a so-ordered stipulation between counsel. Alternatively, the lawyer might make the disclosure extrajudicially after obtaining the prosecutor's binding written agreement that the government will not use the information in other contexts. The former lawyer also could work with the former client or the former client's new counsel in deciding how to proceed.

Further, there is case law that a client can prevent the disclosure of protected information by abandoning the claim that would otherwise waive the privilege. *Bittaker*, 331 F.3d at 721. To the extent that the IAC claim seems likely to lead to the prosecution's discovery of information incriminating the former client in other matters, a call to the client's new defense lawyer may lead to an abandonment of the IAC claim without the need for any disclosure to prosecutors. *See Dunlap v. United States*, 2011 WL 2693915, at *3 (D.S.C. July 12, 2011) (ordering the IAC petitioner to choose between (1) preserving the attorney-client privilege by abandoning or withdrawing the IAC claims, or (2) continuing to pursue the IAC claims and waiving privilege, so as to require his former counsel to respond to the allegations via an affidavit and, potentially, in live testimony if an evidentiary hearing takes place).[16]

The ABA Opinion concluded that "it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable." Although we view the ABA's approach as providing a safe harbor within which a defense attorney's conduct cannot reasonably be questioned later, we do not share the Opinion's view that extrajudicial disclosure rarely will be justifiable. Under D.C. Rule 1.6(e)(3), a former defense lawyer may share information with prosecutors "to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." The text of the rule does not require a court order to make the disclosures that the rule permits. Lawyers who are uncertain about whether disclosure of confidential information falls within the exception, however, should consider seeking a ruling from the court on the applicability of the exception. Obtaining such review will be prudent in close cases.

In the second hypothetical, the former client files an IAC claim alleging that the lawyer violated the client's direction to file an appeal from the fact that the sentence was too long. There, the lawyer may choose to share with prosecutors the reason no appeal was filed: that, in fact, the client never instructed the lawyer to file the appeal; that the lawyer had discussed the possibility of an appeal with the client and the lawyer told the client there was no basis for doing so because the client had received the sentence he agreed to in the plea bargain; and that the lawyer also had sent the client a one-sentence letter stating, "per our conversation today, I will not be filing an appeal in your case."

The defense lawyer here may correctly conclude that sharing this information and the "no appeal" letter with the prosecutor is reasonably necessary to respond to the IAC claims because:

- The alleged failure to follow client's instruction to file an appeal, if true, involves professional misconduct by the lawyer.
- The lawyer is the only witness who can confirm or rebut the client's allegation that he told the lawyer to file the appeal.[17]
- The potential disclosure relates only to the former client's specific allegations about the failure to file an appeal.
- No other portion of the file will be disclosed to prosecutors.

The lawyer is not required to await a subpoena or court order before disclosing information to the prosecutor, for the D.C. Rule contemplates disclosure under the second exception in paragraph (e)(3) even where no proceeding is under way or even contemplated.[18] Moreover, the lawyer does not need to seek a protective order or an agreement with the prosecutors limiting use and disclosure of the protected information to the IAC proceeding because the reasons for not filing the appeal will have no foreseeable impact on the former client in any other proceeding.

In the third hypothetical, the former client's allegations are so outrageous, farfetched, and unsubstantiated that the lawyer is certain that neither the judge nor any rational reader will believe them. The ethically correct initial response to such a claim might well be no response at all.[19] That initial assessment can, of course, be revisited later if the allegations gain some unexpected traction. If the court surprises the lawyer by ordering an

[15] *Accord Restatement (Third) of the Law Governing Lawyers* §64 cmt. (e) (2000) ("When feasible, the lawyer must also invoke protective orders, submissions under seal, and similar procedures to limit the extent to which the information is disseminated.").

[16] *Dunlap* warned the petitioner "that withdrawing the pending § 2255 motion may foreclose his ability to pursue these same claims at a later date as it is a possibility that a future § 2255 could be considered untimely or successive in nature." *Id.* (citing 28 U.S.C. § 2255(f) & (h).

[17] The fact that the information may be available elsewhere does not necessarily preclude disclosure by the lawyer. The criterion in all instances is whether disclosure is "reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client." D.C. Rule 1.6(e)(3).

[18] *See supra* note 13.

[19] "The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others." *Restatement (Third) of the Law Governing Lawyers* § 64 cmt. (e) (2000).

evidentiary hearing, for example, the lawyer would want to reconsider whether and how much to respond.

The fourth hypothetical is more difficult. In that hypothetical, the lawyer declined to call witness X in the robbery trial because (1) X's testimony was cumulative of that provided by other witnesses, and (2) the expected cross-examination of X with respect to her relationship with the client was likely to lead prosecutors to evidence of the former client's involvement in an unsolved murder.

The fact that X's testimony was cumulative of that provided by others may itself be dispositive of the IAC claim.[20] In this case, however, the lawyer cannot truthfully suggest that this was her only reason for not calling X. An answer that goes into the other reason will implicate the former client in a crime unrelated to the conviction being attacked through the IAC claim. A suggestion that there was another reason may lead prosecutors down a path that will cause collateral harm to the former client in a later proceeding unconnected with the IAC claim.[21] For that reason alone, the lawyer may choose not to disclose the information pursuant to the self-defense exception.

Cognizant of the fact that the District of Columbia has disciplined lawyers for disclosing protected information in the context of a judicial proceeding but outside the limits of a Rule 1.6 exception, *e.g., In re Ponds*, 876 A.2d 636 (D.C. 2005) (withdrawal motion); *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001) (same), the lawyer who finds herself in this situation may well find it prudent to seek the court's guidance. The lawyer may also want to seek a protective order to confine the use of any disclosed information to the IAC proceeding.

Although the District of Columbia's self-defense exception does not require a court order, in close cases—particularly where, as in an IAC proceeding, a tribunal is readily available—the lawyer may find it prudent to seek a judicial determination of the limits of the exception.[22] We urge careful and dispassionate thought.[23] Lawyers who react quickly to an IAC claim may later find themselves facing discipline for having said too much too soon.

*Conclusion*

D.C. Rule 1.6(e)(3) permits a defense lawyer whose conduct has been placed in issue by a former client's ineffective assistance of counsel claim to make, without judicial approval or supervision, such disclosures of information protected by Rule 1.6 as are reasonably necessary to respond to the client's specific allegations about the lawyer's performance. Even so, a lawyer should reflect before making disclosures of protected information to prosecutors, courts, or others. A lawyer's confidentiality obligations to her former client are broader than the attorney-client privilege. Although the former client's claim likely waives the evidentiary privilege, that alone does not eliminate the broader confidentiality obligation owed under Rule 1.6. Nor does the limited "self-defense" exception to confidentiality in Rule 1.6(e)(3) open the door to unlimited disclosures to prosecutors, courts or others of protected information. The rule allows a lawyer to disclose protected information only to the extent "reasonably necessary" to respond to "specific allegations" by the former client. Reasonableness is a fact-bound issue about which others may later disagree. Lawyers who are uncertain about the permissibility of disclosing protected information in response to an IAC claim should consider seeking independent advice or judicial approval of the disclosure.

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*Opinion 365*

**Conflict of Interest Analysis for Government Agency Lawyer Defending Agency from Furlough-Related Employment Complaints While Pursuing Her Own Furlough-Related Employment Complaint**

Can a government lawyer represent an agency employer in defending the agency from furlough-related complaints brought by other agency employees when the lawyer was also furloughed and is pursuing her own complaint in which the allegations are substantially similar to those in the complaint she is defending? Under the D.C. Rules of Professional Conduct, a lawyer has a conflict of interest in a matter when "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." Rule 1.7(b)(4). Such a conflict plainly exists in this situation. However, so-called individual interest conflicts like this one can be waived under Rule 1.7(c) if:

(1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible

[20] If that were all that there was—e.g., that the lawyer chose not to call X because X's testimony would be duplicative of the testimony of other witnesses—disclosure of that reasoning might well be within the self-defense exception in many IAC cases.

[21] The former client's IAC claim will, of course, be harmed by any contrary response by the accused lawyer. Rule 1.6(e)(3) permits such harm to the former client by authorizing the lawyer to respond to the claim. However, cases like *Bittaker v. Woodford* and *United States v. Nicholson* take steps to prevent collateral harm to the client by confining use of the disclosed information to the IAC proceeding itself and by prohibiting use of that information against the former client in any subsequent retrial if the IAC claim is successful. Comment [25] to Rule 1.6 urging lawyers to seek "appropriate protective orders or other arrangements . . . to the fullest extent practicable" also seems directed at the prevention or mitigation of collateral harm. It should be noted, however, that the District of Columbia's Rule 1.6(e)(3) allows a lawyer in appropriate cases to respond to specific allegations by a former client even if those allegations are not made in the context of a pending or threatened proceeding. If it really is reasonably necessary for the lawyer to make a public response to a specific public allegation by a former client, protective orders or similar arrangements may not be available or practicable. In that situation, the possibility of harm to the client, collateral or otherwise, cannot preclude a self-defense disclosure otherwise authorized by Rule 1.6(e)(3).

[22] The confidentiality obligation imposed by Rule 1.6 applies equally to disclosures made to the court. Lawyers need to remember that in deciding what to say to the court while seeking a judicial determination.

[23] The most important thing is to stop and think before making any disclosures. In *Nesse v. Shaw Pittman*, a lawyer's attempt to use the self-defense exception to justify an exchange of information with opposing counsel was undermined by the court's finding of "absolutely no indication that [the lawyer] was aware of that exception and explicitly relied upon it when he spoke to [opposing counsel]." 202 F.R.D. 344, 355 (D.D.C. 2001). "Given the [the lawyer's] vulnerable position, and the demand for information to be used against his former client, the first thing he should have done upon hearing from [opposing counsel] was to seek independent advice. Accepting [the law firm's] post hoc rationalization of his behavior now is the surest way to discourage lawyers from seeking such advice; lawyers would be encouraged to make disclosures to their former client's opponents without getting independent advice as to whether to do it in the hope that, after the disclosure, a second lawyer will come up with an ethical justification that never occurred to them in the first place." *Id.* That case did not involve an IAC claim. This Committee does not believe that independent professional advice is required before a lawyer who is accused of IAC can disclose responsive information to prosecutors. The lawyer needs to recognize the issue and think it through.

adverse consequences of such representation; and

(2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

The only affected client here is the agency. The agency's informed consent to the conflicted lawyer's representation notwithstanding her individual interest conflict would satisfy the requirements of the first paragraph. But client consent alone is not enough. Under the second paragraph, the lawyer must also reasonably believe that she can provide competent and diligent representation to the agency in the matter despite her personal interest, and her belief must be objectively reasonable under the circumstances. That may be a difficult standard to meet when the lawyer is pursuing her own challenge to the furlough while being asked to defend the agency against substantially similar challenges by other affected agency employees.

**Applicable Rules**

- Rule 1.7 (Conflict of Interest)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.2 (Subordinate Lawyers)

*Inquiry*

As has been widely reported, automatic cuts to the federal government's budget – the so-called "sequester" – are requiring federal agencies to find ways to reduce their costs of operation. One way to reduce costs is to furlough government employees. The Committee has received a number of inquiries from government lawyers about their obligations under the D.C. Rules of Professional Conduct when asked to work on sequester-related furlough disputes that may affect them personally. The inquirers are lawyers in the federal government whose normal responsibilities include defending their agencies against employment-related complaints brought by agency employees. These lawyers are themselves agency employees, each of whom has the right to challenge agency employment actions, including furloughs, that affect them personally. When multiple employees file complaints, we understand that each employee's complaint is handled separately in an administrative proceeding or litigation that involves only the agency and the individual employee as parties.

Employment-related complaints normally turn on the specific facts relating to the particular employee. Even when a single action such as a furlough affects a group of employees, complaints brought by individual members of that group may be factually distinguishable from each other. For example, a complaint by an employee who met certain filing deadlines would be distinguishable from an otherwise identical one brought by an employee who failed to meet the deadline. Different individuals may choose to challenge the decision affecting them in different ways. Accordingly, as discussed further below, whether an attorney may have a conflict of interest in defending the agency against a furlough complaint while pursuing her own furlough complaint against the agency will depend on the similarity between the allegations in the attorney's complaint and the complaint she is defending, and on whether the outcome of the complaint the lawyer is defending will have a persuasive or binding effect on her own complaint. The specific rules that govern furloughs, including employees' notice and appeal rights, depend on the nature and length of the furlough. *See generally* 5 C.F.R. pt. 351, *Reduction in Force*; 5 C.F.R. pt. 752, *Adverse Actions.*

To crystalize these issues for discussion, we will hypothesize a situation involving all the following elements:

1. One agency's implementation of the sequester resulted in a decision to furlough a specific group of employees, including agency lawyers who normally defend the agency against employment-related complaints.
2. An agency lawyer normally charged with defending the agency in such matters has filed a complaint challenging her own furlough.
3. Her personal complaint about her furlough is pending and unresolved when she is asked to defend the agency against furlough-related complaints filed by one or more other members of that furloughed group, the allegations of which are substantially similar to those in her own complaint. The resolution of one of the complaints may have a persuasive or binding effect on the other complaints.
4. The agency assigning her to defend against the other complaints knows that the lawyer is challenging her own furlough but still wants (and, perhaps, needs) that lawyer to defend against the substantially similar complaints brought by other members of the furloughed group.

Do the D.C. Rules of Professional Conduct permit the agency lawyer to represent her agency client in defending the agency from those furlough-related complaints in this situation?[1]

*Analysis*

Rule 1.7 of the District of Columbia Rules of Professional Conduct groups conflicts of interest into two categories: (1) those that can be waived under some circumstances, and (2) those that can never be waived even if all affected clients consent. Rule 1.7(a) defines the non-waivable conflict: "A lawyer shall not advance two or more adverse positions in the same matter." Rule 1.7(b) defines four types of conflicts that can be waived under circumstances set out in Rule 1.7(c). As discussed more fully below, the inquiry under consideration does not involve a non-waivable conflict under Rule 1.7(a) but an individual interest conflict under Rule 1.7(b)(4). However, whether that conflict can be waived under Rule 1.7(c) is a difficult question to which the answer will vary depending upon the facts of each individual situation.

**1. Rule 1.7(a).**

Although agency employer is asking the lawyer to defend her agency against furlough-related complaints by other agency employees at the same time that the lawyer is pursuing her own furlough-related complaint against her agency employer, there would be no violation of Rule 1.7(a) because each employee's furlough challenge is a separate matter within the meaning of the rule.[2] Because they are separate matters, the lawyer would

[1] This situation also involves questions under a separate body of law governing conflicts of interest for federal government employees generally. *See generally* 5 C.F.R. pt. 2635, *Standards of Ethical Conduct for Employees of the Executive Branch*. Such matters and any other requirements of substantive law are outside the D.C. Rules of Professional Conduct, and we lack authority and expertise to express any views on them. We note that lawyers are required to understand and comply with the requirements of any applicable substantive law as well as the requirements of the Rules of Professional Conduct.

[2] We note that Rule 1.7(a) speaks of advancing adverse positions in "the same matter" while Rule 1.7(b)(1) speaks of conflicts between clients in a "matter" that "involves a specific party or parties." D.C. Rule 1.0(h) defines "matter" to mean "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule." The meaning and effect of the limiting clause in Rule 1.7(b)(1) is discussed at

not be advancing "two or more adverse positions in the same matter." Accordingly, this situation would not give rise to a non-waivable conflict under Rule 1.7(a).[3]

**2. Rule 1.7(b).**

Rule 1.7(b) defines four conflict situations that can be waived under circumstances defined by Rule 1.7(c).[4] The fourth specifically addresses situations in which the lawyer's individual interests may adversely affect the lawyer's representation of a client:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
>
> * * *
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

This rule generally applies to a lawyer who is asked to defend an agency's furlough of other agency employees while the lawyer is pursuing her own challenge to the same furlough.[5] A lawyer who is pursuing her own furlough complaint against the agency might be motivated to pull her punches in defending against substantially similar complaints brought by other agency employees, especially if the lawyer's advocacy on behalf of the agency may detrimentally affect her own case. Thus, under the D.C. Rules of Professional Conduct, the lawyer cannot represent the agency in defending against others' furlough complaints "[e]xcept as permitted by paragraph (c)" of Rule 1.7.

**3. Rule 1.7(c).**

Individual interest conflicts under Rule 1.7(b)(4) can be waived under the conditions set forth in Rule 1.7(c):

> A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
>
> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

The phrase "informed consent" in the first paragraph means "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." Rule 1.0(e).

Our hypothetical assumes that the lawyer's employer – her agency client – has given informed consent to her representation of the agency in defending against other employees' furlough complaints while the lawyer pursues her own, substantially similar furlough complaint against the agency. In short, we assume that the agency has considered the lawyer's potentially conflicting personal motivations and decided that it still wants the lawyer to defend it from substantially similar furlough complaints filed by others. Such a consent would satisfy Rule 1.7(c)(1).[6]

Under Rule 1.7(c)(2), however, the client's consent alone is not enough to waive the conflict. In addition, in order to undertake a representation, the lawyer must "reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client." That is, the lawyer must hold such a belief *and* that belief must be reasonable under an objective standard. Under Rule 1.0(j), "'reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer."

As we recognized in another opinion:

> [T]he prohibition of Rule 1.7(b)(4) . . . is one which is highly dependent on the circumstances of the representation and the lawyer's own circumstances. In this Opinion, we can do no more than identify the conflict of interest considerations, and leave it to the inquirer to determine whether the particular circumstances of his representation of his client are such that his judgment "will be or reasonably may be adversely affected" by the fee arrangement. The test to be applied is an objective one, that is, whether a lawyer's judgment "will be or reasonably may be adversely affected" by certain circumstances is determined by the position of a reasonable lawyer under the circumstances.

D.C. Legal Ethics Opinion 300 (2000).

In a later opinion, we raised concerns under Rule 1.7(b)(4) about an arrangement in which "success" in representing the client in an immigration matter would trigger extensive and long-lasting financial support obligations from the lawyer to the immigration client:

> The significant financial obligations imposed by the Affidavit of Support can create exactly the kind of conflict addressed by this rule. A lawyer who has second thoughts or a change in financial circumstances, for example, may have an incentive to sabotage the client's immigration application so that the lawyer's support obligations never can take effect.

D.C. Legal Ethics Opinion 354 (2010).

The ABA's Standing Committee on Ethics and Professional Responsibility considered personal interest conflicts in the context of a situation in which the lawyer is asked to post bail for a client. ABA Formal Ethics Opinion 04-432 (2004). Analyzing Model Rule 1.7(a)(2),[7]

length in D.C. Legal Ethics Opinion 344 (2008). Although the word "matter" in Rule 1.7(a) is not confined to matters involving specific parties, the only reading of Rule 1.7(a) that makes sense in the context of the current inquiry is one that treats each employee's individual challenge to a furlough decision affecting that employee as a separate "matter."

[3] As explained in the comments to the rule, "[i]nstitutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter. For that reason, paragraph (a) prohibits such conflicting representations, with or without client consent." Rule 1.7 cmt. [2].

[4] The first three paragraphs involve lawyers with two or more clients. Rule 1.7(b)(1) addresses a situation in which one client asks the lawyer to represent it in a matter that involves and is adverse to another client. Rules 1.7(b)(2) and (b)(3) deal with situations in which the representation of one client will be or is likely to be adversely affected by the lawyer's representation of another client. These three subsections do not apply here because the agency lawyers have only one client, their agency employer.

[5] See Rule 1.7 cmt. [11] ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

[6] A government agency that employs lawyers is a sophisticated consumer of legal services from whom it is easier to get an effective waiver of certain conflicts than from less sophisticated clients. See Rule 1.7 cmt. [28] ("Lawyers should . . . recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent."); D.C. Legal Ethics Opinion 354 (2010) ("While conflicts under Rule 1.7(b)(4) can be waived under certain circumstances, the enforceability of such a waiver from an individual immigration client in these circumstances is doubtful.").

[7] Model Rule 1.7(a)(2) defines several conflict situations, including one in which "there is a significant risk that the representation of one or more

that opinion concluded that the lawyer could post bail for the client "only in those rare circumstances in which there is no significant risk that [the lawyer's] representation of the client will be materially limited by her personal interest in recovering the amount advanced."[8]

In our view, the reasonable belief requirement of Rule 1.7(c)(2) is a difficult obstacle to surmount if the lawyer is asked to defend the agency against a furlough complaint with allegations that are substantially similar to the allegations she has raised in her own furlough complaint against the agency. The level of difficulty increases with the similarity of the allegations in the complaints. In other words, the obstacle becomes harder to surmount as the allegations converge towards sameness. The difficulty is compounded if an agency or court decision resolving one complaint will have a binding effect, or may have a persuasive effect, on the resolution of the other complaint. At the other end of the scale, it is less likely that Rule 1.7(c)(2) will present an obstacle to the lawyer's representation when there is no factual or legal overlap between the lawyer's own furlough-related complaint and the complaints of others against which the agency has asked the lawyer to defend.

Although we can identify a framework for the analysis of these issues generally, the answer in any particular situation will depend on the allegations, the lawyer involved, and the procedural context of the complaint. If the lawyer does not believe that she can provide "competent and diligent representation to" her agency client in the furlough matters while pursuing her own furlough complaint – or if the hypothetical "reasonably prudent and competent lawyer" in her situation would not believe that she could – she may not undertake the representation of the agency client in such matters even if the agency is prepared to waive the conflict. Rule 1.7(c)(2).

**4. Rules 5.1 and 5.2, Supervising and Supervised Lawyers.**

This inquiry also raises issues for agency lawyers who supervise furloughed lawyers. Supervisors and managers who are lawyers can be held professionally responsible for their subordinates' conduct. Rule 5.1(a) requires lawyers who possess "managerial authority in a law firm or government agency" to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct." Rule 5.1(b) requires a lawyer who has "direct supervisory authority over another lawyer" to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Rule 5.1(c)(1) provides that a lawyer "shall be responsible for another lawyer's violation of the Rules of Professional Conduct" if the lawyer "orders or with knowledge of the specific conduct, ratifies the conduct involved."[9]

In turn, a subordinate lawyer is responsible for complying with the professional conduct rules even if a supervisor or other person directs her to engage in prohibited conduct. *See* Rule 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person"). However, a subordinate lawyer does not violate the professional conduct rules "if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Rule 5.2(b).

*Conclusion*

We recognize that an agency lawyer would be placed in a difficult situation if her full-time employer, the agency, asked her to defend the agency against furlough-related complaints that raise allegations substantially similar to the allegations the lawyer is raising in her own complaint, even where the agency waived any individual interest conflict relating to the lawyer's representation. Under the D.C. Rules of Professional Conduct, the client's consent is necessary but not sufficient to enable a lawyer to undertake certain kinds of matters. Clients cannot waive their right to have a lawyer who reasonably believes she can provide competent and diligent representation. Moreover, supervisory lawyers must make reasonable efforts to ensure that their subordinate lawyers comply with the professional conduct rules. Lawyers have an affirmative obligation not to undertake matters that they do not reasonably believe they can handle competently and diligently. We suggest that agencies and their lawyers work together to resolve the ethical issues addressed in this opinion.

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*Opinion 366*

**Ethical Issues that Commonly Arise in Private Adoption Matters**

Lawyers who represent clients, whether birth parents or prospective adoptive parents, in private or independent adoption proceedings in the District of Columbia must ensure their conduct conforms to the D.C. Rules of Professional Conduct. Private adoptions frequently give rise to a number of significant ethical obligations, not the least of which are duties arising under conflict of interest rules, that the lawyer must squarely address with his or her client or clients, often at the onset of the representation. In many instances, a lawyer will be required to obtain the informed consent of one or more clients, and in some circumstances that of former clients, regarding certain aspects of the representation, in order to commence or continue representation. Private adoption practitioners should be particularly mindful of ethical duties attendant to communications with unrepresented persons, as well as duties of confidentiality owed to both current and former clients.

**Applicable Rules**

- Rule 1.0(e) – Informed Consent
- Rule 1.3 – Diligence and Zeal
- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality of Information

clients will be materially limited by . . . a personal interest of the lawyer."

[8] The ABA opinion lists several examples of "unusual situations" in which the bond-posting lawyer might conclude that continuing representation is permissible:

> The amount involved may, for example, be negligible and of little or no consequence to the lawyer. There may be situations in which a lawyer who is a friend of the family of the client may expect that the family will indemnify her from loss when she has posted bond for the client in exigent circumstances. The lawyer could commit to herself, or even agree in writing to the client, that she would not exercise her right of legal recourse against the client. Yet again, circumstances may be such that the lawyer reasonably believes that there is little or no risk that the client will fail to appear.

[9] In addition, Rule 5.2(c)(2) provides that a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if "[t]he lawyer has direct supervisory authority over the other lawyer or is a partner or has comparable managerial authority in the law firm or government agency in which the other lawyer practices, and knows or reasonably should know of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

- Rule 1.7 – Conflict of Interest: General
- Rule 1.8(e) – Conflict of Interest: Specific Rules
- Rule 1.9 – Conflict of Interest: Former Client
- Rule 4.3 – Dealing with Unrepresented Person
- Rule 5.4 – Professional Independence of a Lawyer

*Inquiry*

The Committee has been asked to provide guidance to the Bar on ethical considerations that commonly arise in "private adoptions," which are also referred to as "independent adoptions." For purposes of this opinion, these terms describe an adoption in which the birth parents have neither voluntarily relinquished their parental rights to an authorized public or private "child-placing agency"[1] nor had their parental rights involuntarily terminated.[2] These latter types of adoptions are outside the scope of this opinion.

A private adoption may present a number of issues that implicate the D.C. Rules of Professional Conduct ("D.C. Rules"), including: (1) accepting legal fees from a third party (typically, for representing the birth parent(s) from the person(s) seeking to adopt); (2) engaging in reciprocal client referrals among other adoption practitioners; (3) jointly representing both birth parents; (4) communicating with an unrepresented party (often an unrepresented birth parent, while either representing the prospective adoptive parent(s) or while representing the other birth parent, concerning the decision or procedures to place a child for adoption or to relinquish parental rights); and/or (5) representing a client in an adoption proceeding opposite a former client from a previous adoption proceeding. Before discussing the application of the ethics rules, we briefly describe the statutes and Superior Court procedural rules that govern private adoption proceedings in the District of Columbia.[3]

*Background*

Private adoption proceedings are initiated in the Superior Court's Family Division by a petition filed by person(s) seeking to adopt ("adoptive parent(s)" or "petitioner(s)").[4] The court may grant an adoption petition only after determining that "the adoption will be in the best interest of the prospective adoptee."[5] Resolution of this ultimate question requires the court to decide (1) whether "the prospective adoptee is physically, mentally, and otherwise suitable for adoption by the petitioner"; and (2) whether "the petitioner is fit and able to give the prospective adoptee a proper home and education."[6] To assist the court in assessing the petitioner's fitness, a "licensed child-placing agency" will conduct an investigation and report its findings.[7] The Committee is advised that in private adoptions the prospective adoptive parents typically retain the entity that will perform the study and pay its fees.

Consent to the adoption is required "from both [birth] parents, if they are both alive";[8] the "minority of a natural parent is not a bar to that parent's consent to adoption."[9] The court may appoint an attorney to represent "a parent or guardian whose consent is required … if the individual is financially unable to obtain adequate representation."[10] More commonly, however, the adoptive parents will pay the legal fees for a lawyer to represent each birth parent that desires representation. The Committee is informed that due to the relatively small number of lawyers regularly engaged in adoption practice, the same lawyers will often be facing each other, either having been retained by the petitioner or in representing a birth parent through referral from the petitioner's lawyer.

Consent to the adoption must also be obtained "from the prospective adoptee if he or she is fourteen years of age or older."[11] District of Columbia law does not provide a prospective adoptee with appointed counsel, even when the prospective adoptee's consent is required. The court has public funds available, but is not required by either statute or Superior Court Rule, to appoint a guardian *ad litem* ("GAL"), who is "charged with the representation of the child's best interest." Notwithstanding that every prospective adoptee, irrespective of age, is deemed a party to the proceeding under Super. Ct. Adoption Rule 17(a), if the court does not appoint a GAL for a prospective adoptee, there may be no lawyer – indeed, no person – involved in the proceeding who is specifically charged with "representation of the child's best interest."[12]

[1] Such adoptions are typically referred to as "agency adoptions." In agency adoptions, the birth parents "relinquish parental rights" to a "licensed child-placing agency" for purposes of having the agency place the adoptee with adoptive parents; by statute "the agency is vested with parental rights and may consent to the adoption of the child pursuant to the statutes regulating adoption procedure." D.C. Code § 4-1406(a)(1). The relinquishment of parental rights to a child-placing agency prior to the adoption is governed by statute. *See* D.C. Code §§ 4-1401, *et seq.*

[2] *See* D.C. Code § 16-2320(a)(6)(termination following a finding of neglect). Although lawyers may be involved in the representation of a birth parent or an adoptee in the termination of parental rights proceedings, lawyers ordinarily are not involved in the ensuing adoption proceedings that will follow if a court terminates parental rights.

[3] This Committee does not opine on questions of law outside of the D.C. Rules of Professional Conduct. The ethical questions presented in this inquiry, however, demand a contextual understanding of the statutory and procedural framework and of certain requirements that arise under substantive adoption law. The accompanying discussion of the statutes and court rules that govern adoptions in the District of Columbia reflects the Committee's understanding of relevant law for the sole purpose of analyzing the issues presented under the D.C. Rules of Professional Conduct.

[4] D.C. Code § 16-305.

[5] *Id.* § 16-309(b)(3); *see, e.g., In re E.D.R.*, 772 A.2d 1156 (D.C. 2001).

[6] *Id.*§§ 16-309(b)(1)-(2).

[7] *Id.* § 16-307; Super. Ct. Adoption Rule 7(d). The Committee is informed that adoptive parents usually retain one of the licensed child-placing agencies that engage in agency adoptions to perform the requisite home study.

[8] D.C. Code § 16-304(b)(2)(A). Section 16-304(d), however, establishes two exceptions to the statutory consent requirement to cover instances when a birth parent, after notice of the adoption petition, either (1) cannot be located; or (2) has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months. In addition, under D.C. Code § 16-304(e) the court may grant an adoption petition when it finds "after a hearing, that the consent or consents are withheld contrary to the best interest of the child."

[9] *Id.* § 16-304(c).

[10] *Id.* § 16-316(a). The reference in the statute to "a guardian" as a potential recipient of appointed counsel "if the individual is financially unable to obtain adequate representation" is to a person in whose custody the prospective adoptee has been placed, not a guardian ad litem, who is always a lawyer.

[11] *Id.* § 16-304(b)(1).

[12] *Id.* § 16-316(b). For a prospective adoptee "fourteen years of age or older," whose consent, like that of the birth parents, is required for the adoption to go forward, he or she will have no one to consult with in evaluating and interpreting the home study and in deciding whether to consent to the adoption if the court decides not to appoint a GAL. As we discuss below, an attorney who represents a birth parent does not – and cannot, consistent with D.C. Rule 1.7, simultaneously represent a prospective adoptee who is too young to give informed consent to joint representation. Additionally, we note that except in certain narrowly defined circumstances, an attorney who represents a birth

Consent and the resulting adoption have significant consequences for a consenting birth parent and an adoptee whose independent consent must be obtained: "A party who formally gives his consent to the proposed adoption … waives the requirement of notice" of the adoption proceedings in Superior Court;[13] and, pursuant to Super. Ct. Adoption Rule 17(a), the consenting person is no longer deemed a "party" to the adoption proceedings. Once a person consents to the adoption, that consent "may be revoked or withdrawn only after a judicial determination that the consent was not voluntarily given. The person moving to revoke or withdraw consent has the burden to establish that the consent was not voluntarily given."[14] The adoption effects a complete termination of birth parents' parental rights.[15]

As explained above, the law does not require the court to provide a prospective adoptee with legal representation in a private adoption proceeding, notwithstanding that the consequences of the proceeding are surely no less significant for the adoptee than for the birth parents, who are statutorily entitled to counsel. Although the proper administration of adoption proceedings is not a subject on which the Committee opines, the Committee recognizes, and discusses more fully in this opinion, that the D.C. Rules of Professional Conduct constrain lawyers representing other parties in the adoption proceeding from apprising the court of adverse information that may potentially affect the court's decision of whether "the adoption will be in the best interest of the prospective adoptee." The absence of a lawyer for the prospective adoptee may, in some instances result in the court's being unaware of such information.

The Committee is aware that the law mandates appointment of a GAL in child neglect proceedings. In Opinion 295, the Committee noted the Court of Appeals' decision holding that "a child's GAL occupies a 'dual role' as neutral fact-finder for the judge and as zealous advocate on behalf of the child's best interests." *See S.S. v. D.M.*, 597 A.2d 870, 875 (1991).[16] Even though a GAL's precise function in a private adoption would differ from that of a GAL in a neglect proceeding, the appointment of a GAL could assist the court in determining whether placement of the prospective adoptee with the petitioner is in the adoptee's "best interests."

*Discussion*

**Informed Consent**

The concept of "informed consent" is central to a number of circumstances that confront practitioners in private adoption matters.[17] Because many ethical issues that arise in private adoptions require a lawyer to obtain the informed consent of one or more clients or former clients, it is critical that lawyers understand the terminology. To avoid the possibility of confusion in the discussion that follows, we note at the outset that the "informed consent" requirement under the D.C. Rules of Professional Conduct is wholly distinct from the statutory "consent to adoption" required by D.C. Code § 16-304(b)(2)(A).[18]

Rule 1.0(e) states that "'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." Comment [2] addresses the content of a lawyer's communication to the (prospective) client in order to ensure that the client's consent to a proposed arrangement or action is "informed."

> 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 [1] a disclosure of the facts and circumstances giving rise to the situation, [2] any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and [3] a discussion of the client's or other person's options and alternatives. *See* Rule 1.0 Comment [2]

In addition to imposing these affirmative obligations of disclosure, explanation, and discussion, "[o]btaining informed consent will usually require an affirmative response by the client or other person."[19] We emphasize that "a lawyer may not assume consent from a client's or other person's silence."[20]

Finally, the comments to Rule 1.0(e) further explain that "[i]n 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." Thus, information sufficient to allow one person to give informed consent may not be sufficient for another. This opinion discusses the practical application and requirements for obtaining informed consent in the context of specific issues that may arise in these types of representations.

**Representing Birth Parents When Legal Fees are Paid by Party Seeking to Adopt**

It is a common practice for the lawyer who represents the person(s) filing the adoption petition to recommend a lawyer or lawyers to represent either or both of the birth parents and for the petitioner to

parent cannot, in the absence of the informed consent of that client, apprise the court of adverse information that may potentially affect the court's decision whether "the adoption will be in the best interest of the prospective adoptee."

[13] *Id.* § 16-306(b). A lawyer who undertakes to obtain a client's consent to the adoption must explain and ensure the client appreciates the consequences of giving that consent. *See* D.C. Rule 1.4(b).

[14] Super. Ct. Adoption Rule 70(a).

[15] D.C. Code § 16-312(a).

[16] D.C. Legal Ethics Opinion 295 (Restriction on Communications by a Lawyer Acting as Guardian Ad Litem in a Child Abuse and Neglect Proceeding) (2000).

[17] The concept of informed consent is independent from, and in addition to, a lawyer's general duty of communication arising under Rule 1.4. Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The comments to Rule 1.4 clarify that "[t]he lawyer must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations" and that "[t]he lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." *See* D.C. Rule 1.4 Comments [2] and [3].

[18] *See* note 8 and the text accompanying notes13-15, *supra*, for a discussion of the consent requirement and the consequences of giving consent to the adoption.

[19] D.C. Rule 1.0, Comment [3].

[20] *Id.* Although Comment [3] to Rule 1.0 notes that "[a] number of D.C. Rules require that a person's consent be in writing," neither Rule 1.8(e)(1) nor Rule 1.7(c)(1) requires that a client's informed consent be memorialized by a writing. Nonetheless, this Committee has consistently advised that an attorney consider memorializing the disclosures to the client and the client's informed consent to the attorney's proposed action even where the D.C. Rules do not require the client's written consent. In this opinion we identify the prudential considerations that favor obtaining written consent when representing a person about to relinquish parental rights.

pay the fees for the birth parents' lawyer(s). A lawyer who accepts such referrals under these conditions must comply with Rules 1.8(e) and 5.4(c).

Rule 1.8(e) states:

> A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) The client gives informed consent after consultation; (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) Information relating to representation of a client is protected as required by D.C. Rule 1.6.

Rule 5.4(c) parallels Rule 1.8(e)(2) and states:

> 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.

Comment [10] to Rule 1.8 notes that "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." Because of this potential disparity in interests, "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." Rules 1.8(e)(2) and 5.4(c) require that the lawyer not permit the adoptive parents (or the attorney representing the adoptive parents) to "direct or regulate the lawyer's professional judgment" in advising her birth parent client regarding the adoption or otherwise "interfere" in the relationship with the client.

Even when a lawyer is satisfied that she can maintain the independent judgment required by Rules 1.8(e)(2) and 5.4(c), Rule 1.8(e)(1) prohibits acceptance of fees from a third party unless the client gives informed consent to the arrangement. Thus, at a minimum "[p]aragraph (e) requires disclosure of the fact that the lawyer's services are being paid for by a third party."[21] For a client's consent to be "informed," however, there must be "a discussion of the client's ... options and alternatives" and an "explanation ... of material advantages and disadvantages of the proposed course of conduct."[22] An indigent birth parent must be informed that court-appointed counsel is available under D.C. Code § 16-316(a) as an alternative to accepting a lawyer whose fees are paid for by the adoptive parents; although the lawyer is free to fairly state her opinion regarding the advantages of not having a court-appointed lawyer, the client must be told that she has a choice and be provided with sufficient information to make that choice intelligently.

The representation and fee arrangement must also conform to the requirements of Rule 1.7 concerning conflict of interest,[23] which prohibits representation of a client "if … [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by ... the lawyer's own financial, business, property, or personal interests."[24] Under Rule 1.7(b)(4), a conflict of interest exists if there is a significant risk that the lawyer's representation will be adversely affected by the lawyer's own interest in the fee arrangement.[25]

Whether the fee arrangement creates such a risk is an objective determination: Would an "objective observer" have a "reasonable doubt" that the representation can be "wholeheartedly and zealously" undertaken?[26] If such an objective reasonable doubt exists, a lawyer must comply with the waiver and informed consent mandates of Rule 1.7(c)(1) and (2) before commencing representation.

Finally, Rule 1.8(e)(3) provides that a lawyer whose representation of a birth parent will be paid for by the adoptive parents must comply with the confidentiality provisions of Rule 1.6, which prohibit a lawyer from "revealing" a client "confidence or secret" and from using a confidence or secret "to the disadvantage of the client" or "for the advantage of the lawyer or of a third person."[27]

**Reciprocal Referrals Among Private Adoption Attorneys**

As noted earlier, the Committee understands that in private adoption practice, as in a number of other practice areas, there are informal groups of lawyers who engage in reciprocal referrals; that is, a lawyer who represents the adoptive parents in one matter will refer the birth parent(s) to a colleague, who may reciprocate when the roles are reversed. The Committee emphasizes that the D.C. Rules do not prohibit such relationships among lawyers; indeed, the Committee recognizes that they are inevitable and may inure to a client's benefit. Nonetheless, such relationships can contribute to a "reasonable doubt" in the mind of an "objective observer" whether a lawyer's financial interest in continuing to receive referrals from colleagues could interfere with the lawyer's "wholehearted and zealous" representation of a client in the event that the client takes a position that is not the one preferred by the client of the lawyer who made the referral.

Because one of the principles underlying Rules 1.7(b) and (c) is that "the client as well as the lawyer must have the opportunity to judge and be satisfied that [wholehearted and zealous] representation can be provided,"[28] a prudent lawyer will, in most cases, treat a representation that stems from a "reciprocal referral relationship" as raising a conflict under Rule 1.7(b)(4) and will disclose "the existence and nature of the possible conflict and the possible adverse consequences of such representation,"[29] so that the client can consider the issue and provide the informed consent needed for the lawyer to undertake the representation.

In discussing this matter (and all matters that require the client's informed consent to a proposed action) with the prospective client, a lawyer who proposes to represent a birth parent must consider the prospective client's age (perhaps a minor), sophistication in legal matters (often minimal), and the stress presented by the client's circumstances of relinquishing parental rights. The lawyer must tailor the substance and delivery of the disclosure to ensure that the client appreciates the decision she is making.[30]

[21] D.C. Rule 1.8, Comment [10].

[22] D.C. Rule 1.0, Comment [2].

[23] D.C. Rule 1.8, Comment [10].

[24] D.C. Rule 1.7(b)(4).

[25] D.C. Rule 1.8, Comment [11].

[26] D.C. Rule 1.7, Comment [7].

[27] D.C. Rule 1.6(a)(1)-(3); D.C. Rule 1.8(e)(3) and Comment [10].

[28] D.C. Rule 1.7, Comment 7 ("The client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.").

[29] D.C. Rule 1.7(c)(1).

[30] Comment [11] to D.C. Rule 1.8 recognizes that in some circumstances, for example, where the prospective client is experienced in obtaining legal services, disclosure of the "the fact of the payment and the identity of the third-party payer" may be sufficient to satisfy D.C. Rule 1.8(e). However, in dealing with a birth parent (particularly one who has not reached the age of majority) who is about to place a child for adoption and is unable to afford counsel, the lawyer should assume that a more

**Representation of More than One Birth Parent**

Because the consent of both birth parents is required (absent involuntary termination of either's parental rights), each may want legal representation in deciding whether to consent to the adoption or, if consent is withheld, in mounting an opposition.[31] As we stated in Opinion 296, although the D.C. Rules do not prohibit joint representation, "[a] necessary predicate to a decision to undertake joint representation is an initial determination that the interests of the joint clients can be pursued without conflict."[32] We also cautioned, however, that a lawyer who is considering undertaking joint representation must keep in mind that "[n]o matter how consistent the apparent interests of clients in a joint representation may appear at the onset … [joint representation] poses inherent risks of future conflicts of interest."[33] Moreover, 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."[34]

**Absolute Prohibition of Representation: Adverse Interests Between Birth Parents**

Turning first to the prohibition in Rule 1.7(a) against "advanc[ing] two or more adverse positions in the same matter," lawyers must remember that this prohibition prohibits joint representation not only when there are conflicting opinions regarding any aspect of the prospective adoption but also when the birth parents seek representation in order to resolve their disagreement(s). In Opinion 243, we concluded that Rule 1.7(a) did not permit "the joint representation of a divorcing husband and wife who seek assistance in resolving their disagreement as to the terms of the dissolution of their marriage." The Committee stated: "We believe that such joint representation would place too great a strain on the fundamental duty of loyalty to individual clients that undergirds our ethical rules."[35] Our reasoning in that opinion applies with equal force to a lawyer's prospective joint representation of birth parents when the lawyer is aware that they have adverse positions on matters involved in the adoption proceeding.

**Conditional Prohibition: Informed Consent to Joint Representation**

When birth parents seek joint representation and there is no such adversity in their positions regarding the adoption, a lawyer must, nonetheless, consult "with each client concerning the implications of the common representation and obtain[] each client's [informed] consent"[36] to the joint representation before agreeing to undertake it. We take this opportunity to review relevant provisions of the D.C. Rules of Professional Conduct in the context of joint representations to ensure that lawyers' consultations with their prospective clients address fully "the implications of the common representation" and that clients who consent to joint representation have been adequately informed of the actual and potential consequences of the decision.

As we stated in Opinion 296, "[a] joint representation in and of itself *does not alter the lawyer's ethical duties ["of loyalty and confidentiality," as well as "the duty to inform"] to each client, including the duty to protect each client's confidences.*"(emphasis added). That opinion described the "delicate balance" a lawyer must maintain in fulfilling her obligations to each client under both Rule 1.4 (Communication) and Rule 1.6 (Confidentiality of Information), and cautioned that "[i]f the balance cannot be maintained, the common representation is improper."[37] We reiterate here this critical point: "In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation …."[38]

Specifically, Rule 1.4 requires a lawyer to "keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[39] This means that "*[a] client is entitled to whatever information the client wishes about all aspects of the subject matter of the representation unless the client expressly consents not to have certain information passed on.*"[40] On the other hand, Rule 1.6 requires that a lawyer not: "(1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; or (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."

Comment [16] to Rule 1.6 addresses the tension that joint representation creates between a lawyer's obligation to maintain client confidentiality and her obligation to keep a client fully informed:

> *As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.* This is so because the lawyer has an equal duty of loyalty to each client, and *each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See* D.C. Rule 1.4 (emphasis added).[41]

fulsome explanation of the relationship with the referring lawyer is required in order to obtain the prospective client's informed consent to the representation under such circumstances. *Cf.* D.C. Rule 1.0, Comment [2] ("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.").

[31] With respect to the unwed natural father, if he "grasps an opportunity … to develop a relationship with his offspring … and accepts some measure of responsibility for the child's future," he has a constitutional right to participate in the adoption proceedings. *Lehr v. Robertson*, 463 U.S. 248, 261-62 (1983).

[32] D.C. Legal Ethics Opinion 296 (Joint Representation: Confidentiality of Information )(2000). Although LEO 296 was adopted before the 2007 D.C. Rules Amendments, its discussion of "the difficult ethical issues under D.C. Rule 1.7(b)(2) and (b)(3) posed by joint representations of any kind" is unaffected by the subsequent elimination of former D.C. Rule 2.2, which addressed the lawyer's role as intermediary, or the amendments to D.C. Rule 1.6(d), regarding a lawyer's revealing a client's confidences and secrets "[w]hen a client has used or is using a lawyer's services to further a crime or fraud."

[33] *Id.*

[34] D.C. Rule 1.7, Comment [14].

[35] D.C. LEO 243.

[36] D.C. LEO 296, discussing former Rule 2.2. The joint representation concerns identified in former Rule 2.2 and discussed in LEO 296 are captured in Comments [14]-[18] to Rule 1.7(b).

[37] D.C. Legal Ethics Opinion 296 (2000).

[38] *Id.*

[39] D.C. Rule 1.4(a) and (b).

[40] D.C. Rule 1.4, Comment [2] (emphasis added).

[41] As the Committee stated in Opinion 327, Rule 1.6(d)(1) permits a lawyer to reveal a client's confidence or secret when the client has provided informed consent to such disclosure. The Committee went on to point out that "[w]here the disclosing client has unambiguously consented to further

In the context of joint representation of birth parents,[42] the consultation regarding "the implications of the common representation" must include a discussion of the following points. First, the prospective clients must be made aware of the risk that a future disagreement between them could result in the lawyer having to withdraw from both representations, and that each would have to then find a new lawyer, which in most circumstances will delay the final resolution of the adoption proceeding and require additional expenditures of their time. Second, the lawyer must ensure that each prospective client understands that "[w]ith regard to the attorney-client privilege, the prevailing D.C. rule is that, as between commonly represented clients, the privilege does not attach."[43] Third, as we said in Opinion 327, it is essential that the lawyer "carefully explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients," and that the lawyer "may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information."[44]

Lawyers must also advise each client that there are alternatives to joint representation. As noted, separate court-appointed counsel is available for each indigent birth parent. In addition, the Committee has been advised that adoptive parents will often fund separate legal counsel for each birth parent if requested to do so. Informed consent requires that lawyers explain to the prospective client(s) the benefits of separate counsel. This may include explaining that there are mechanisms available that enable separate lawyers to share such information as each client agrees to share while protecting confidences and secrets and maintaining each person's attorney-client privilege.

Although Rule 1.7 does not impose a requirement that either the lawyer's explanations or the client's decision concerning joint representation be in writing, the Committee noted in Opinion 296 that former Rule 2.2 imposed a writing requirement and the reasons for the requirement:

> Comment [2] to Rule 2.2 underscores that the explanation of risks and consent must be in writing because "the potential for confusion is so great." A written explanation requires the lawyer to "focus specifically on those risks" and educates the client to "risks that many clients may not otherwise comprehend."[45]

After pointing out that the reasons for the writing requirement in Rule 2.2 applied equally to "joint representations of any kind," we concluded:

> The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation.[46]

**Communication with an Unrepresented Birth Parent**

The Committee has been advised that lawyers who practice adoption law confront with some regularity two circumstances that involve communication with an unrepresented person. We understand that it is not uncommon for a birth mother to decline the opportunity to consult with an attorney before executing the statutory consent form that terminates her parental rights.[47] Because someone has to obtain the executed form for the adoption to proceed, the Committee understands that the task of obtaining the requisite consent often falls to the attorney who represents the prospective adoptive parents. Another situation that arises involves communications between an unrepresented birth parent and a lawyer who represents one of the other parties, usually the lawyer who represents the other birth parent.

Both scenarios are governed by Rule 4.3 (Communication with an Unrepresented Person). Rule 4.3(a)(1) prohibits "giving advice to the unrepresented person other than the advice to secure counsel, if the interests of such person *are or have a reasonable possibility of being in conflict with* the interests of the lawyer's client" (emphasis added). In addition, Rule 4.3(a)(2) provides that a lawyer may not "state or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested."

Although an adoptive parent's lawyer tasked with obtaining an unrepresented birth parent's consent to the adoption may subjectively believe that there is no conflict between the interests of the unrepresented birth parent and the lawyer's client, obtaining a birth parent's formal consent is *the* essential step in a proceeding that will result, if the court grants the adoption petition, in the transfer of parental rights from the unrepresented birth parent to the lawyer's client(s). Under these circumstances, a prudent lawyer will treat the birth parent as someone whose interests "are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

Therefore, the lawyer must make clear that she represents the prospective adoptive parent(s), that the lawyer's role is to assist the adoptive parent(s) in adopting the birth parent's child, and that the purpose of her communicating with the birth parent is to obtain the birth parent's consent to the adoption, which, if granted, will terminate the birth parent's parental rights. We emphasize that when the lawyer who represents the adoptive parent(s) is meeting with an unrepresented birth parent for this purpose, the lawyer may not advise the unrepresented birth parent on any matter. If the birth parent poses a question that requires other than an objective answer (*e.g.*, what happens next, who is the judge assigned to the matter), the adoptive parents' lawyer must limit her response to advising the birth parent that he or she may want to talk with a lawyer and the available options for obtaining one.

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disclosure [of a confidence or secret otherwise protected by Rule 1.6], a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance."

[42] As we noted previously in the discussion of the required disclosures concerning payment of fees by third parties (*see* notes 22-31 and accompanying text, supra), the substance of the disclosures will vary depending upon the context of the representation, the ages of the prospective clients, and their experience and sophistication in legal matters.

[43] D.C. Rule 1.7, Comment [15].

[44] D.C. Rule 1.7, Comment [16].

[45] D.C. LEO 296, *quoting* former D.C. Rule 2.2, Comment [2].

[46] *Id.*

[47] While we have not received similar information regarding birth fathers, we will assume that there is some percentage of them who take the same position. As we noted previously, *supra* note 13, once a birth parent executes a formal consent to adoption, that person is no longer a "party" to the adoption proceedings and waives notice of future proceedings. Thus, a birth parent who declines the opportunity to consult with counsel prior to formally consenting to the adoption is effectively waiving the right to have legal representation in connection with the adoption.

In the second scenario, in which a lawyer who represents one birth parent is communicating with the other, unrepresented birth parent, if the purpose of the communication is to obtain the consent of the unrepresented birth parent to the adoption, our previous analysis leads to the same result: A lawyer is limited to identifying herself, identifying her client, and stating the reason for the communication. The lawyer may not counsel the unrepresented birth parent on the wisdom of giving consent, may answer questions only of the type described above, and, in response to other questions, must limit her response to advising the birth parent that he or she may want to talk with a lawyer and the available options for obtaining one. If the communication is for any purpose other than obtaining the unrepresented person's consent to the adoption, and if the lawyer has no reason to believe that the birth parents have adverse interests or positions in regard to the adoption, there is arguably greater leeway for the lawyer to conclude that the unrepresented parent's interests do not conflict with those of the lawyer's client. However, the prudent practice is for the lawyer to limit her "advice" to a suggestion that the unrepresented person may wish to obtain counsel.

**Separate Representation of Prospective Adoptee**

A lawyer who represents a birth parent does not and cannot also represent the prospective adoptee. Because the interests of a birth parent and the prospective adoptee could differ with respect to material matters, for example, the relevance of information pertaining to the suitability of the adoptive parents or another issue that may affect whether the adoption is in the prospective adoptee's best interest, joint representation raises a conflict under Rules 1.7(b)(2), (3) and (4) which, under Rule 1.7(c)(1), would require each client's informed consent before the attorney could undertake the joint representation. When the prospective adoptee is a newborn or very young child, obtaining such informed consent is, of course, a practical impossibility.

Furthermore, when the potential joint representation involves a birth parent and an unrepresented minor adoptee of any age, the inherent uncertainty of whether the prospective adoptee has voluntarily given her informed consent to the joint representation as well as the concerns discussed herein with respect to the joint representation of birth parents,[48] which are particularly acute in this context, make joint representation of a birth parent and a prospective adoptee rarely, if ever, permissible.

**Duty of Confidentiality Revisited**

A lawyer who represents a birth parent or an adoptive parent may fundamentally disagree with the client on whether certain information potentially relevant to the court's "best interests of the prospective adoptee" mandate should be brought to the court's attention. However, absent a circumstance that gives rise to one of the limited exceptions under Rule 1.6, a lawyer representing a party in an adoption may not apprise the court of information that the lawyer believes is relevant to the court's approval of the petition without first obtaining informed consent from his or her client.

As discussed extensively above, a lawyer has duties of confidentiality under Rule 1.6 that would prohibit a lawyer's voluntary use or revelation of client confidences or secrets except in narrowly defined circumstances.[49] Rule 1.6(b) very broadly defines "confidence" as "information protected by the attorney-client privilege under applicable law," and "secret" as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

As such, if a lawyer becomes aware of information that may cause the lawyer, but not the lawyer's client, to question whether the prospective adoption is "in the best interest of the prospective adoptee," duties of confidentiality will typically foreclose the lawyer's bringing that information to the court, as such information is clearly a client "secret."[50] The lawyer must abide by the client's decision regardless of the lawyer's disagreement. However, in a particularly unpalatable circumstance, a lawyer may seek to withdraw from the representation, but only if that can be done without "material adverse effect on the interests of the client," or if other another independent reason to withdraw exists under Rule 1.16.

**Representing a Client in an Adoption Opposite a Former Client from a Previous Adoption**

The Committee is informed that lawyers for whom adoption law is a primary or exclusive practice area are sometimes on the opposite side of an adoption proceeding from a former client in a previous adoption that did not involve the lawyer's current client. This situation is governed by Rule 1.9, which states:

> 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.

"Matters are 'substantially related' for purposes of this D.C. 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."[51]

It would be difficult to conceive of an adoption proceeding in which an attorney did not obtain "confidential factual information" about his client; in many instances, there is a substantial risk that such information could "materially advance" the position of the lawyer's new adoption client.[52] Therefore, Rule 1.9 requires informed consent of the former client to the subsequent representation if the interests of the former and the current client are "materially adverse."

Prudence suggests, however, that even when the interests of the former and current clients cannot reasonably be deemed "materially adverse," – that is, for example, both persons are on record independently as in favor the court's granting the adoption petition in the latter proceeding

[48] *See* notes 31-46 and accompanying text.

[49] *See* D.C. Rule 1.6 (a).

[50] *See* note 12, *supra*, in which the Committee notes its concerns when there is no GAL appointed to represent a prospective adoptee. Presumably, in this circumstance the court engages in particularly close questioning of the agency that has evaluated the suitability of the prospective adoptive parents.

[51] D.C. Rule 1.9, Comment [3] (emphasis added).

[52] For example, a lawyer who previously represented the birth mother may have learned information about personal habits of the former client of which the new client (the adoptive parents) are unaware that could adversely affect the healthy development of the prospective adoptee, and which, if known, could cause the adoptive parents to withdraw the adoption petition. On the other hand, a lawyer who represents a birth parent and has represented the prospective adoptive parents in a previous adoption (or any matter in which she has learned confidential information) may have learned information about that party's financial situation or home life that might be relevant to the new client's assessment of the petitioner's suitability.

– a lawyer will obtain the former client's informed consent before agreeing to represent a person on the other side of the subsequent proceeding.

In Opinion 309, the Committee considered "whether advance waivers of conflicts of interest are permissible and, if so, whether there are requirements for such waivers additional to, or different from, those prescribed by Rules 1.7 and 1.9 for waivers generally." Only one small portion of Opinion 309—a footnote—is relevant to the instant discussion. In the footnote, the Committee was careful to distinguish between a waiver of *conflict of interest* for purposes of representation and a waiver of *confidentiality* by the former client:

> *Waivers permitting the adverse use or disclosure of confidential information, see D.C. Rule 1.6(c)-(d), may not be implied from waivers of conflicts of interest. Because of their considerable potential for mischief*, waivers of confidentiality require particular scrutiny and may be invalid even when granted by sophisticated clients with counsel (in-house or outside) independent of the lawyer seeking the waiver.[53]

Accordingly, a former client's "current" waiver of a representational conflict under Rule 1.9 does not permit a lawyer to disclose or use for the benefit of the current client confidential information obtained about the former client during the former representation. Moreover, as noted in Opinion 309, any separate waiver by the former client of confidentiality under Rule 1.6 would be subject to "particular scrutiny" and might be found to be invalid. Accordingly, it may not be possible for the attorney to obtain an effective waiver of confidentiality from the former client that would permit the attorney to make use of the former client's confidential information to advance the position of the attorney's new adoption client.

If that confidential information were such that the current client would reasonably be entitled to know it under Rule 1.4 and have her lawyer use it in fulfilling the lawyer's obligations of diligence and zeal to the current client under Rule 1.3, the lawyer would need to obtain the current client's informed consent to having the information withheld. But if the lawyer is unable to disclose to the current client the former client's confidential information, the lawyer will likely be unable to obtain the current client's informed consent to the lawyer not using or revealing the information. *See* Comment [27] to Rule 1.7(b) ("If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue."). Accordingly, prudence suggests that a lawyer should be extremely cautious in considering whether to undertake to represent a new client in a private adoption adverse to a former client.[54]

*Conclusion*

Lawyers engaged in private adoptions must ensure that they adhere to the mandates of the D.C. Rules, specifically those governing conflicts of interest, and that they make sufficient disclosures and explanations to obtain prospective client(s)' informed consent where the rules make that a prerequisite to undertaking a representation.

A lawyer for a birth parent may accept payment of legal fees from the adoptive parent(s) only after disclosing information – including information about any reciprocal referral relationship with the adoptive parents' lawyer – necessary to obtain the informed consent for this arrangement from the lawyer's client. Furthermore, a lawyer who accepts fees from the adoptive parents for representation of a birth parent must ensure that the fee arrangement does not affect her independent judgment in the representation of the client and must not disclose the confidences and secrets of her client without the informed consent of her client.

A lawyer may not represent both birth parents when the lawyer is aware at the outset that they differ in their positions in regard to the proposed adoption; nor may a lawyer engage in such joint representation for the purpose of helping birth parents to resolve any such disagreement. In circumstances in which the birth parents agree that the adoption petition should be granted, a lawyer must consider that there is an inherent tension that arises in a joint representation in fulfilling her obligations under both Rule 1.4 and Rule 1.6; she must explain these obligations and the potential consequences should differences between the clients' respective positions later arise; and she must obtain each client's informed consent to the joint representation.

A lawyer who represents only one birth parent may not give legal advice to the other birth parent. Likewise, a lawyer who represents the adoptive parents and is charged with obtaining the consent to adoption from an unrepresented birth parent may not give legal advice to that birth parent. In both circumstances, if the unrepresented person poses questions to the lawyer, the lawyer should restrict her advice to a recommendation to obtain counsel and the potential mechanisms for accomplishing this.

A lawyer who seeks to obtain a birth parent-client's written consent to the adoption must ensure that the client understands the consequences of such consent, including that it terminates both the client's involvement in the adoption proceedings and the client's parental rights. A lawyer who represents a birth parent does not and cannot jointly represent the prospective adoptee.[55]

Except in rare circumstances where an exception to Rule 1.6 applies, a lawyer must obtain the client's informed consent before disclosing to the court information obtained in the course of the representation that could contribute to the court's deciding that the adoption is not "in the best interests of the prospective adoptee." If the client declines to permit such disclosure, the lawyer must abide by the client's decision.

A lawyer who has represented either a birth parent or an adoptive parent in an adoption proceeding may represent a different, adverse client in a subsequent adoption proceeding involving the former client only if the lawyer obtains the informed consent of the former client to the subsequent representation. Because the waiver of conflicts of interest would not constitute a waiver of the former client's confidentiality protections under Rule 1.6, and considering the potential risks to the lawyer's ability to meet obligations that might arise under Rules 1.3 and 1.4 to the new client, prudence suggests that a lawyer should be extremely cautious in considering whether to undertake to represent a party in a private adoption in which a former client from a previous private adoption is on the other side.

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[53] D.C. Legal Ethics Opinion 309 (Advanced Waivers of Conflict of Interest)(2001), note 10 (citations omitted; emphasis added).

[54] A lawyer asked by the court to serve as a GAL for a prospective adoptee in a proceeding involving a former client should be disinclined to accept such an appointment for the same reasons.

[55] As we have observed, because there is no entitlement to legal representation by an adoptee in a private adoption proceeding, it is this Committee's understanding that unless a lawyer or GAL is appointed by the court, there is no one charged specifically with advocating on behalf of the adoptee. In those circumstances, the court's determination about whether the adoption is in the best interests of the child will be based on the home study of the independent agency, and any other evidence that may be introduced.

*Opinion 367*

**Representation of Client by Lawyer Seeking Employment with Entity or Person Adverse to Client, or Adversary's Lawyer; Clarification of Opinion 210**

When a lawyer is seeking employment with an entity or person adverse to his client,[1] or with the adversary's lawyer, a conflict of interest may arise under Rule 1.7(b)(4) if the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected by the lawyer's own financial, business, property, or personal interests (for purposes of this Opinion, a lawyer's own financial, business, property, or personal interests are collectively referred to as a "personal interest conflict"). Both subjective and objective tests must be applied to determine whether a personal interest conflict exists.

There is no "bright line" test for determining the point during the employment process when a personal interest conflict arises, and that point may vary. There are a number of factors to consider in determining whether a personal interest conflict exists, including whether the individual lawyer is materially and actively involved in representing the client and, if so, whether the lawyer's interest in the prospective employer is targeted and specific, and/or has been communicated to, and reciprocated by, the prospective employer.

Where the prospective employer is affiliated with, but separate and distinct from, the entity adverse to the job-seeking lawyer's client, there may be no personal interest conflict in the first instance, because the adversary and the prospective employer may be separate entities for conflicts purposes.

If a personal interest conflict arises, there are three possible courses of action that may be available to the individual lawyer, each of which is subject to applicable requirements of the D.C. Rules of Professional Conduct: (a) disclosing to the client the existence and nature of the personal interest conflict and the possible adverse consequences of the lawyer's representation of the client and obtaining the client's informed consent to the representation; (b) withdrawing from the representation; or, (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed.

The personal interest conflict of an individual lawyer in a law firm, nonprofit, or corporate legal department is not imputed to the other lawyers in the law firm, nonprofit, or corporate legal department, so long as the personal interest conflict does not present a significant risk of adversely affecting the representation of the client by such other lawyers. The imputation rule does not apply to a government agency.

A subordinate lawyer who discusses a potential personal interest conflict with his supervisory lawyer, and acts in accordance with the supervisory lawyer's reasonable determination of whether the subordinate lawyer has a personal interest conflict and follows the supervisory lawyer's recommended course of action, will not be held professionally responsible even if it is subsequently determined that the supervisory lawyer's determination of whether there was a personal interest conflict, and/or the recommended course of action, were incorrect under the Rules.

**Applicable Rules**

- Rule 1.0(c) – Terminology
- Rule 1.3 – Diligence and Zeal
- Rule 1.4 - Communication
- Rule 1.6 - Confidentiality of Information
- Rule 1.7 - Conflict of Interest: General
- Rule 1.10 - Imputed Disqualification: General Rule
- Rule 1.16 - Declining or Terminating Representation
- Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers
- Rule 5.2 - Subordinate Lawyers

*Inquiries*

The Committee has received numerous inquiries with respect to the ethical requirements applicable to a lawyer seeking employment with an entity or person adverse to his client, or with the adversary's lawyer. Prospective employers may include a law firm, a government agency, a nonprofit, or a corporate legal department. Specifically, these inquiries seek guidance on when a personal interest conflict arises in the employment process and, if a personal interest conflict arises, the courses of action available to the lawyer.

*Background*

In D.C. Legal Ethics Committee Opinion 210 ("Representation of Criminal Defendants by Attorney Seeking Position as Assistant U.S. Attorney") (1990), the Committee concluded that a lawyer who is primarily employed in criminal defense work against the U.S. Attorney's Office for the District of Columbia ("USAO-DC") may continue to represent criminal defense clients, and accept new criminal defense clients, while seeking a position with the USAO-DC, only if each of her criminal defense clients consents to the representation notwithstanding the conflict of interest with full disclosure of the possible disadvantages that may result if the lawyer must withdraw to start employment with the USAO-DC.[2] The Opinion concluded that a lawyer should disclose the prospective employment to the client and obtain the client's consent when the lawyer takes the "first active step" in seeking such employment.[3] Opinion 210 states that this "first active step" may occur when the lawyer calls to discuss or inquire about procedures for submitting an application, and certainly occurs when the lawyer submits a resume.[4]

The Committee affirms Opinion 210 on its particular facts. Since Opinion 210 was issued, however, the legal marketplace has become increasingly mobile, with lawyers at every experience level frequently migrating among government agencies, law firms, nonprofits, and corporate legal departments. Concomitantly, the inquiries the Committee has received in the 24 years since Opinion 210 was issued have presented a variety of factual scenarios not contemplated by Opinion 210. Accordingly, the Committee believes

[1] The terms "adverse" and "adversary" are not intended to be limiting. A personal interest conflict could arise even if the prospective employer is not "adverse" in the strict legal sense. In other words, a lawyer seeking employment with a co-plaintiff or co-defendant, or any entity in a similar position in a transactional matter, or with a lawyer representing such co-plaintiff, co-defendant or entity may have a personal interest conflict.

[2] Opinion 210 was decided under DR 5-101(A), whose substance now is contained in Rule 1.7, and DR 7-101(A), whose substance now is contained in Rule 1.3.

[3] The conflict of interest issues discussed in Opinion 210 also raise issues regarding the constitutional right of a defendant to the effective assistance of counsel. Those issues, however, are beyond the scope of this Opinion.

[4] Four members of the Committee concurred in Opinion 210, but emphasized the narrow reach of the Opinion and stated that in other circumstances the lawyer should withhold or delay the employment application altogether until the conflict is removed.

Opinion 210 might be applied in an overly broad manner to factual scenarios that are distinguishable from the scenario presented therein and thus believes that a clarification of Opinion 210 is in order.

*Analysis*

In clarifying Opinion 210, a number of questions arise:

(1) When does a personal interest conflict arise for an individual lawyer seeking employment with an entity or person adverse to the lawyer's client, or with the adversary's lawyer?

(2) If the prospective employer is affiliated with or related to, but separate and distinct from, the entity adverse to the lawyer's client, is there a personal interest conflict?

(3) If a personal interest conflict arises, what are the lawyer's possible courses of action?

(4) If an individual lawyer has a personal interest conflict, is that personal interest conflict imputed to the other lawyers in his law firm, government agency, nonprofit, or corporate legal department?

(5) What are the ethical duties of a subordinate lawyer and a supervisory lawyer in a law firm, nonprofit, corporate legal department, or government agency when the subordinate lawyer has a potential personal interest conflict?

We emphasize that this Opinion addresses only the potential conflicts that arise during the period of time while the lawyer remains in his current employment and is pursuing possible new employment. Additional considerations need to be addressed to determine whether the individual lawyer may accept the new employment and begin work at the new employer; in some cases the lawyer may be precluded from doing so if the lawyer cannot obtain consents from the affected clients. *See, e.g.*, Rules 1.6, 1.9, 1.10(b), 1.11; Opinions 273, 312.

*Discussion*

**(1) When Does a Personal Interest Conflict Arise During the Employment Process?**

Rule 1.7(b)(4) provides that a personal interest conflict arises when:

> "the lawyer's professional judgment on behalf of the client *will be or reasonably may be* adversely affected by the lawyer's responsibilities to or interest in a third party or the lawyer's own financial, business, property, or professional interest." [Emphasis supplied.]

The disjunctive phrase emphasized above suggests that a personal interest conflict arises even if the lawyer's judgment will not be adversely affected, if the lawyer's judgment reasonably may be adversely affected. Comment [11] to Rule 1.7 cites Opinion 210 and states "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 discussion *could*[5] adversely affect the lawyer's representation of the client." [Emphasis supplied.]

There are two tests under Rule 1.7(b)(4) for determining whether the lawyer's professional judgment might reasonably be adversely affected in the context of a lawyer's seeking employment with an entity or person adverse to the lawyer's client, or the adversary's lawyer: (a) the lawyer's subjective perception of whether a conflict of interest may exist, and (b) an objective observer's perception of whether a conflict of interest may exist.

(a) Subjective Test

Opinion 210 states that the lawyer's own subjective perception of the relationship between his personal interest and the client's interest determines whether a personal interest conflict exists. The lawyer must ask himself a number of questions. Would he be tempted to "pull punches" in representing the client to enhance his prospects with, or at least not jeopardize his chances with, the prospective employer? Would the lawyer's actions in the matter have an impact on the prospective employer's decision to hire him? Would the outcome of the matter have an effect on any compensation or other benefits the lawyer would receive from the prospective employer? The lawyer might ask himself these and any number of other questions, depending upon the facts of the particular search for employment. If the answer to any of these questions is "yes," the lawyer's subjective determination that his professional judgment on behalf of the client will be, or reasonably may be, adversely affected, gives rise to a personal interest conflict.

(b) Objective Test

In addition to the subjective test, Rule 1.7(b)(4) contains an objective test: whether the lawyer's professional judgment on behalf of the client "reasonably may be adversely affected" by the lawyer's personal interest. Comment [7] to Rule 1.7 provides that, even if the lawyer believes that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests. The underlying premise is that if there is reason to doubt the lawyer's ability to provide the client with wholehearted and zealous representation, the lawyer must disclose the possible conflict to his client and obtain the client's informed consent to the lawyer's representation notwithstanding the conflict of interest. Thus, even if the lawyer determines that his own personal interests in obtaining employment will not impair his zealous representation of the client, if an objective observer reasonably would doubt that determination, then the lawyer must disclose the possible conflict to the client [Opinion 210] and obtain the client's consent to the continued representation notwithstanding the personal interest conflict.

(c) Existence of Personal Interest Conflict

Whether a personal interest conflict exists typically will depend upon the specific facts. A lawyer may be actively involved in a matter and interact regularly with the adversary or the adversary's lawyer, or the lawyer may work behind the scenes and have no contact with the adversary or the adversary's lawyer. A lawyer may make cold calls to multiple prospective employers, or blanket multiple prospective employers with form letters and resumes, without a specific target in mind. The lawyer may consult a legal recruiting firm that takes similar action. These prospective employers may or may not include an entity adverse to the lawyer's client, or the adversary's lawyer. The prospective employers, including the adverse entity or its lawyer, may or may not respond, or may respond that they are not interested in pursuing employment with the lawyer. Converse-

[5] We reject the view that any step towards changing employment by a lawyer ipso facto adversely affects the client. For example, simply contemplating alternative employment would not constitute a personal interest conflict.

ly, a prospective employer, including the adverse entity or its lawyer, may seek out the lawyer, and the lawyer may or may not respond, or may respond that he is not interested in pursuing employment with the prospective employer. The lawyer's resume may be sent to government agencies, corporate legal departments, or non-profits that are affiliated with, but separate and distinct from, the client's adversary.

Accordingly, the Committee believes that a nuanced test for determining the existence of a personal interest conflict is appropriate. Although we appreciate the desirability of a "bright line" test for determining the existence of a personal interest conflict, no such test can adequately accommodate all of the scenarios that might arise. The key question is whether the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected. We set forth below two criteria to consider in determining whether a personal interest conflict exists when a lawyer is seeking employment with an entity or person adverse to his client, or the adversary's lawyer. If the first criterion (material and active role in representing the client) is met, then the lawyer should consider the second criterion (targeted, communicated and reciprocated interest) as well.

(i) The Lawyer's Role in Representing the Client

The first criterion in determining whether a lawyer has a personal interest conflict in seeking employment with an entity or person adverse to his client, or the adversary's lawyer, is whether the lawyer has a material and active role in representing the client.

Factors to consider in determining whether the lawyer has a "material" role in the matter include whether the lawyer has contact with the client regarding the matter, has contact with the adversary or the adversary's lawyer in the course of representing the client in the matter, and/or is working on the substance of the matter. If none of these factors is present, the lawyer's role in the matter would likely not be material, and his professional judgment on behalf of the client would likely not be adversely affected such that a personal interest conflict would arise. In that case, the lawyer would not have to consider the extent to which his interest in the adversary or the adversary's lawyer is targeted, communicated and/or reciprocated under (ii), below, because his non-material role in the matter would not give rise to a personal interest conflict.

If any of these factors is present, the lawyer's role in the matter would likely be material, and his professional judgment on behalf of the client would likely be adversely affected such that a personal interest conflict likely would arise, if the lawyer continues to have an active role in the matter. In that case, the lawyer would have to consider the extent to which his interest in the adversary or the adversary's lawyer is targeted, communicated and/or reciprocated under (ii), below, because his material role in the matter likely would give rise to a personal interest conflict.

For purposes of this analysis, a lawyer should generally be considered to have an active role in a matter if the matter remains pending and the lawyer is either currently working on the matter or expects to be undertaking work on the matter in the future. If a matter has concluded and has been closed by the firm with notice to the client, then no firm lawyer who worked on the matter would be considered to have an active role at that time. In addition, a lawyer who worked on a discrete part of a matter that remains pending, but whose work is concluded with no expectation of future work on the matter, would no longer be considered to have an active role. For example, the lawyer may have had a limited role in one part of a transaction, which part is now concluded, although other lawyers in the firm are continuing to represent the client in other parts of the transaction.

On the other hand, if a pending matter is currently dormant, a lawyer who expects to work on the matter when action is required in the future would likely be considered to have an active role in the matter. For example, a case may have been fully litigated and awaiting the decision of the trial court; although there is no current action to be taken in the matter, a lawyer would nonetheless likely be considered to have a current active role in the case if the lawyer expects to be involved in action to be taken in the future, such as a possible appeal of the court's decision. Under such circumstances, in our view the lawyer's professional judgment on behalf of the client could be, both subjectively and objectively judged,[6] adversely affected by the pursuit of employment with an adversary or the adversary's counsel. This is particularly so where the lawyer has no control over the timing of events (such as a trial court decision) that may require the lawyer's immediate attention when they occur.

In that regard, we differ with Formal Opinion 96-400 (1996) ("Job Negotiations with Adverse Firm or Party") ("ABA Opinion 96-400"),[7] in which the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "ABA Committee") considered the nature and extent of the lawyer's role in representing the client. The ABA Committee concluded that if a case has been fully litigated, and the lawyer is just awaiting the decision of the appellate court and presently has no action to take or consider, there would be no personal interest conflict unless and until a point comes when the lawyer should consider some further action on the client's behalf. We depart from ABA Opinion 96-400 in concluding that a lawyer's involvement in a pending but currently dormant matter may give rise to a personal interest conflict. Again, the situations in which a lawyer may have a personal interest conflict in seeking employment with an adversary or an adversary's lawyer are not amenable to a "bright line" test.

(ii) Extent to which Lawyer's Interest in Adversary or Adversary's Lawyer is Targeted, Communicated and/or Reciprocated

Assuming a lawyer has a material and active role in a matter, the second criterion in determining whether a lawyer has a personal interest conflict in seeking employment with an entity or person adverse to his client, or the adversary's lawyer, is the extent to which the lawyer's interest in the prospective employer is targeted, communicated and/or reciprocated. *See* ABA Opinion 96-400 (opining that one of the factors in determining whether a personal interest conflict exists is the extent to which the lawyer's interest in the prospective employer is concrete, and has been communicated and reciprocated).

In Formal Opinion 1991-1 (1991) ("Refusing Employment When the Interests of the Lawyer may Impair Independent Professional Judgment") ("NYCBA

[6] We reiterate that both the subjective and objective tests under Rule 1.7(b)(4) discussed above apply to these determinations.

[7] In its July 2011 newsletter, the ABA noted that ABA Opinion 96-400 was issued prior to the 2002 amendments to the Model Rules, including Rule 1.7 and Rule 1.10. Comment [10] to Model Rule 1.7, one of the 2002 amendments, is in effect a codification of ABA Opinion 96-400.

Opinion 1991-1") the New York City Bar Association Committee on Professional and Judicial Ethics (the "NYCBA Committee") focused on these criteria in considering when a personal interest conflict exists when a lawyer is seeking employment with an entity or person adverse to his client or the adversary's lawyer. The NYCBA Committee concluded that this would occur —

> in any case no later than when an offer of conflicting employment is extended to the lawyer, which offer is not promptly declined. Therefore, disclosure would always be necessary at least where an offer of future employment is outstanding and being considered (or has been accepted). This rule, however, is not sufficient. Although disclosure at the point an offer is extended would protect against certain of the types of conflicts identified above, it is not sufficient as to others. In particular, it does not deal at all with the potential conflicting influences that may arise in connection with the process of securing the offer of employment. Therefore, the Committee notes that, in many cases, the disclosure obligations may arise as soon as the lawyer either (i) has taken clear affirmative steps to seek to obtain specific conflicting employment (e.g., applied for such a position) or (ii) is seriously considering the pursuit of such employment in response to some expression of interest by the potential employer.

The NYCBA Committee was not prepared, however, to opine that in all cases a personal interest conflict would arise at these earlier identified points in the process. Neither is this Committee.

In our view, a personal interest conflict may arise at various points during the employment process. Assuming a lawyer has a material and active role in a matter, a personal interest conflict may arise when the lawyer's interest in the prospective employer, both subjectively and objectively judged,[8] is targeted and specific, and has been communicated to the prospective employer, such as when a lawyer sends a targeted resume directly to an entity or person adverse to his client or the adversary's lawyer.[9] In another situation, where a lawyer sends blanket form letters and resumes to multiple potential employers, a personal interest may not arise until a potential employer expresses specific interest in the lawyer. If in response to such blanket form letters and resumes, the employer sends a non-targeted and general response (e.g., a notification that the application has been received and nothing more), a personal interest conflict may not arise at that time. Assuming a lawyer has a material and active role in a matter, a personal interest conflict arises if the lawyer participates in substantive discussion of his experience, clients, or business potential, or the terms of employment, with the prospective employer. A personal interest conflict is clearly present where there is an outstanding offer of employment that the lawyer is considering or has accepted.

At bottom, the lawyer must examine each situation carefully to determine whether, given all of the facts subjectively and objectively judged, the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by his interest in potential employment with the adversary or the adversary's lawyer.

(iii) Opinion 210

Opinion 210 provides an example of how an application of these criteria could give rise to a personal interest conflict. The attorney who submitted the inquiry in Opinion 210 was a sole practitioner who primarily represented criminal defendants in the Superior Court of the District of Columbia against the USAO-DC and was applying to the USAO-DC for employment. As a sole practitioner she would have had primary responsibility for all of her cases and would have had direct personal interactions with the lawyers in the Office to which she was applying. Therefore, submitting a resume was sufficient to give rise to a personal interest conflict. This is quite different from an employment search where a transactional lawyer who is not materially and actively involved in a transaction submits broadcast resumes to many potential employers, who happen to include an adversary in a transaction, or that adversary's counsel.

**(2) Prospective Employer Affiliated with, or Related to, but Separate and Distinct from, Entity or Person Adverse to the Lawyer's Client**

If a lawyer is seeking employment with a nonprofit, corporate legal department, or government agency, that entity may be affiliated with, but separate and distinct from, the entity that is adverse to his client. For example, a nonprofit or corporation may be a subsidiary or affiliate of a parent corporation, but the subsidiary or affiliate may not be wholly owned by the parent, the two companies may have separate legal departments, and the two companies may have separate officers, directors, offices, and business activities. A government agency may have separate bureaus, offices, or components all within the same agency. The two entities may conduct separate hiring processes.

More specifically, Rule 1.6(k) provides that the client of a government lawyer is the agency that employs the lawyer, unless expressly provided to the contrary by appropriate law, regulation, or order. Comment [38] to Rule 1.6 provides that the term "agency" includes, *inter alia*, executive and independent departments and agencies, special commissions, committees of the legislature, agencies of the legislative branch such as the Government Accountability Office, and the courts to the extent that they employ lawyers (e.g., staff counsel) to counsel them. The employing agency has been designated the "client" under this Rule to provide a commonly understood and easily determinable point for identifying the government "client." Thus, to determine when a personal interest conflict may arise in seeking employment with a government entity it is necessary to examine a government agency's particular rules, regulations, and orders.

If the employer is separate and distinct, the lawyer would likely not have a personal interest conflict in seeking employment unless the lawyer believes he could not provide competent and diligent representation to the affected client. For example, in Opinion 210 we considered whether a lawyer could continue to seek and accept new clients whom the District of Columbia Corporation Counsel's Office[10] was prosecuting while her application for employment with the USAO-DC was pending. We concluded that this question did not present a situation in which there is or may be a conflict of interest between the lawyer's interests and her client's interests. The lawyer could not reasonably be concerned about jeopardizing her employment prospects with the USAO-DC's Office, which is part of the Department of Justice, a fed-

[8] We reiterate that both the subjective and objective tests under Rule 1.7(b)(4) discussed above apply to these determinations.

[9] Because there is no "bright line" test, there conceivably may be factual scenarios where a personal interest conflict could exist without the lawyer communicating his interest in employment to the prospective employer.

[10] This office is now the District of Columbia Office of the Attorney General.

eral Executive Branch agency, while zealously defending a criminal client prosecuted by the District of Columbia Corporation Counsel's Office, a District of Columbia agency. Therefore, DR 5-101, the predecessor to Rule 1.7(b)(4), did not apply. Although a client in a criminal matter may prefer that his lawyer be completely "defense oriented" and not consider becoming a prosecutor with any employer while defending him, this preference does not mean that a personal interest conflict exists.

As discussed below, there may be factual scenarios, however, where there might be a personal interest conflict even if the prospective employer is separate and distinct from the client's adversary.

(a) District of Columbia Government Agencies

In D.C. Bar Opinion 268 (1996) ("Conflict of Interest Where Private Lawyers Provide Volunteer Legal Assistance to the D.C. Corporation Counsel; Reconsideration of Opinion 92"), the Committee concluded that a lawyer may give volunteer legal assistance to the D.C. Corporation counsel and simultaneously continue to represent private clients against the City and its agencies. We recognized that the City government client is not always the City as a whole, but may be more narrowly defined as one of the City's constituent agencies. Therefore, a personal interest conflict does not arise where the lawyer is not opposing his own City government client, but some other agency of the City. Although Opinion 268 did not address the issue of a lawyer seeking employment with a City agency that is adverse to his client, it provides some guidance concerning when a lawyer may have a personal interest conflict in seeking employment with the D.C. government. If the lawyer is litigating against one agency of the D.C. government, but applies to another section of the D.C. government, he may not have a personal interest conflict because the agency and the other section are not the same adversary for conflict of interest purposes.

(b) Federal Government Agencies

Federal statutory and regulatory provisions that apply to lawyers (among others) who are employed by federal agencies may provide some guidance as to when a federal government entity with which a lawyer is seeking employment may be considered to be separate and distinct from another such entity that is adverse to the lawyer's client in a pending matter. Although the Committee does not opine on legal matters, these federal statutes and regulations may assist lawyers in determining whether they have a personal interest conflict when seeking employment with the federal government.[11]

18 U.S.C. § 207 contains the seven federal statutory restrictions that may limit lawyers' activities after they leave federal government service (or after they leave certain senior positions in the federal government). The U.S. Office of Government Ethics ("OGE") has published guidance, at 5 C.F.R. pt. 2641, concerning all seven of the restrictions in § 207, as well as all the exceptions in the statute. 5 C.F.R. § 2641.302, entitled "Separate Agency Components," provides that, for purposes of 18 U.S.C. § 207(c) only (senior employees), the Director of OGE may designate agency "components" that are distinct and separate from the "parent" agency and from each other. Absent such designation, the representational bar of § 207(c) extends to the whole of the agency in which the senior employee served. The list of designated components is published and periodically updated.[12]

Although these statutory and regulatory provisions do not apply to lawyers seeking federal government employment, they may provide some guidance concerning when a lawyer may have a personal interest conflict under Rule 1.7(b)(4) in seeking employment with a particular federal government agency or component thereof. The lawyer seeking employment with a federal government agency may consider whether one component of a federal government agency is expressly designated by OGE as separate from another component of that federal government agency, and, even if it is not so designated, may consider as guidance the enumerated criteria in determining whether he may have a personal interest conflict under Rule 1.7(b)(4). If the different components of the federal government agency are separate and distinct entities under the statutes and regulations for conflict of interest purposes, the lawyer may not have a personal interest conflict under Rule 1.7(b)(4).

(c) Corporate or Nonprofit Legal Department

With respect to corporate or nonprofit clients, Comment [21] to Rule 1.7 recognizes the presumption that the lawyer who represents a corporation, partnership, trade association, or other organization-type client is deemed to represent the specific entity and not its subsidiaries, affiliates, or "other constituents."[13]

Thus, when a lawyer seeks employment with the legal department of a corporation that is a subsidiary or an affiliate of a corporation that is adverse to his client, and the adverse corporation has its own separate legal department and is otherwise separate from the subsidiary or affiliate, as a general rule, and absent other circumstances, the two entities usually would not be considered the same entity for conflicts purposes, and the lawyer likely would not have a personal interest conflict in seeking employment with a subsidiary or affiliate of a corporation that is adverse to the lawyer's client. This conclusion is consistent with Opinion 268 and Opinion 210 because the lawyer's client is not adverse to his prospective employer, but to a separate and distinct subsidiary or affiliate of his prospective employer.

**(3) Three Possible Courses of Action to Resolve a Personal Interest Conflict**

There are three possible courses of action available to a lawyer with a per-

[11] Moreover, a federal government lawyer seeking employment with a person or entity adverse to the federal government, or the adversary's lawyer, is subject to conflict of interest provisions under federal statutes and regulations (e.g., 18 U.S.C. §§ 207, 208 and 5 C.F.R. pt. 2635, Subpart F) in addition to Rule 1.7(b)(4). As noted, the Committee does not opine on legal matters. Accordingly, the applicability of, and compliance with, these federal statutes and regulations are beyond the scope of this Opinion. Government lawyers seeking new employment, however, are alerted to the fact that they must consider both sets of conflict of interest provisions.

[12] 5 C.F.R. § 2641.302 sets forth the following criteria for designating an agency component to be "separate": (1) the component is created by statute or a statutory reference indicating that it exercises functions which are distinct and separate; (2) the component exercises distinct and separate subject matter or geographical jurisdiction; (3) the degree of supervision exercised by the parent over the component is minimal; (4) the component exercises responsibilities that cut across organizational lines within the parent; (5) the size of the component in absolute terms is significant; and (6) the size of the component in relation to other agencies or bureaus within the parent is significant.

[13] This presumption can be rebutted under Comment [23] if the organizational affiliates are deemed to be "alter egos" by analyzing a number of factors. For example, if the affiliates have a unified corporate legal department, they may be considered the same entity for conflicts purposes. For purposes of this Opinion, we assume that the presumption is not rebutted.

sonal interest conflict: (a) disclosing to the client the existence and nature of the personal interest conflict and the possible adverse consequences of the lawyer's representation of the client and obtaining the client's informed consent to the representation notwithstanding the personal interest conflict under Rule 1.7(c)(1), provided Rule 1.7(c)(2) permits this course of action; (b) withdrawing from the representation under Rule 1.16(a) or Rule 1.16(b), if applicable; or, (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed.

(a) Disclosure of Personal Interest Conflict to Client and Client Consent to Representation

Rule 1.7(c)(1) allows a lawyer who has a personal interest conflict arising out of his seeking employment with an entity or person adverse to his client, or with the adversary's lawyer, to represent the client notwithstanding the personal interest conflict if the client provides informed consent to such continued representation after full disclosure of the existence and nature of the conflict and the possible adverse consequences of such representation.

However, as is the case with Rule 1.7(b)(4), Rule 1.7(c)(2) applies both a subjective test and an objective test before the personal interest conflict can be waived: "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Thus, disclosing the conflict to the client and obtaining the client's consent are not options under Rule 1.7(c)(1) unless, both subjectively and objectively judged, the lawyer can provide competent and diligent representation to the client notwithstanding the personal interest conflict.[14]

If the lawyer already has been representing the client while operating under a personal interest conflict because he is seeking prospective employment with a person or entity adverse to his client, or the adversary's lawyer, he may ask the client for retroactive consent to his representation under Rule 1.7(c) notwithstanding his personal interest conflict.[15]

Although Rule 1.7(c)(1) does not require that the client's consent be memorialized in writing, it would be prudent to obtain either current or retroactive consent in writing from the client.

(b) Withdrawal from Representation of Client

In some circumstances, the individual lawyer may resolve a personal interest conflict by withdrawing from the representation of the client under Rule 1.16(a)(1), which requires a lawyer to withdraw from representation of the client if the representation will result in a violation of the Rules of Professional Conduct.

Alternatively, even if the Rules of Professional Conduct would not be violated, withdrawal could be made under Rule 1.16(b) if withdrawal can be accomplished without material adverse effect on the interests of the client.[16]

If the rules of the cognizant tribunal so require, under Rule 1.16(c), the lawyer must obtain the permission of the tribunal to withdraw and, if ordered by the tribunal, must continue the representation notwithstanding good cause for withdrawal.

(c) Discontinuation of the Prospective Employment Process

The third course of action is discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed. Even after he stops seeking this potential new employment, the lawyer still will need to consider whether the lawyer has an ongoing interest in pursuing such employment in the future that is of such a nature that it will, or reasonably may, adversely affect the lawyer's professional judgment on behalf of the client.

**(4) Imputation of Personal Interest Conflict**

D.C. Rule 1.10(a)(1) provides that an individual lawyer's conflict of interest under Rule 1.7(b)(4) is not imputed to other lawyers in his current "firm" if that personal interest conflict does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm.[17] Accordingly, a personal interest conflict of a lawyer in a firm who is seeking employment with an entity that is adverse to one of the firm's clients, or the adversary's lawyer, is not imputed to other lawyers in the firm, assuming his personal interest conflict will not adversely affect the representation of the client by the other lawyers in the firm.

For purposes of imputation of conflicts, Rule 1.0(c) and Rule 1.10 define the term "firm" to include law firms, nonprofits, and corporate legal departments, but not government agencies. Thus, even in those limited situations where a Rule 1.7(b)(4) personal interest conflict may be imputable to a "firm," there would be no such imputation if the conflict involves a lawyer employed by a government agency.

**(5) Duties of Subordinate and Supervisory Lawyers When Subordinate Has a Personal Interest Conflict**

(a) Subordinate Lawyer

If the lawyer seeking employment with an entity or person adverse to his client, or the adversary's lawyer, is a "subordinate lawyer" within the meaning of Rule 5.2(b), and is supervised by a "supervisory lawyer" within the meaning of Rule 5.1 (see below), the supervisory lawyer may attempt to determine whether the subordinate lawyer has a personal interest conflict and, if so, what the appropriate course of action is for the subordinate

[14] In addition to the requirements of Rule 1.7(c)(2), a lawyer considering this issue should examine his obligations under Rule 1.3(a) (Diligence and Zeal) and Rule 1.4(a) (Communication) and Comment [5] under the Scope section of the Rules. Ultimately, however, the rule of interpretation expressed in Comment [5] and Rule 1.3 and Rule 1.4 do not supplant, amend, enlarge or extend the requirements of Rule 1.7(c)(2).

[15] *See, e.g., Interstate Properties v. Pyramid Company of Utica,* 547 F. Supp. 178 (S.D.N.Y 1982); *In re Evans*, 902 A.2d 56 (D.C. 2006); *Griva v. Davidson*, 637 A.2d 830 (D.C. 1994); *Jesse v. Danforth,* 486 N.W.2d 63 (Wis. 1992). As a general proposition, the Restatement (2d) of the Law Governing Lawyers § 21(4) states: "A client may ratify an act of a lawyer that was not previously authorized."

[16] If the lawyer withdraws from the representation, he must comply with the requirements of Rule 1.16(d) to protect the client's interests. After withdrawal, he must also consider his ethical duties under Rule 1.6 (Confidentiality of Information), Rule 1.9 (Conflict of Interest; Former Client) and Rule 1.11 (Successive Government and Private or Other Employment).

[17] Comment [8] to D.C. Rule 1.10 differs from its ABA Model Rule 1.10 counterpart (comment [3] to ABA Model Rule 1.10) in that the D.C. Comment [8] expressly states (referring to Opinion 210), "nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (e.g. U.S. Attorney's Office) or with a law firm representing the opponent of a firm client." There is no similar language in its ABA Model Rule 1.10 counterpart (comment [3] to ABA Model Rule 1.10).

lawyer. Under Rule 5.2(a), generally a lawyer violates the Rules of Professional Conduct even if he acts at the direction of another person. However, under Rule 5.2(b), a subordinate lawyer is not responsible for a violation of Rule 1.7(b)(4) if he acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. Accordingly, if a subordinate lawyer discusses a potential personal interest conflict with his supervisory lawyer, and acts in accordance with the supervisory lawyer's reasonable determination of whether the subordinate lawyer has a personal interest conflict and follows the supervisory lawyer's recommended course of action, the subordinate lawyer will not be held professionally responsible even if it is subsequently determined that the supervisory lawyer's determination of whether there was a personal interest conflict, and/or the recommended course of action, were incorrect under the Rules.

(b) Supervisory Lawyer

Rule 5.1(a) provides that a partner in a "firm" or "law firm," and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency, shall make reasonable efforts to ensure that the firm or government agency has in effect measures providing reasonable assurance that all lawyers in the firm or government agency conform to the Rules of Professional Conduct.

Rule 5.1(b) provides that 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. Comment [1] to Rule 5.1 states that both Rule 5.1(a) and Rule 5.1(b) apply to members of a law firm, lawyers having comparable managerial authority in a nonprofit, corporate legal department, or government agency, and to lawyers who have intermediate managerial responsibilities in those entities.

Rule 5.1(c)(2) sets forth general principles for the imputation to a supervisory lawyer of liability for a subordinate lawyer's violation of the Rules of Professional Conduct. If the supervisory lawyer knows or reasonably should know of the violation at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action, the subordinate lawyer's violation is imputed to the supervisory lawyer. Thus, if the supervisory lawyer knows or reasonably should know that the subordinate lawyer has a personal interest conflict and fails to take appropriate action, the supervisory lawyer may be responsible for the subordinate lawyer's violation of Rule 1.7(b)(4).

A supervisory lawyer may take a variety of actions where a subordinate lawyer is seeking employment with an adversary or an adversary's lawyer. Depending upon the facts, a supervisory lawyer might reasonably determine that there is a personal interest conflict and disclose the subordinate lawyer's prospective employment to the client and seek the client's consent to the subordinate lawyer's continued representation of the client notwithstanding the personal interest conflict. A supervisory lawyer might choose to relieve the subordinate lawyer of any responsibility for working on that client's matter and have other lawyers in the law firm, nonprofit, corporate legal department, or government agency continue to represent the client.[18] Under a different set of facts, a supervisory lawyer might reasonably determine that the subordinate lawyer does not have a personal interest conflict, and thus the supervisory lawyer would not be required to disclose the subordinate lawyer's prospective employment to the client and obtain the client's consent. The supervisory lawyer, nevertheless, may still decide to relieve the subordinate lawyer of any responsibility for working on that client's matter to avoid the possibility that the subordinate lawyer's role in the matter will develop into one that would give rise to a personal interest conflict.

*Conclusion*

When a lawyer is seeking employment with a person or entity adverse to his client, or the adversary's lawyer, the existence of a personal interest conflict under Rule 1.7(b)(4) is not susceptible to a "bright line" test. The lawyer must determine, using both subjective and objective tests, whether the lawyer's professional judgment on behalf of the client will, or reasonably may, be adversely affected. Factors to consider include whether the lawyer is materially and actively involved in representing the client and, if so, whether the lawyer's interest in the prospective employer is targeted and specific and/or whether the prospective employer has reciprocated the lawyer's interest. If the lawyer has a personal interest conflict there are three courses of action that may be available, each of which is subject to the applicable requirements of the Rules: disclosing the personal interest conflict and obtaining the client's consent to continued representation; withdrawing from the representation, if possible; or, discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed.

[18] The Committee recognizes the difficult position created for the subordinate lawyer who has a personal interest conflict and is faced with the choice of informing the supervisory lawyer of possible alternative employment, and risking negative internal consequences with the current employer, or improperly not disclosing the personal interest conflict. The Committee is sensitive to the difficult position created for the subordinate lawyer by this decision but is unable to propose a "safe harbor" for the subordinate lawyer. The Rules of Professional Conduct Review Committee is alerted to the need to consider a viable means for subordinate lawyers to address the personal interest conflict issue without jeopardizing continued satisfactory employment with the current employer.

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*Opinion 368*

**Lawyer Employment Agreements—Restrictions on Departing Lawyer Who Competes with Former Firm**

A law firm may not provide for or impose liquidated damages on a lawyer who, after departure, competes with the firm. A firm and a departing lawyer may have liability to one another, though, for work done before the lawyer's departure. Also, a firm may not restrict a departed lawyer's subsequent professional association or affiliation with partners or employees of the firm, except insofar as such activity is subject to legal limitations outside the Rules of Professional Conduct. Whether a choice of law provision in a partnership or employment agreement can avoid application of the D.C. Rule governing lawyer departures usually will depend on the location where the departing lawyer principally practiced.

**Applicable Rules**

- Rule 5.6(a) - Restrictions on Right to Practice
- Rule 8.5(b)(2) – Disciplinary Authority; Choice of Law
- Rule 8.4 - Misconduct

*Inquiry*

The committee has received a number of inquiries along the following lines and has concluded that a discussion of these issues will be of interest to the Bar.

1. Whether a law firm may provide for or impose liquidated damages on a lawyer who, after departure, competes with the firm.
2. Whether a law firm may provide for or impose a financial penalty on a departing lawyer who associates professionally with anyone who was a partner or employee (lawyer or non-lawyer) at the firm.
3. Whether, where at least one lawyer at a law firm is admitted to practice in both the District of Columbia and another jurisdiction, the firm may insert a choice of law provision in a partnership, employment, or other agreement in order to avoid applying Rule 5.6(a) of the D.C. Rules of Professional Conduct in favor of a rule of the other jurisdiction that addresses the same subject matter but yields a different result.

*Analysis*

For the reasons set out below, the committee answers the first two inquiries in the negative. Our answer to the third inquiry is somewhat more complex.

The D.C. Rules of Professional Conduct ("D.C. Rules") provide:

> "A lawyer shall not participate in offering or making:
>
> (a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."[1]

D.C. Rule 5.6.[2]

Because they limit a client's freedom in choosing a lawyer and a lawyer's professional autonomy, provisions in partnership, employment, and other agreements that expressly or impliedly restrict a lawyer's practice are prohibited. *Neuman v. Akman*, 715 A.2d 127, 130-31 (D.C. 1998) (citing D.C. Rule 5.6, cmt. [1]); *accord Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989);[3] *Stevens v. Rooks Pitts and Poust*, 682 N.E.2d 1125, 1132 (Ill. App. 1997);[4] D.C. Legal Ethics Op. 325 (2004); D.C. Legal Ethics Op. 241 (1993); D.C. Legal Ethics Op. 122 (1983).[5] The prohibition extends not only to absolute bars upon competition with the former firm but also, at least in some circumstances, to "[r]estrictions . . . that impose a substantial financial penalty on a lawyer who competes after leaving the firm." D.C. Rule 5.6 cmt. [2];[6] *accord Cohen*, 550 N.E.2d at 411; *Stevens*, 682 N.E.2d 1125; D.C. Legal Ethics Op. 325 (2004); D.C. Legal Ethics Op. 241 (1993); D.C. Legal Ethics Op. 194 (1988); D.C. Legal Ethics Op. 65 (1979).[7]

*Liquidated damages*

The first inquiry addresses whether a law firm may provide for or impose liquidated damages on a lawyer who, after departure, competes with that firm. Liquidated damages, unlike actual damages, are fixed in advance of a breach rather than afterward. They are viewed by the D.C. Court of Appeals "with a gimlet eye" and will be sustained only if "'not . . . disproportionate to the level of [actual] damages reasonably foreseeable at the time of the making of the contract.'"[8] *District Cablevision Limited Partnership v. Bassin*, 828 A.2d 714, 723 (D.C. 2003) (quoting *Council v. Hogan*, 566 A.2d 1070, 1092 (D.C. 1989)); *accord Ashcraft & Gerel v. Coady*, 244 F.3d 948, 954-55 (D.C. Cir. 2001).[9] Moreover—

> when a contract specifies a single sum in damages for any and all breaches even though it is apparent that all are not of the same gravity, the specification is not a reasonable effort to estimate damages; and when in addition the fixed sum greatly exceeds the actual damages likely to be inflicted by a minor breach, its character as [an impermissible] penalty becomes unmistakable.

*District Cablevision*, 828 A.2d at 723 (quoting *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1290 (7th Cir. 1985)); *accord Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 151 (N.J. 1992); *cf. Ashcraft & Gerel*, 244 F.3d at 955 (upholding liquidated damages clause where amount was not fixed but increased over time to reflect lawyer's increasing value to law firm).

As we read D.C. Rule 5.6(a), *Neuman* and other case law, and our own previous opinions, a departing lawyer may not be subjected to liquidated damages because she subsequently competes with her former firm. She and the firm may be responsible to one another for the value of work completed *before* she leaves the firm. *See* D.C. Legal Ethics Op. 194 (1988) (disapproving agreement that deprived departing lawyer of part of unrealized accounts if lawyer competed within 12 months). This applies notably in the case of contingent fee cases. Compensation for such matters might not be received or even owed until long after her departure, and a portion of that compensation might be attributable to work done at the former firm prior to her departure. D.C. Legal Ethics Op. 221 (1991); *accord In re Thelen LLP*, 20 N.E.3d 264, 271 (N.Y. 2014) (stating that former firm is enti-

[1] This opinion does not address the rule's exception for "benefits upon retirement."

[2] This rule, promulgated in 1991, is substantively indistinguishable from DR 2-108(A) of the former D.C. Code of Professional Responsibility. *See Neuman*, 715 A.2d at 130 n. 5.

[3] Although *Cohen* was decided under New York law, the New York rule is similar to ours and the D.C. Court of Appeals has characterized *Cohen* as "perhaps the leading case interpreting Rule 5.6(a) or its equivalent." *Neuman*, 715 A.2d at 132.

[4] *Stevens* applied Illinois law. The D.C. Court of Appeals noted in *Neuman*, however, that given the similarity of D.C. Rule 5.6 to Model Rule 5.6 and analogous rules of other jurisdictions, it had "freely consulted the various sources we have found that construe those codes." *Neuman*, 715 A.2d at 130 n. 5. For this reason, it is appropriate to take note of decisions elsewhere that interpret similar rules.

*5* D.C. Legal Ethics Opinions 1 through 209 were issued under the former D.C. Code of Professional Responsibility. Because the prohibition in D.C. Rule 5.6(a) substantively is the same as former D.C. DR 2-108(A), *see* note 2, *supra*, and none of this committee's earlier opinions interpreting DR 2-108(A) has been expressly or impliedly overruled, we consider those opinions as well as those decided under the D.C. Rules.

[6] Comment 2, which was added to the D.C. Rules in 2006, does not have a counterpart in the comments to Model Rule 5.6. The D.C. Rules define "substantial" as denoting "a material matter of clear and weighty importance." D.C. Rule 1.0(m).

[7] Some jurisdictions permit "reasonable" financial assessments against former partners who compete with the firm if such assessments accurately reflect the reduction in the firm's value due to the departure. *E.g., Howard v. Babcock*, 863 P.2d 150 (Calif. 1993); *Jacob v. Norris, McLaughlin & Marcus*, 607 A.2d 142, 151-52 (N.J. 1992). This is distinctly the minority rule, however. Restatement (Third) of the Law Governing Lawyers § 13 rptr. n. *b*. (2000); Ellen J. Bennett, Elizabeth J. Cohen & Martin Whittaker, Annotated Model Rules of Professional Conduct 489 (7th ed. 2011).

[8] This committee does not opine on legal questions outside the D.C. Rules but often must discuss its understanding of such issues in order to provide context for its views on the D.C. Rules.

[9] In a different context, the sales article of the D.C. Commercial Code permits liquidated damages "only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty." D.C. Code § 28:2-718 (2014).

tled to an accounting for value of contingent fee case as of the lawyer's departure date). A 1990 D.C. Court of Appeals decision held that contingent fee matters are part of the partnership property. *Beckman v. Farmer*, 579 A.2d 618 (D.C. 1990). *Farmer* was a law firm dissolution matter that did not involve a penalty for post-departure competition, so the opinion did not discuss the penalty-for-competition issue. *Id*.[10]

By contrast, we believe that an agreement imposing substantial damages—actual or liquidated—attributable to or because of work done by the departing lawyer (or her new firm) in competition with the former firm *after* she relocates would violate Rule 5.6(a). D.C. Legal Ethics Op. 65 (1979); *see Stevens*, 682 N.E.2d at 1131-32. *But cf. Robinson v. Nussbaum*, 11 F. Supp. 2d 1 (D.D.C. 1997) (holding that hourly matters are partnership property but not addressing post-departure competition penalties).[11]

In 1979 this committee considered a liquidated damages provision that a lawyer's post-departure work "for a client of the firm during a two-year period following . . . termination" would render the departing lawyer liable to his former firm for "40% of his net billings to such clients . . . during the said two year period." D.C. Legal Ethics Op. 65 (1979). The committee concluded that the provision violated the predecessor of D.C. Rule 5.6(a). *Id.* A later opinion disapproved a clause that imposed liquidated damages of $150,000 for any breach of an agreement's suite of post-employment restrictions. D.C. Legal Ethics Op. 181 (1987).[12]

In *Thelen*, the New York Court of Appeals decided that hourly fee matters are not law firm property. *In re Thelen LLP*, 20 N.E.3d 264. This opinion does not address that particular issue but the *Thelen* court pointed out several policy considerations that are relevant here. First and most important, many a departing lawyer would be compelled to inform clients who wish to follow her that she can't afford to continue representing them. That would constitute—

> a major inconvenience for the clients and a practical restriction on a client's right to choose counsel. Or, more likely, these attorneys would simply find it difficult to secure a position in a new law firm because any profits from their work for existing clients would be due their old law firm, not their new employers.
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> * * *
>
> Additionally, clients might worry that their hourly fee matters are not getting as much attention as they deserve if the [new] law firm is prevented from profiting from its work on them.

*Id.* at 273. Second, such a rule would allow the departed lawyer's former partners "to profit from work they do not perform, all at the expense of a [the departed lawyer and her] new firm," thus creating a windfall for the former firm. *Id.*

Similar considerations underlie Rule 5.6(a). Thus, regardless of whether a liquidated damages provision passes muster under contract principles, it is grounds for professional discipline if it runs afoul of the limitations set out above.[13]

*Restrictions upon post-departure association with personnel of former firm*

The second inquiry is whether a law firm may penalize a lawyer financially for entering into an agreement or association with an individual who was a partner or employee (lawyer or non-lawyer) with the former firm.

In 1987 this committee reviewed an agreement we described as "perpetually prohibiting any interference" by a departed lawyer "with the firm's relationships with its lawyer/employees." D.C. Legal Ethics Op. 181 (1987). The committee opined that by interfering with the right of association among attorneys, the provision indirectly restricted the departing attorney's right to practice law and hence violated the predecessor of Rule 5.6(a). *Id.* (citing ABA Informal Op. 1417 (1978)); *accord Jacob*, 607 A.2d at 152-54. We see no reason to alter this conclusion and accordingly reaffirm Opinion 181.[14] As is the case in respect of damages for post-departure competition, any penalty must be substantial to trigger the prohibition of Rule 5.6(a). D.C. Rule 5.6, cmt. [2].

This is not to say that a departing lawyer has an unlimited right to solicit firm partners or employees, particularly before she departs. We have noted that although this issue is "primarily, if not entirely," a function of "law other than ethics law, such as the common law of interference with business relations and fiduciary obligations," there could be extreme instances where deception and dishonesty by the departing lawyer might constitute "dishonesty, fraud, deceit, or misrepresentation" in violation of Rule 8.4(c). D.C. Legal Ethics Op. 273 (1997).

*Choice of Law*

The final inquiry is whether, where the departing lawyer also is admitted to practice in another jurisdiction,[15] a choice of law provision in a partnership or other agreement may avoid the application of D.C. Rule 5.6(a) in favor of a rule of the other jurisdiction that yields a different result. By way of example, a minority of jurisdictions permit the imposition of a financial penalty on a competing former

[10] We know of no D.C. appellate rulings on the issue of post-departure compensation for hourly fee matters, and this opinion does not address that issue.

[11] This committee cannot opine on whether an agreement that violates D.C. Rule 5.6(a) can be enforced as a matter of contract law. Rule C-4, Rules of the District of Columbia Bar Legal Ethics Committee (1995); *accord* D.C. Legal Ethics Op. 65 (1979) (declining to address enforceability of agreement that violated predecessor of Rule 5.6(a)); *see also* N.Y.C. Bar Ass'n Formal Op. 1999-03 (1999) (same). The D.C. Court of Appeals does not appear to have ruled on the enforceability issue. A 1994 U.S. District Court ruling in D.C. held such a provision unenforceable. *Shainis v. Baraff, Koerner, Olender & Hochberg, P.C.*, 1994 U.S. Dist. Lexis 21971 (Civil Action No. 93-2253 (NHJ)) (July 18, 1994). Case law elsewhere is divided. *Compare Feldman v. Minars,* 658 N.Y.S.2d 614, 617 (App. Div. 1997) (enforcing agreement even though it violated Rule 5.6(b)), *with Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995 (N.Y. 1993) (holding unenforceable a provision that violated Rule 5.6(a)), *Stevens*, 682 N.E.2d at 1131-32 (same), *Jacob*, 607 A.2d at 155 (same), and *Cohen*, 550 N.E.2d 410 (same).

[12] *Ashcraft & Gerel,* which upheld a departing lawyer's contractual liability for liquidated damages, is not to the contrary. D.C. Rule 5.6 "is inapplicable," said the court, "because the liquidated damages were not linked to [the departing lawyer's] decision to compete with the firm" and hence were "readily distinguishable from a contract not to compete." *Ashcraft & Gerel*, 244 F.3d at 955. Moreover, *Ashcraft & Gerel,* which applied District of Columbia law, was decided in 2001. In 2006, the D.C. Court of Appeals added comment 2, which expressly includes "substantial financial penalt[ies]" in the prohibition of D.C. Rule 5.6(a). Given that subsequent change in D.C. law, it is conceivable that *Ashcraft & Gerel* would be decided differently were it to arise today.

[13] Again, we express no view on whether such a clause may be enforceable in the context of the underlying contract dispute. *See supra* n. 11.

[14] Opinion 181 also involved a liquidated damages clause—one that the committee described as "truly oppressive." The opinion added that "[t]he *in terrorem* effect of this sword of Damocles hanging over the head of a departing lawyer is not to be underestimated." D.C. Legal Ethics Op. 181 (1987).

[15] For the sake of simplicity, we assume that only one other jurisdiction is involved. The basic principles outlined here also apply if more than one other jurisdiction is involved.

lawyer, so long as the penalty reasonably reflects the loss in the value of the law firm occasioned by the departure. *See supra* n. 7 and authorities cited therein.

A lawyer admitted to practice here is subject to the District's disciplinary authority regardless of where the questioned conduct occurs. D.C. Rule 8.5(a). Moreover, "[a] lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct." *Id.*[16] Where multiple jurisdictions are involved, however, and the conduct is not in connection with a matter pending before a tribunal—

> the rules to be applied [by the D.C. disciplinary authorities] shall be the rules of the admitting jurisdiction in which the lawyer *principally practices*; provided, however, that if particular conduct clearly has its *predominant effect* in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

D.C. Rule 8.5(b)(2) (emphasis added). The intent of this rule is that "any particular conduct of an attorney shall be subject to only one set of rules of professional conduct" and that the process of determining which set applies be "as straightforward as possible." D.C. Rule 8.5 cmt. [3].

Although they antedate choice-of-law provisions in the Model Rules[17] and state ethics codes, several rulings from outside the District of Columbia are instructive. A 1991 ABA opinion, for example, addressed the fact that the District permits ownership and management of law firms by non-lawyers, while every other American jurisdiction prohibits such arrangements. ABA Formal Op. 91-360 (1991) ("ABA Opinion"). "[W]hat ethical rule should govern," the ABA committee asked, "when lawyers are partners in a law firm that, as permitted by the D.C. rule, includes nonlawyer partners, but are also members of the bar of another jurisdiction [State X] whose rules forbid such partnerships?" *Id.* The ABA committee concluded that if the lawyer admitted in D.C. and in State X is practicing in a D.C.-located firm with nonlawyer partners, State X should not discipline her for such conduct. *Id.* On the other hand, State X should be able to discipline the lawyer if she were to practice in State X as a partner of the D.C.-located firm. *Id.*;[18] *accord* Mich. Op. RI-225 (1995); *see In re Overboe*, 745 N.W.2d 852, 861-62 (Minn. 2008) (applying South Dakota rules to conduct of lawyer admitted there and in Minnesota where lawyer's office and trust account were in South Dakota and funds involved were those of South Dakota clients).

The ABA Opinion cited several state ethics opinions in support of its conclsions. ABA Opinion n. 13. A 1984 Michigan opinion had responded to a Michigan Bar member, also admitted in California, who practiced in the latter jurisdiction but not the former. Mich. Ethics Op. CI-929 (1984). The inquirer asked whether he could employ a foreign lawyer in his California law office. *Id.* The opinion stated that "[t]o the extent that California would permit the contemplated conduct, the attorney would not be in violation of the Michigan Code of Professional Responsibility." *Id.*

The ABA Opinion also cited a 1986 Maryland opinion that addressed a situation where a lawyer licensed in Maryland and specially admitted to appear in a District of Columbia litigation learned that he had introduced the client's forged documents into evidence in connection with the litigation. Md. State Bar Ass'n, Comm. on Ethics, Op. 86-28 (1986). Maryland's rules required disclosure; D.C.'s prohibited it. *Id.* The Maryland opinion stated that—

> [w]here a Maryland attorney is acting in a foreign jurisdiction in accordance with that jurisdiction's Code of Professional Responsibility, it is the opinion of this committee that his conduct is ethical per se. While the Maryland Code of Professional Responsibility may impose different or more stringent requirements on its attorneys, it does not require its attorneys to behave in a manner that is inconsistent or at variance with the code of conduct prescribed by another jurisdiction when practicing there.

*Id.* Although the Maryland opinion addressed conduct in connection with a proceeding before a tribunal, *see* Model Rule 8.5(b)(1), the ABA Opinion nonetheless found Maryland's rationale instructive in a Rule 8.5(b)(2) setting like that presented in this opinion.

More recently, a New York State Bar Association opinion has set out useful criteria for determining where a lawyer "principally practices" and where the "predominant effect" of a lawyer's conduct is felt. N.Y.S. Bar Ass'n Ethics Op. 1027 (2014) ("New York Opinion").[19] On the former point, the factors cited in the New York Opinion are—

> (a) the number of calendar days the lawyer spends working in each jurisdiction, (b) the number of hours the lawyer bills in each jurisdiction, (c) the location of the clients the lawyer serves, (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm), and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster).

*Id.* (citing Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014)). The New York Opinion adds that "[g]iven the increase in law practice over the Internet, and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer 'principally practices' . . . is becoming less certain." *Id.*

"[N]o simple formula is available to determine where the 'predominant effect' will occur," either. *Id.* "Factors to consider include such things as (a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate." *Id.*

We conclude that D.C. Rule 8.5(b)(2) supplies the answer to this inquiry and does so consistently with the ABA Opinion. For the departing lawyer and lawyers in her former firm who are located in the District of Columbia, it makes no difference whether the "principally practices" or the "predominant effect" prong of the rule applies. As to the first prong, they principally practice here. As for the second prong—predominant effect—recall that Rule 5.6(a) seeks to protect lawyers' autonomy and clients' right to choose a

[16] Note that ABA Model Rule 8.5(b) differs from D.C. Rule 8.5(b) in several respects. Among them is the fact that under the Model Rule, a lawyer may be subject to rules of a jurisdiction where the lawyer is not admitted to practice. ABA Model Rule 8.5.

[17] The 1983 initial version of the ABA Model Rules was silent on the issue. Its comments merely directed readers to "principles of conflict of laws" and "applicable rules of choice of law." ABA Model Rules of Professional Conduct, Rule 8.5 cmts. 2, 3 (1983). Current D.C. Rule 8.5(b)(2) follows the 1993 amendment to Model Rule 8.5(b). *See id.* Rule 8.5(b) (1993).

[18] The ABA Opinion added that a lawyer admitted in D.C. and State X ethically could be a partner in both the D.C. firm and a State X firm, but only if the State X practice "was conducted through another firm that was both fiscally and managerially separate from and independent of the D.C. firm." ABA Opinion n. 12.

[19] The New York version of Rule 8.5(b)(2) is substantively indistinguishable from D.C. Rule 8.5(b)(2).

lawyer . D.C. Rule 5.6 cmt. [1]. The predominant effect of a provision penalizing such a lawyer for post-departure competition falls upon a lawyer who is located in D.C. For that reason, the predominant effect prong renders members of the D.C. Bar in the firm subject to the D.C. version of Rule 5.6(a) regardless of where they principally practice.[20]

Where the departing lawyer is admitted in D.C. but located in a jurisdiction that permits a penalty for post-departure competition, it also doesn't matter which prong of D.C. Rule 8.5(b)(2) applies. The departing lawyer principally practices in the other jurisdiction, and the predominant effect of the penalty provision falls upon that lawyer. Hence in that case, the *other* jurisdiction's version of Rule 5.6(a) would apply to the departing D.C. Bar member and the D.C. Bar members in her former firm. In such a case, D.C. should not penalize those lawyers for acting in accordance with the other jurisdiction's rule.

*Conclusion*

We conclude, then, that a law firm may not provide for or impose liquidated damages on a lawyer who, after departure, competes with the firm. The firm and the lawyer may have liability to one another, though, for work done before the lawyer's departure. Also, a firm may not restrict a departed lawyer's subsequent professional association or affiliation with partners or employees of the firm, except insofar as such activity is subject to legal limitations outside the Rules of Professional Conduct. Finally, whether a choice of law provision in a partnership or employment agreement can avoid application of the D.C. Rule governing lawyer departures usually will depend on the location where the departing lawyer principally practiced.

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*Opinion 369*

## Sharing of Legal Fees With a Lawyer Referral Service

A lawyer may remit a percentage of fees earned on a matter referred to her by the inquiring "lawyer referral service" only if such fees (1) are derived from litigation matters, as set out in Rule 5.4(a)(5) of the D.C. Rules of Professional Conduct, or (2) are "usual fees" of such a service within the meaning of comment [6] to Rule 7.1.

**Applicable Rules**

- Rule 5.4 - Professional Independence of Lawyer
- Rule 7.1 – Communications Concerning a Lawyer's Services

*Inquiry*

The committee has been asked whether the D.C. Rules of Professional Conduct ("D.C. Rules" or "Rules") permit certain payments to a lawyer referral service ("Service"). The Service would direct prospective low-income clients to a network of lawyers willing to work for such clients at modest rates. For each client referred to a network lawyer by the Service, the lawyer would remit to the Service a flat "referral" payment ("Flat Payment") of approximately $200. Should the representation proceed beyond the initial consultation, the network lawyer would further remit to the Service fifteen percent of any fees earned through the representation ("Percentage Payment"). The arrangement would apply to all types of legal representation and would not be limited to litigation matters. The Service is or will be qualified as exempt from federal income taxation under section 501(c)(3) of the Internal Revenue Code.[1]

The Service undertakes to "provide quality assurance and accountability" through a dispute resolution panel. The inquiry does not state whether the Service is open to all D.C. Bar members, whether it requires all participating lawyers to have reasonably adequate malpractice insurance, or whether it will refer cases to lawyers who own, operate, or are employed by the Service.

For the reasons set forth below, we conclude that (1) the D.C. Rules permit the payment of the Flat Payment and (2) the Percentage Payment is permitted only if within Rule 5.4(a)(5) or comment [6] to Rule 7.1.

*Analysis*

D.C. Rule 7.1 provides that "[a] lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact." D.C. Rule 7.1(b)(2). The comments to that rule, however, state that "a lawyer may participate in *lawyer referral programs* and pay the *usual fees* charged by such programs." D.C. Rule 7.1, cmt. [6] (emphasis added).

Rule 5.4(a) provides that a lawyer may not share legal fees with a non-lawyer. The purpose of this rule is "to protect the lawyer's professional independence of judgment." D.C. Rule 5.4, cmt. [1].

In 1989, this committee opined that a non-profit public interest legal services project could receive a percentage (one sixth) of fees paid to attorneys to whom the project referred clients and who agreed to charge reduced fees. D.C. Legal Ethics Op. 201 (1989). Noting that then-applicable Disciplinary Rule 2-103(C) of the D.C. Code of Professional Responsibility expressly permitted "the usual and reasonable fees or dues charged by a lawyer referral service," we found that the Percentage Payment was reasonable and, based upon a survey of referral arrangements in other jurisdictions, usual as well. *Id.* In reaching this conclusion, the committee noted that the Project's referral service was "operated for the benefit of the public" and that it was designed "not . . . to procure financial benefit or legal work for a lawyer as a private practitioner" but "to make affordable legal services available to a needy population that might not otherwise be able to retain legal assistance." *Id.* The opinion added that the arrangement "would apparently also be proper" under Rule 7.1 of the proposed D.C. Rules, which was then pending before the D.C. Court of Appeals, but made no mention of Rule 5.4 of the proposed D.C. Rules. *Id.* The arrangement, said the committee, "does not impair or control the independent professional judgment of referral attorneys, nor subject them to conflicting interests or divided loyalties." *Id.*[2]

In 1998, we concluded that although Rule 7.1(b)(5), which subsequently was removed from the D.C. Rules, permitted

[20] The "predominant effect" prong is to be applied narrowly, *see* D.C. Rule 8.5 cmt. [4]; N.Y.S. Bar Ass'n Ethics Op. 1027 (2014), but we conclude that this fact pattern triggers it.

[1] Section 501(c)(3) exempts "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (2015).

[2] A 1993 opinion observed that the prohibition on fee-sharing was motivated in part by concern "that nonlawyers might control the activities of lawyers and interfere with the lawyers' independent professional judgment." D.C. Legal Ethics Op. 233 (1993).

a lawyer to pay a non-lawyer for referring business to the lawyer, "a payment to a nonlawyer for the referral of business, tied to the amount of revenue received by the lawyer from the referred business" violated Rule 5.4(a) and was not permitted. D.C. Legal Ethics Op. 286 (1998). Opinion 286 applied generally to referrals and, unlike Opinion 201, was not limited to payments to nonprofit organizations.

In 2001, we opined that D.C. Rule 5.4 was not violated by a lawyer's participation in a federal General Services Administration (GSA) program that engaged lawyers to represent federal agencies and that required such lawyers to pay GSA one percent of fees received from such agencies. D.C. Legal Ethics Op. 307 (2001). The fees were used to fund GSA's operation of the program. *Id.* We noted that comment [6] to Rule 7.1 "distinguishes between a 'recognized or established agency or organization' offering a 'lawyer referral program,' to which a lawyer may 'pay the usual fees charged by such programs,' on the one hand, and 'payments to intermediaries to recommend the lawyer's services' . . . on the other." *Id.* The concern about the latter type of arrangement, we said, was grounded in the desire to "prevent[] nonlawyer intermediaries from using their power over lawyers who rely on them for business referrals to influence those lawyers' 'professional independence of judgment.'" *Id.* (citing D.C. Rule 5.4, cmt. [1]). The opinion described the former type of referral arrangements—arrangements that "do not compromise lawyers' independence" and involve recognized or established agencies or organizations—as a "positive development," but recognized that the D.C. Rules "are less clear than they could be on this issue." *Id.*; *see* D.C. Legal Ethics Op. 329 (2005) (noting that the policy considerations underlying the Rule 5.4(a) prohibition are "whether a proposed arrangement would interfere with a lawyer's independent judgment" and "whether refusing to permit the arrangement would result in fewer legal resources being available for those in need of them").

As of 2005, then, Rule 5.4(a), comment [6] to Rule 7.1, and Opinions 201, 286, and 307 permitted fees to be divided with a non-lawyer on a percentage basis only where the non-lawyer was a lawyer referral service. At that time, there were four exceptions to the prohibition of Rule 5.4. None related to the inquiry at hand. In 2005, however, an additional exception was recommended by the D.C. Bar. *See* D.C. Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations* 174-77 (2005) ("*Wortham Report*"). This exception was adopted by the D.C. Court of Appeals, effective February 1, 2007, and provides that—

> a lawyer may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter and that qualifies under section 501(c)(3) of the Internal Revenue Code.

D.C. Rule 5.4(a)(5). The fees covered by this exception, namely those "awarded by a tribunal or received in settlement of a matter," are limited to those "recovered from the opposing party" in a "case[]," D.C. Rule 5.4, cmt. [11], and accordingly are limited to fees arising from litigation.

The comment adopted along with Rule 5.4(a)(5) recognizes that an arrangement within that subparagraph may involve fee-splitting but states that "the prospect . . . does not inherently compromise the lawyer's professional independence . . . . A lawyer who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests." D.C. Rule 5.4, cmt. [11]. The comment further notes that unlike the corresponding Model Rules provision, the D.C. Rule "is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases, without significantly advancing the purpose of the exception." *Id.*

The question, then, is whether the adoption of Rule 5.4(a)(5) was intended to repeal, sub silentio, the exception for the "usual fees" of a "lawyer referral service" that are recognized by comment [6] of Rule 7.1 and by Opinions 201, 286, and 307. We think not.

There was no provision like subparagraph (a)(5) in the D.C. Rules before 2007 and no counterpart in the D.C. Code of Professional Responsibility, which was in force prior to January 1, 1991.[3] Importantly, the discussions in the Wortham Report of proposed subparagraph (a)(5) and of Rule 7.1 do not suggest that adoption of the former would repeal or even narrow the latter's existing approval of the payment of "usual fees" to lawyer referral programs. *See Wortham Report* at 174-77, 190-95.

Although Rule 5.4(a)(5) is narrower than comment [6] to Rule 7.1 in the sense that it is limited to fees derived from litigation matters, it is broader in that it applies not only to lawyer referral programs but to any non-profit organization. Moreover, Rule 5.4(a)(5) covers not only payments to the referring organization from outside lawyers but also from lawyers who are employed or retained directly by the organization. By contrast, comment [6] to Rule 7.1 contemplates only payments by lawyers to whom matters are referred by a lawyer referral service, and then only the "usual fees" of such a service.

The Flat Payment from the lawyer to the Service would not depend upon the amount of fees paid by the client to the lawyer. Hence the Flat Payment is not a sharing of legal fees and does not violate Rule 5.4(a). D.C. Legal Ethics Op. 342 (2007); D.C. Legal Ethics Op. 286 (1998).[4] The Percentage Payment is a percentage of the fees earned by the lawyer for the representation. As such, it is permissible only if it *either* comes within subparagraph (a)(5) of Rule 5.4 *or* is a "usual fee[]" charged by a "lawyer referral program," as noted in comment [6] to Rule 7.1.

To the extent that matters referred by the Service are not litigation matters, the Percentage Payment is not authorized by Rule 5.4(a)(5). This eliminates subparagraph (a)(5) as a potential basis for Percentage Payments outside the litigation context.

Therefore, the Percentage Payment is permissible only if it satisfies the requirements of comment [6] to Rule 7.1. That in turn leads to two inquiries—whether the Service is a "lawyer referral service" and, if so, whether the Percentage Payment is a "usual fee" of such an operation.

The 2007 revision of the D.C. Rules eliminated comment [6]'s references to "recognized or established agency or organization" and "organized legal referral program," but we do not believe that a change in substance was intended. The deletion reflected the Wortham Report's recommendation, which ultimately was adopted by the D.C. Court of Appeals, to

[3] A similar provision, limited to division of court-awarded fees, was recommended by the ABA's Ethics 2000 Commission and was added to the ABA Model Rules of Professional Conduct in 2002. See ABA Model Rule 5.4(a)(4) (2015).

[4] We assume without deciding that at approximately $200, the Flat Payment would be reasonable within the meaning of the Rules. See D.C. Rule 1.5(a).

eliminate the rule that permitted payment to anyone—including individuals and for-profit entities—in exchange for referrals. *See Wortham Report* 190-95. By implication, only the types of referral programs mentioned in the first sentence of this paragraph remain permissible under the post-2007 D.C. Rules.

Is the Service such a program? The D.C. Rules do not include express criteria for making that determination. The Model Rules do offer such criteria, however, and we agree with the considerations underlying Model Rule 7.2(b)(2), which is analogous to comment [6] to D.C. Rule 7.1. Model Rule 7.2 allows a lawyer to pay the "usual charges" of "a not-for-profit . . . lawyer referral service." ABA Model Rule 7.2(b)(2) (2015). A comment describes lawyer referral services as "consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements." *Id.* cmt. [6].

The comment goes on to cite approvingly an ABA standard requiring that such services "not make referrals to lawyers who own, operate or are employed by the referral service." *Id.*

We conclude that the Service will constitute a "lawyer referral service" within the meaning of comment [6] to D.C. Rule 7.1 if the Service—

- is generally open to D.C. Bar members who agree to its reduced-fee prerequisite, see ABA Model Rule 7.2, cmt. [6];
- takes reasonable steps to ensure that lawyers to whom matters are referred are competent to handle such matters, see D.C. Rule 1.1;
- does not interfere with the lawyers' professional independence of judgment;
- requires only reasonable referral fees (a criterion that is met by its current fifteen percent requirement), see D.C. Rule 1.5(a);
- requires that all lawyers in its network have reasonably adequate malpractice insurance see ABA Model Rule 7.2, cmt. [6];
- has a neutral dispute resolution mechanism, see id.; and
- does not refer matters to lawyers who own, operate, manage, or are employed by the Service, *see id.*

The second question is whether the Percentage Payment is a "usual fee." Opinion 201 concluded that a non-profit public interest legal services project could receive a percentage (one sixth) of fees paid to attorneys to whom the project referred clients and who had agreed to charge reduced fees. D.C. Legal Ethics Op. 201 (1989); *see* D.C. Legal Ethics Ops. 286 (1998) and 307 (2001). Here, the percentage proposed to be remitted to the Service is fifteen percent, which of course is less than one sixth. Moreover, the Service is a 501(c)(3) entity. As noted in the D.C. Rules, *see* D.C. Rule 5.4(a), cmt. [1], and numerous prior opinions of this committee, *see, e.g.*, D.C. Legal Ethics Ops. 201 (1989), 286 (1998), 307 (2001), and 329 (2005), such entities are unlikely to impair or control the independent professional judgment of the attorneys to whom referrals are made.

Thus, we conclude that the Percentage Payment is a usual fee within the meaning of comment [6] to D.C. Rule 7.1.

*Conclusion*

Accordingly, we conclude that the D.C. Rules permit a lawyer to remit to the Service the Flat Payment and, if the Percentage Payment is within Rule 5.4(a)(5) or comment [6] to Rule 7.1, the Percentage Payment as well.

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*Opinion 370*

**Social Media I: Marketing and Personal Use**

*Introduction*

Social media and social networking websites are online communities that allow users to share information, messages, and other content, including photographs and videos. The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice or videoconferencing content.[1] This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy may exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2]

Increasingly, attorneys are using social media for business and personal reasons. The Committee wants to raise awareness of the benefits and pitfalls of the use of social media within the practice of law and to emphasize that the District of Columbia Rules of Professional Conduct (the "Rules") apply to attorneys in the District of Columbia (the "District") who use, or may use, social media for business or personal reasons.[3] This Opinion applies to all attorneys who use social media, regardless of practice area or employer and applies regardless of whether the attorney engages in advertising or client communications via social media. The Committee notes that any social media presence, even a personal

[1] "Content" means any communications, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] We have previously addressed issues related to attorneys' participation in certain kinds of internet and electronic communications, but have not yet addressed the broader uses of social media. In Opinion 316, we concluded that attorneys could take part in online chat rooms and similar arrangements through which they could engage in communications in real time or nearly real time, with internet users seeking legal information. D.C. Legal Ethics Op. 316 (2002). In Opinion 281, we addressed issues related to the use of unencrypted electronic mail. D.C. Legal Ethics Op. 281 (1998). In Opinion 302, we stated that lawyers could use websites to advertise for plaintiffs for class action lawsuits and use websites that offer opportunities to bid competitively on legal projects. D.C. Legal Ethics Op. 302 (2000).

page, could be considered advertising or marketing, and lawyers are cautioned to consider the Rules applicable to attorney advertising, even if not explicitly discussed below. Lawyers reviewing this Opinion may also wish to review Opinion 371 (Social Media II), which addresses use of social media by lawyers in providing legal services.

Social networking websites provide an online community for people to share daily activities, their interests in various topics, or to increase their circle of personal or business acquaintances. There are sites with primarily business purposes, some that are primarily for personal use and some that offer a variety of different uses. According to the 2014 ABA Legal Technology Survey, among attorneys and law firms, in addition to blogs, LinkedIn, Facebook and Twitter are among the more widely used social networks.[4] On these sites, members create online "profiles," which may include biographical data, pictures and other information that they wish to post. These services permit members to locate and invite other members of the network into their personal networks (to "connect" or "friend" them) or to invite the friends or contacts of others to connect with them.

Members of these online social networking communities communicate in a number of ways, publicly or privately. Members of these online social networking communities may have the ability, in many instances, to control who may see their posted content, or who may post content to their pages. Varying degrees of privacy exist. These privacy settings allow users to restrict or limit access of information to certain groups, such as "friends," "connections" or the "public."

Social media sites, postings or activities that mention, promote or highlight a lawyer or a law firm are subject to and must comply with the Rules.[5] Attorneys who choose to use social media must adhere to the Rules in the same way that they would if using more traditional forms of communication.

The Rules, as well as previous Opinions of this Committee, apply to a number of different social media or social networking activities that an attorney or law firm may be engaged in, including:

1. Connecting and communicating with clients, former clients or other lawyers on social networking sites;
2. Writing about an attorney's own cases on social media sites, blogs or other internet-publishing based websites;
3. Commenting on or responding to online reviews or comments;
4. Self-identification by attorneys of their own "specialties," "skills" and "expertise" on social media sites;
5. Reviewing third-party endorsements received by attorneys on their personal or law firm pages; and,
6. Making endorsements of other attorneys on social networking sites.

The Committee concludes that, generally, each of the activities identified above are permissible under the Rules; but not without caution, as discussed in greater detail below. Consistent with our mandate, we consider only the applicability of the D.C. Rules of Professional Conduct. Given that social media does not stop at state boundaries, we remind members of the District of Columbia Bar that their social media presence may be subject to regulation in other jurisdictions, either because the District applies another state's rules through its choice-of-law rule,[6] or because other states assert jurisdiction over attorney conduct without regard to whether the attorney is admitted in other states.[7]

Lawyers must be aware of the ethical rules regarding social media in the principal jurisdiction where they practice, consistent with Rule 8.5. However, adherence to the ethical rules in the jurisdiction of one's principal practice may not insulate an attorney from discipline. There is considerable variation in choice of law rules across jurisdictions. We specifically wish to caution lawyers that the disciplinary rules of other jurisdictions, including our neighboring jurisdictions of Maryland and Virginia, allow for the imposition of discipline upon attorneys who are not admitted in that jurisdiction, if the lawyer provides or offers to provide any legal services in the jurisdiction. ABA Model Rule 8.5(b)(2) provides a limited safe harbor to this provision, by stating that "[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." We note, however, that not every state has adopted this safe harbor. This Committee undertook a detailed evaluation of choice of law rules in non-judicial proceedings in Opinion 311.[8]

We explicitly note that this Opinion is limited to the use of social media as a communications device. This Opinion does not address issues related to the ethical use of social media in litigation or other proceedings, or with regard to issues related to advising clients on the use of social media. Those issues are addressed in Opinion 371 (Social Media II).

[4] www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html (last visited Oct. 26, 2016).

[5] The Committee further notes that even social media profiles that are used exclusively for personal purposes might be viewed by clients or other third parties, and that information contained on those social media websites may be subject to the Rules of Professional Conduct. The Rules extend to purely private conduct of a lawyer, in areas such as truthfulness and compliance with the law. See Rule 8.4.

[6] In accordance with D.C. Rule 8.5(b), the Office of Disciplinary Counsel will apply the rules of another jurisdiction to an attorney's conduct in two circumstances:

> (1) For conduct in connection with a matter pending before a tribunal, the rules to be applied shall be the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise, and
>
> (2) For any other conduct,
>
> > (ii) If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Note that, in contrast to ABA Model Rule 8.5 (*see infra* note 7), D.C. Rule 8.5 does not provide for jurisdiction over attorneys not admitted to practice in the District and does not apply the rules of another jurisdiction unless the attorney is either practicing before a tribunal in another jurisdiction, or is licensed to practice in another jurisdiction.

[7] In contrast to D.C. Rule 8.5 (discussed *supra* in note 6), ABA Model Rule 8.5(a) states that "[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." Moreover, ABA Model Rule 8.5(b)(2) states that for conduct not in connection with a matter pending before a tribunal, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." Accordingly, Model Rule 8.5(b)(2), unlike D.C. Rule 8.5(b)(2), may result in the application of rules of jurisdictions to which the lawyer is not admitted.

[8] D.C. Legal Ethics Op. 311 (2002). The revisions to Rule 8.5(b)(1) that became effective on February 1, 2007 have modified Opinion 311 to the extent that the Opinion now applies more broadly to conduct in connection with a "matter pending before a tribunal" rather than only in connection with a "proceeding in a court before which a lawyer has been admitted to practice." These revisions, however, do not change this Committee's analysis in Opinion 311 as to "other conduct" under Rule 8.5(b)(2).

**Applicable Rules**

The Rules that are potentially implicated by social media include:

- Rule 1.1 (Competence)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General)
- Rule 1.18 (Duties to Prospective Client)
- Rule 3.3 (Candor to Tribunal)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.3 (Responsibilities Regarding Non-Lawyer Assistants)
- Rule 7.1 (Communications Concerning a Lawyer's Services)
- Rule 8.4 (Misconduct)
- Rule 8.5 (Disciplinary Authority; Choice of Law)

*Discussion*

## I. Social Media in General

The guiding principle for lawyers with regard to the use of any social network site is that they must be conversant in how the site works. Lawyers must understand the functionality of the social networking site, including its privacy policies. Lawyers must understand the manner in which postings on social media sites are made and whether such postings are public or private. Indeed, comment [6] to Rule 1.1 (Competence) provides:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence.

As discussed in more detail herein, lawyers must be cognizant of the benefits and risks of the use of social media and their postings on social media sites. Social networking sites, and social media in general, make it easier to blur the distinctions between communications that are business and those that are personal. Communications via social media are inherently less formal than more traditional or established forms of communication. Lawyers and law firm employees must be reminded of the need to maintain confidentiality with regard to clients and client matters in all communications. It is recommended that all law firms have a policy in place regarding employees' use of social networks. Lawyers in law firms have an ethical duty to supervise subordinate lawyers and non-lawyer staff to ensure that their conduct complies with the applicable Rules, including the duty of confidentiality. *See* Rules 5.1 and 5.3.

Content contained on a lawyer's social media pages must be truthful and not misleading. Statements on social media could expose an attorney to charges of dishonesty under Rule 8.4 or lack of candor under Rule 3.3, if the social media statements conflict with statements made to courts, clients or other third parties, including employers. Similarly, statements on social media could expose a lawyer to civil liability for defamation, libel or other torts.

## II. Permissible Uses of Social Media

### A. Attorneys may connect with and communicate with clients, former clients or other lawyers on social networking sites, but not without caution.

There are no provisions of the Rules that preclude a lawyer from participating in social media or other online activities. However, if an attorney connects with, or otherwise communicates with clients on social networking sites, then the attorney must continue to adhere to the Rules and maintain an appropriate relationship with clients. Lawyers must also be aware that, if they are connected to clients or former clients on social media, then content made by others and then placed on the attorney's page and content made by the attorney may be viewed by these clients and former clients. Attorneys should be mindful of their obligations under Rule 1.6 to maintain client confidences and secrets.

Some social networking sites, like Facebook, offer users the option to restrict what some people may see on a user's page. These options also allow a user to determine who may post content publicly on the lawyer's page. It is advisable for lawyers to periodically review these settings and adjust them as needed to manage the content appearing publicly on the lawyer's social media pages. Attorneys should be aware of changes to the policies of the sites that they utilize, as privacy policies are frequently changed and networks may globally apply changes, pursuant to the updated policies.

#### *i. Avoiding the formation of an inadvertent attorney-client relationship*

As we opined in Opinion 316, it is permissible for lawyers to participate in online chat rooms and similar arrangements through which attorneys could engage in real time, or nearly real time communications with internet users. However, that permission was caveated with the caution to avoid the provision of specific legal advice in order to prevent the formation of an attorney-client relationship. In Opinion 302, we provided "best practices" guidance on internet communications, with the intent of avoiding the inadvertent formation of an attorney-client relationship. One of the suggested "best practices" included the use of a prominent disclaimer. *Id*. However, we have reiterated "that even the use of a disclaimer may not prevent the formation of an attorney-client relationship if the parties' subsequent conduct is inconsistent with the disclaimer." D.C. Ethics Op. 316.

These same principles are applicable to the use of social media. Disclaimers are advisable on social media sites, especially if the lawyer is posting legal content or if the lawyer may be engaged in sending or receiving messages from "friends," whether those friends are other attorneys, family or unknown visitors to the lawyer's social media page, when those messages relate, or may relate, to legal issues.[9]

Rule 1.18 imposes a duty of confidentiality with regard to a prospective client, who is defined in Rule 1.18(a) as "a person who discusses … the possibility of forming a client-lawyer relationship with respect to a matter." However, comment [2] to Rule 1.18 notes that "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [the Rule]." The guidance of Rule 1.18 is of particular importance in social networking, where lawyers may self-identify themselves as attorneys and where, most likely, those "connected" to the lawyer will be aware

[9] As we discussed in Opinion 302, in the District of Columbia, the question of what conduct gives rise to an attorney-client relationship is a matter of substantive law. Neither a retainer nor a formal agreement is required in order to establish an attorney-client relationship in the District of Columbia. *See, e.g. In re Lieber*, 442 A.2d 153 (D.C. 1982) (attorney-client relationship formed where attorney failed to indicate lack of consent to accept a court appointed client after receiving notification of appointment by mail). Further, even casual legal advice can give rise to an attorney-client relationship if the putative client relies upon it. *See, e.g., Togstad v. Vesely, Otto, Miller & Keffe*, 291 N.W.2d 686 (Minn. 1980) (finding an attorney-client relationship where the attorney stated that he did not think a prospective client had a cause of action but would discuss it with his partner, did not call prospective client back, and prospective client relied on attorney's assessment and did not continue to seek legal representation).

that the user is an attorney; however, without more, the mere knowledge that a friend is an attorney does not give rise to a reasonable expectation that interactions with that attorney would create a prospective or actual client relationship, or its attendant duty of confidentiality.

### *ii. Avoiding the creation of conflicts of interest*

Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer's firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. Rule 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer's own financial, business, property or personal interests," unless the conflict is resolved in accordance with Rule 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.

Moreover, online communications and interactions with people who are unknown to the lawyer may unintentionally cause the development of relationships with persons or parties who may have interests that are adverse to those of existing clients.

### *iii. Protecting client confidences and secrets*

Protecting client information is of the utmost importance when using social media. Most attorneys are aware of the importance of protecting attorney-client communications, attorney work-product or other privileged information. The obligation to protect this information extends beyond the termination of the attorney-client relationship.

Rule 1.6 distinguishes between information that is "confidential" and that which is a "secret," and requires attorneys to protect both kinds of information. In the District of Columbia,

> "Confidence" refers to information protected by the attorney-client privilege under applicable law. "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Rule 1.6(b). Comment [8] to Rule 1.6 makes clear that the Rule potentially applies to all information gained in the course of the professional relationship, and exists without regard to the nature or source of the information, or the fact that others share the knowledge.

No less critical are considerations of the level of confidentiality available on the social media sites themselves. If an attorney uses social media to communicate with potential or actual clients or co-counsel, then careful attention must be paid to issues of privacy and confidentiality. It is critically important that lawyers review the policies of the social media sites that they frequent, particularly policies related to data collection. Privacy settings on social media are not the equivalent of a guarantee of confidentiality.

Particular consideration must be given to the issue of maintaining and protecting the confidentiality of communications on social networking sites.[10] Messaging and electronic mail services provided by social networking sites may lack safeguards sufficient for communicating with clients or prospective clients. Moreover, the messaging and electronic mail services provided by these sites should not be assumed to be confidential or private. Therefore, when appropriate, clients or potential clients should be advised by lawyers of the existence of more secure means of communicating confidential, privileged, sensitive or otherwise protected information. Messages with clients that are sent or received via social networks must be treated with the same degree of reasonable care as messages sent or received via electronic mail or other traditional means of communication. Social media sites may not permanently retain messages or other communications; therefore care should be taken to preserve these communications outside of the social media site, in order to ensure that the communications are maintained as part of the client file. It is advisable that communications regarding on-going representations or pending legal matters be made through secured office e-mail, and not through social media sites.

Certain social media sites collect information about the people and groups that the user is connected to and the interactions with that group or person. The information collected is gathered from both the lawyer and the person communicating with the lawyer and can include content, information and frequency of contact.[11] These sites also collect information about uses of their partner products and/or websites, allowing the social media service to collect and integrate information about its users, which can be used for targeted advertising and/or research purposes.[12] Thus, depending on the intended use of the social media site, it is advisable for a lawyer to give careful consideration to which social media sites, if any, may be more appropriate for business-related uses or for communications with potential or actual clients.

When inviting others to view a lawyer's social media site, or profile, a lawyer must be mindful of the ethical restrictions relating to solicitations and other communications. Most social networking sites require an e-mail address from the user as part of the registration process. Then, once the social networking site is accessed by a lawyer, the site may access the entire address book (or contacts list) of the user. Aside from any data collection purposes, this access allows the social media site to suggest potential connections with people the lawyer may know who are already members of the social network, to send requests or other invitations to have these contacts connect with the lawyer on that social network, or to invite non-members of the social network to join it and connect with the lawyer.

However, in many instances, the people contained in a lawyer's address book or contact list are a blend of personal and professional contacts. Contact lists frequently include clients, opposing counsel, judges and others whom it may be impermissible, inappropriate or potentially embarrassing to have as a connection on a social networking site. The connection services provided by many social networks can be a good marketing and networking tool, but for attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure. Accordingly, great caution should be exercised whenever a social networking

[10] *See also* D.C. Legal Ethics Op. 281.

[11] An example is contained in Facebook's data policy. (https://www.facebook.com/about/privacy/) (last visited Oct. 26, 2016).

[12] Miller, C., *The Plus in Google Plus? It's Mostly for Google*, Feb. 14, 2014 http://www.nytimes.com/2014/02/15/technology/the-plus-in-google-plus-its-mostly-for-google.html?_r=0 (last visited Oct. 26, 2016).

site requests permission to access e-mail contacts or to send e-mail to the people in the lawyer's address book or contact list and care should be taken to avoid inadvertently agreeing to allow a third-party service access to a lawyer's address book or contacts.

**B. Attorneys may write about their own cases on social media sites, blogs or other internet-based publications, with the informed consent of their clients.**

The scope of the protections provided in Rule 1.6 militates in favor of prudence when it comes to disclosing information regarding clients and cases. While lawyers may ethically write about their cases on social media, lawyers must take care not to disclose confidential or secret client information in social media posts. Rule 1.6(e)(1) states that a lawyer may use a client's confidences and secrets for the lawyer's own benefit or that of a third party only after the attorney has obtained the client's informed consent to the use in question. Because Rule 1.6 extends to even information that may be known to other people, the prudent lawyer will obtain client consent before sharing any information regarding a representation or disclosing the identity of a client. Even if the attorney is reasonably sure that the information being disclosed would not be subject to Rule 1.6, it is prudent to obtain explicit informed client consent before making such posts. With or without client consent, attorneys should exercise good judgment and great caution in determining the appropriateness of such posts. Consideration should be given to the identity of the client and the sensitivity of the subject matter, even if the client is not overtly identified. It is advisable that the attorney share a draft of the proposed post or blog entry with the client, so there can be no miscommunication regarding the nature of the content that the attorney wishes to make public. It is also advisable, should the client agree that the content may be made public, that the attorney obtain that client consent in a written form.

Consideration must also be given to ensure that such disclosures on social media are compliant with Rule 7.1. Rule 7.1 governs all communications about a lawyer's services, including advertising. These Rules extend to online writings, whether on social media, a blog or other internet-based publication, regarding a lawyer's own cases. Such communications are subject to the Rules because they have the capacity to mislead by creating the unjustified expectation that similar results can be obtained for others. Care must be taken to avoid material misrepresentations of law or fact, or the omission of facts necessary to make the statement considered as a whole not materially misleading. Accordingly, social media posts regarding a lawyer's own cases should contain a prominent disclaimer making clear that past results are not a guarantee that similar results can be obtained for others.

Law firms that have blogs or social media sites or that allow their lawyers to maintain their own legal blogs or social media pages should take appropriate steps to ensure that such content is compliant with the Rules, consistent with the duties set forth in Rule 5.1. Non-attorney employees who create content for their own or their employers' social media sites should be educated regarding the protection of client information and, if appropriate, be supervised by their employing law firm or lawyer, as required by Rule 5.3.[13]

As noted above, all social media postings for law firms or lawyers, including blogs, should contain disclaimers and privacy statements sufficient to convey to prospective clients and visitors that the social media posts are not intended to convey legal advice and do not create an attorney-client relationship.

**C. Attorneys may, with caution, respond to comments or online reviews from clients.**

The ability for clients to place reviews and opinions of the services provided by their counsel on the internet can present challenges for attorneys. An attorney must monitor his or her own social networking websites, verify the accuracy of information posted by others on the site, and correct or remove inaccurate information displayed on their social media page(s). As set forth in comment [1] to Rule 7.1, client reviews that may be contained on social media posts or webpages must be reviewed for compliance with Rule 7.1(a) to ensure that they do not create the "unjustified expectation that similar results can be obtained for others."[14]

Attorneys may respond to negative online reviews or comments from clients. However, Rule 1.6 does not provide complete safe harbor for the disclosure of client confidences in response to a negative internet review or opinion. Rule 1.6(e) states that:

> A lawyer may use or reveal client confidences or secrets:
>
> (3) to the extent reasonably necessary to establish a defense to a criminal charge, disciplinary charge, or civil claim, formally instituted against the lawyer, based upon conduct in which the client was involved, ***or to the extent reasonably necessary to respond to specific allegations by the client concerning the lawyer's representation of the client*** **[emphasis added]**.

Thus, the lawyer's ability to reveal confidences under Rule 1.6(e)(3) is limited to only "specific" allegations by the client concerning the lawyer's representation of the client. Comment [25] to Rule 1.6 specifically excludes general criticisms of an attorney from the kinds of allegations to which an attorney may respond using information otherwise protected by Rule 1.6. However, even when the lawyer is operating within the scope of the Rule 1.6(e)(3) exception, the comments to Rule 1.6 caution that disclosures should be no greater than the lawyer reasonably believes are necessary. There is no exception in Rule 1.6 that allows an attorney to disclose client confidences or secrets in response to specific or general allegations regarding an attorney's conduct contained in an online review from a third party, such as opposing counsel or a non-client.[15]

Other jurisdictions have taken a more restrictive view of responding to comments or reviews on lawyer-rating websites. For example, the New York State Bar Association Committee on Professional Ethics, in its Opinion 1032 (2014), held that "[a] lawyer may not disclose confidential client informa-

[13] *See, e.g.*, Gene Shipp, *Bar Counsel: 20/20: The Future of the Rules of Professional Conduct*, WASHINGTON LAWYER (June 2013), sharing the example that our world is changing so fast that "a high-profile celebrity, who comes to your office on a highly confidential matter and graciously pauses to allow a picture with your receptionist, may be unhappy with your staff's violation of Rule 1.6 when their picture appears on the Internet even before you have had a chance to say hello."

[14] The Committee does not distinguish between client comments that are solicited and those that are unsolicited. Rule 7.1 governs all communications about a lawyer's services.

[15] Although beyond the scope of this Opinion, the Committee notes that the Rule 1.6(e)(3) exception allows an attorney to respond to wrongs alleged by a third party, but only if the third party has formally instituted a civil, criminal or disciplinary action against the lawyer. *See* comments [23] and [24] to Rule 1.6.

tion solely to respond to a former client's criticism of the lawyer posted on a [lawyer-rating website]." The New York analysis turned on the language contained in New York's Rule 1.6, which requires "accusations," rather than allegations, in order to trigger the "self-defense" exception of N.Y. Rule 1.6. Attorneys licensed in the District of Columbia who are admitted to practice in multiple jurisdictions are cautioned that they may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct. Under the District's choice of law rule, Rule 8.5(b)(2)(ii),

> the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

*See* notes 6 and 7, *infra*.[16]

We recognize that there are limitations on the control that any individual can assert over his or her presence on the internet. That is why we recognize that an attorney's ethical obligations to review and regulate content on social media extends only to those social media sites or webpages for which the attorney maintains control of the content, such as the ability to delete posted content, block users from posting, or block users from viewing. However, notwithstanding the scope of the attorney's affirmative obligations, it is highly advisable for attorneys to be aware of content regarding them on the internet.

**D. An attorney or law firm may identify "specialties," "skills" and "expertise" on social media, provided that the representations are not false or misleading.**

Many social media sites, like LinkedIn, allow attorneys to identify skills and areas of practice. The District of Columbia does not prohibit statements regarding specialization or expertise. Accordingly, District of Columbia attorneys are ethically permitted to identify their skills, expertise and areas of practice, subject to Rule 7.1(a).[17]

As we previously opined in Opinion 249, "Rule 7.1(a) permits truthful claims of lawyer specialization so long as they can be substantiated." Rule 7.1(a) states that an attorney is prohibited from making a "false or misleading communication about the lawyer or the lawyer's services." The relevant comment [1] to this Rule states that "[i]t is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters." Accordingly, we conclude that social media profiles or pages that include statements by the attorney setting forth an attorney's skills, areas of specialization or expertise are subject to Rule 7.1(a) and, therefore, cannot be false or misleading.

**E. Attorneys must review their social media presence for accuracy.**

Consistent with the goals of networking, marketing and making connections, some social networking sites permit members of the site to recommend fellow members or to endorse a fellow member's skills. Users may also request that others endorse the lawyer for specified skills that the lawyer has indicated he or she possesses. LinkedIn and other sites also allow clients or others to submit written reviews or recommendations of the lawyer. Other legal-specific social networking sites focus exclusively on endorsements or recommendations. It is our view that a lawyer is ethically permitted, with caution, to recommend other attorneys, and to accept endorsements, written reviews and recommendations, subject to the Rules.

As noted above, it is our opinion that lawyers in the District of Columbia have a duty to monitor their social network sites. If a lawyer controls or maintains the content contained on a social media page, then the lawyer has an affirmative obligation to review the content on that page. A lawyer must remove endorsements, recommendations or other content that are false or misleading. Lawyers are advised that it is appropriate to reject or refuse endorsements from people who lack the knowledge necessary for making the recommendation. It would be misleading for an attorney to display recommendations or endorsements of skills that are received from people who do not have a factual basis to evaluate the lawyer's skills. Lawyers must reject or refuse endorsements that indicate that the lawyer possesses skills or expertise that the lawyer does not possess. It would be misleading for an attorney to display a recommendation that contained incorrect information. The operative questions asked by the lawyer when reviewing endorsements or recommendations received on their social media pages should be whether the person making the endorsement knows the lawyer and whether the person can fairly comment on the lawyer's skills.

We recommend that lawyers who are using social media sites that allow for the review of posts, recommendations or endorsements prior to publication avail themselves of the settings that allow review and approval of such information before it is publicized on the lawyer's social media page. Some sites, like LinkedIn, provide settings that allow the user to review and approve endorsements that are received before the endorsements are posted publicly. Users may also choose to keep endorsements hidden so that they are not seen by others.[18] Other social networking sites, like Facebook, allow users to adjust their privacy settings to require user approval before certain content, such as photos, can be displayed on a user's home page. Some social media sites allow users to adjust their privacy settings to require approval before a user can be "tagged," a practice that allows content on another person's page to be displayed on the user's page.

[16] Other jurisdictions have sanctioned attorneys for disclosures of client confidences or secrets on social media or other websites. In 2013, the Hearing Board of the Illinois Attorney Registration and Disciplinary Commission held, in the *Matter of Betty Tsamis*, that it was a violation of Rule 1.6(a) for an attorney to respond to an unfavorable review on the legal referral website AVVO with a response that revealed confidential information about the client's case. In *Tsamis*, the attorney first requested that the client remove the posting from the website, which is also a permissible response in the District of Columbia. The client responded that he would remove the post, but only if the attorney returned his files and refunded his fees. Thereafter, AVVO removed the posting from its online client reviews. The client then posted a second negative client review to the same website, which the attorney responded to, disclosing client information. The Hearing Board found that the response exceeded what was necessary to respond to the client's accusations and a reprimand was recommended.

[17] Prudent attorneys should consider the most restrictive rules applicable to them when using self-promotional features on social media. We note that other jurisdictions, like New York, do not permit lawyers to identify themselves as "specialists" unless they have been certified as such by an appropriate organization. They are, however, permitted to detail their skills and experience. *See* N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 748 (Mar. 10, 2015).

[18] Lawyers are advised to review the guidance provided by other jurisdictions in which they are admitted to practice regarding the use of endorsements or the skills and expertise sections in a LinkedIn profile. *See, e.g.*, Maryland State Bar Ass'n, Comm. on Ethics, Ethics Docket No. 2014-05; Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. 2012-8 (Nov. 2012); South Carolina Ethics Advisory Comm., Op. 09-10; *see also* note 17.

It is suggested that lawyers, particularly those who do not frequently monitor their social media pages, those who may not know everyone in their networks well, or those who wish to have an added layer of protection, utilize these heightened privacy settings. Aside from the potential ethical issues discussed herein, there are many good reasons for a lawyer to want to maintain a higher level of control over what content others may place on a lawyer's social media page(s).

It is permissible under the Rules for a lawyer to make an endorsement or recommendation of another attorney on a social networking site, provided that the endorsement or recommendation is not false or misleading. Such endorsements and recommendations must be based upon the belief that the recipient of the endorsement does in fact possess said skills or legal acumen. Rule 8.4(c) prohibits an attorney from being dishonest, or engaging in fraud, deceit or misrepresentation. Therefore, a lawyer must only provide an endorsement or recommendation of someone on social media that the endorsing lawyer believes to be justified.

Rule 8.4(a) states that it is misconduct for a lawyer to violate or to attempt to violate ethics rules through the acts of others. Thus, clients and colleagues cannot say things about the lawyer that the lawyer cannot say. The lawyer's obligation to monitor, review and correct content on social media sites for which they maintain control exists regardless of whether the information was posted by the attorney, a client or a third party.

We reiterate that, for websites or social media sites where the attorney does not have editorial control over content or the postings of others, we do not believe that the Rules impose an affirmative duty on a lawyer to monitor the content of the sites; however, under certain circumstances, it may be appropriate for the attorney to request that the poster remove the content, to request that the social networking site remove the content, or for the attorney to post a curative response addressing the inaccurate content.

## V. Conclusion

Social media is a constantly changing area of technology. Social media can be an effective tool for providing information to the public, for networking and for communications. However, using such tools requires that the lawyer maintain and update his or her social media pages or profiles in order to ensure that information is accurate and adequately protected.

Accordingly, this Committee concludes that a lawyer who chooses to maintain a presence on social media, for personal or professional reasons, must take affirmative steps to remain competent regarding the technology being used and to ensure compliance with the applicable Rules of Professional Conduct.

The world of social media is a nascent area that continues to change as new technology is introduced into the marketplace. Best practices and ethical guidelines will, as a result, continue to evolve to keep pace with such developments.

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*Opinion 371*

## Social Media II: Use of Social Media in Providing Legal Services

### Introduction

Information posted on social media and use of social media in the substantive practice of law raise multiple issues under the Rules of Professional Conduct in all practice areas. This Opinion provides the Committee's guidance about advice and conduct by lawyers related to social media in the provision of legal services, including whether certain advice and conduct are required, permitted, or prohibited by the Rules. The Opinion also identifies issues for lawyers to spot as they provide legal services. Opinion 370 (Social Media I) addresses lawyers' use of social media in marketing and personal use.

The Committee defines social media as follows:

> Social media include any electronic platform through which people may communicate or interact in a public, semi-private, or private way. Through blogs, public and private chat rooms, listservs, other online locations, social networks, and websites such as Facebook, LinkedIn, Instagram, Twitter, Yelp, Angie's List, Avvo, and Lawyers.com, users of social media can share information, messages, e-mail, instant messages, photographs, video, voice, or videoconferencing content.[1] This definition includes social networks, public and private chat rooms, listservs, and other online locations where attorneys communicate with the public, other attorneys, or clients. Varying degrees of privacy exist in these online communities as users may have the ability to limit who may see their posted content and who may post content to their pages.[2]

**Applicable Rules**

- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 3.1 (Meritorious Claims and Contentions)
- Rule 3.3 (Candor to Tribunal)
- Rule 3.4 (Fairness to Opposing Party and Counsel)
- Rule 3.5 (Impartiality and Decorum of the Tribunal)
- Rule 3.6 (Trial Publicity)
- Rule 3.8 (Special Responsibilities of a Prosecutor) Rule 4.1 (Truthfulness in Statements to Others)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 4.3 (Dealing with Unrepresented Person)
- Rule 4.4 (Respect for Rights of Third Persons)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

## I. Understanding Social Media

Because the practice of law involves use or potential use of social media in many ways, competent representation under Rule 1.1[3] requires a lawyer to understand how social media work and

[1] "Content" means any communication, whether for personal or business purposes, disseminated through websites, social media sites, blogs, chat rooms, listservs, instant messaging, or other internet presences, and any attachments or links related thereto.

[2] The Merriam-Webster Dictionary defines "social media" as "forms of electronic communication … through which users create online communities to share information, ideas, personal messages, and other content…." More specifically to the legal profession, the New York State Bar Association Committee on Professional Ethics, in its Formal Opinion No. 2012-2 (May 30, 2012), stated:

> We understand "social media" to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a "network." Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives.

[3] Rule 1.1(a) states:
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

how they can be used to represent a client zealously and diligently[4] under Rule 1.3.[5] Recognizing the pervasive use of social media in modern society, lawyers must at least consider whether and how social media may benefit or harm client matters in a variety of circumstances. We do not advise that every legal representation requires a lawyer to use social media. What is required is the ability to exercise informed professional judgment reasonably necessary to carry out the representation. Such understanding can be acquired and exercised with the assistance of other lawyers and staff.[6]

We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Although the District's Comments to Rule 1.1 do not specifically reference technology, competent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.

Similarly, the requirement of D.C. Rule 1.3(b)(1) to "seek the lawful objectives of a client through reasonably available means" may require that a lawyer utilize social media if it would assist zealous and diligent representation. In using social media for representation, however, a lawyer must at all times stay within the "bounds of the law,"[7] including for example the general prohibition on misrepresentation by pretexting and the duty of truthfulness discussed in this and other Opinions.[8]

## II. Communication with Clients

The duty to maintain client confidences under Rule 1.6,[9] the duty to provide competent representation under Rule 1.1, and the duty to communicate with clients under Rule 1.4[10] are all implicated by lawyer-client social media communication. Because social media communication often is public or semi-public, confidentiality of lawyer-client communication is an important concern.

Protecting the confidentiality of lawyer-client communication under Rule 1.6 requires a lawyer to understand in particular how non-clients can access client social media communication and postings.[11] For example, social media sites usually have a range of privacy settings, and clients may give others access to content posted behind private settings. In addition, site privacy settings can unexpectedly change with new terms and conditions imposed by the site host. Rules 1.1, 1.4 and 1.6 may require[12] that a lawyer advise clients about how non-client access to posted information about legal matters risks inappropriate disclosure of the information, waiver of the attorney-client privilege, and loss of litigation work-product protection.[13] *See, e.g.*, *Lenz v. Universal Music Corp.*, in which the plaintiff "made comments in emails and electronic 'chats' with friends, [and] postings on her blog," which comments disclosed her discussions with counsel. [14] The Court held that the emails and chats waived the attorney-client privilege regarding the matters discussed.

A lawyer should consider reaching agreement with clients about how their attorney-client communication will occur, including whether or not social media should ever be used for such communication because of the confidentiality risks. Agreements about these subjects could be included in engagement letters.

## III. Social Media as Sources of Information about Cases or Matters

Social media have become sources of relevant information in litigation and other adversarial proceedings, as well as in a broad array of transactional and advisory practices, including regulatory work.

### A. Client Social Media

Rules 1.1 and 1.3 require a lawyer to consider the potential risks and benefits that client social media could have on litigation, regulatory, and transactional matters undertaken by the lawyer, and Rule 1.4 requires a lawyer to discuss such risks and benefits with clients.[15]

#### 1. Review by Client's Lawyer

Competent and zealous representation under Rules 1.1 and 1.3 may require lawyer review of client social media postings relevant to client matters.[16] In litigation, client social media postings could be inconsistent with claims, defenses, pleadings, filings, or litigation/regulatory positions. For example, if a client initiated an action claiming serious injuries, the client's social media profile could disclose activity inconsistent with the injuries alleged.[17] A lawyer must address

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[4] *See, e.g.*, N.Y. State Bar Ass'n Social Media Comm., *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section* (2015) ("NYSBA Guidelines"); American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 466 (2014) ("ABA Op. 466"); N.C. State Bar, Formal Ethics Op. 2014-5 (revised 2015) ("N.C. Op. 2014-5"); Pa. Bar Ass'n, Formal Op. 2014-300 ("Pa. Op. 2014-300"). *See generally* D.C. Bar Legal Ethics Op. 281 (1998) (noting in an early internet-related opinion about confidentiality risks from e-mail communication that it was important to understand how e-mails actually traveled over the internet).

[5] Rule 1.3(a) states:
A lawyer shall represent a client zealously and diligently within the bounds of the law.

[6] See MODEL RULES OF PROF'L CONDUCT r. 1.1 cmt. 2 (AM. BAR ASS'N 2014).

[7] *See* supra note 5.

[8] *See generally* D.C. Legal Ethics Op. 323 (2004) and other Opinions addressing application of D.C. Rule 8.4(c).

[9] Rule 1.6(a) and (b) states in part:
(a) Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly:
(1)[R]eveal a confidence or secret of the lawyer's client; . . . .
(b) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

[10] Rule 1.4(a) and (b) states:
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[11] *See supra* note 4.

[12] In this Opinion the terms "may require" and "may need to" mean that whether the referenced Rules would establish a requirement in any given matter will depend on circumstances such as the scope of a lawyer's representation and the nature of the matter. At the same time, the term reflects the Committee's view that the referenced issue should be given serious consideration and could constitute a requirement. The term "should" has the meaning established in the first paragraph of the Scope page of the Rules. See Comment 3 to Rule 1.4.

[13] *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300.

[14] *Lenz v. Universal Music Corp.,* No. 5:07-CV-03783 JF (PVT), 2010 WL 4789099, at *1 (N.D. Cal. Nov. 17, 2010).

[15] *See generally* NYSBA Guidelines; N.Y. Cty. Lawyers' Ass'n, Ethics Op. 745 (2013) ("NYCLA Op. 745").

[16] *See, e.g.*, Pa. Op. 2014-300.

[17] *See, e.g., McMillen v. Hummingbird Speedway, Inc.,* No. 113-2010 CD, 2010 WL 4403285 2010 Pa. Dist. & Cnty. Dec. LEXIS 270, at *1,

any such known inconsistencies before submitting court or agency filings to ensure that claims and positions are meritorious under Rule 3.1, which requires a non-frivolous basis in law and fact,[18] and that misrepresentations are not made to courts or agencies[19] in violation of Rules 3.3 and 8.4.[20]

Client social media also can present risks and benefits for transactions and regulatory compliance. For example, review of client social media for their consistency with representations, warranties, covenants, conditions, restrictions, and other terms or proposed terms of agreements could be important because inconsistency could create rights or remedies for counterparties. Similarly, competent and zealous representation under Rules 1.1 and 1.3 in regulatory matters may require ensuring that representations to agencies are consistent with social media postings and that advice to clients takes such postings into account.

### 2. Review by Adversaries

In litigation and adversarial regulatory matters, social media postings without privacy settings are subject to investigation. Lawyers can and do look at the public social media postings of their opponents, witnesses, and other relevant parties, and as discussed below, may even have an ethical obligation to do so. Postings with privacy settings on client social media are subject to formal discovery and subpoenas.[21] To provide competent advice, a lawyer should understand that privacy settings do not create any expectation of confidentiality to establish privilege or work-product protection against discovery and subpoenas.[22]

### 3. Document Preservation

Because social media postings are subject to discovery and subpoenas, a lawyer may need to include social media in advice and instructions to clients about litigation holds, document preservation, and document collection.[23] A lawyer also may need to determine whether under applicable law, which varies from jurisdiction to jurisdiction, clients may modify their social media presence once litigation or regulatory proceedings are anticipated. For example, are clients permitted to change privacy settings or to remove information altogether from social media postings? Such analysis may need to include consideration of obstruction statutes, spoliation law,[24] and procedural rules applicable to criminal and regulatory investigations and cases; procedural rules and spoliation law in civil cases; and the duty under Rule 3.4(a) not to "[o]bstruct another party's access to evidence or alter, destroy, or conceal evidence, or counsel or assist another person to do so. . . ."[25] Before any lawyer-counseled or lawyer-assisted removal or change in content of client social media, at a minimum, an accurate copy of such social media should be made and preserved, consistent with Rule 3.4(a).[26]

Transactional and regulatory representation also can include advice about adjusting client social media. In the absence of unlawful activity or anticipation of litigation or adversary proceedings, that advice may not be constrained by spoliation or obstruction of justice considerations. In order to comply with Rule 1.1, however, a lawyer should not advise a client to make fraudulent or unlawful adjustments; nor should a lawyer participate in such activity or in misrepresentations or material omissions in violation of Rules 1.2(e),[27] 4.1,[28] or 8.4(c).

### 4. Substantive Regulatory Risks

In regulatory practice, competent and zealous representation also may require advice about whether social media postings or use violate statutory or rule-based limits on public statements or marketing. The Securities and Exchange Commission, Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and other federal, state, and local agencies have promulgated such limits or guidelines. For example, in April 2013 the SEC Division of Enforcement applied Regulation FD and

*13 (Pa. Ct. Com. Pl., Jefferson Cty. Sept. 9, 2010) (plaintiff alleged substantial injures, including "possible permanent impairment," yet public Facebook postings showed him taking several trips, indicating he had exaggerated his injuries).

[18] Rule 3.1 states in part:
A lawyer shall not bring 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.

[19] *See, e.g.,* NYCLA Op. 745; see also NYSBA Guidelines.

[20] Rule 3.3(a)(1) states:
(a) A lawyer shall not knowingly:
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, unless correction would require disclosure of information that is prohibited by Rule 1.6.

Rule 8.4(c) states:
It is professional misconduct for a lawyer to:
(c)Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

[21] *See, e.g., Robinson v. Jones Lang LaSalle Ams., Inc.,* No. 3:12-cv-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) ("I see no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms."); *Loporcaro v. City of New York*, 950 N.Y.S.2d 723 (Sup. Ct., Richmond Cty. 2012) (unpublished table decision), 2012 WL 1231021, at *7 ("Clearly, our present discovery statutes do not allow that the contents of such [social media] accounts should be treated differently from the rules applied to any other discovery material. . . .").

[22] *See, e.g., Tompkins v. Detroit Metro. Airport,* 278 F.R.D. 387, 388 (E.D. Mich. 2012) ("[M]aterial posted on a 'private' Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general public, is generally not privileged, nor is it protected by common law or civil law notions of privacy."); *see also Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Davenport v. State Farm Mut. Auto. Ins.*, No. 3:11-cv-632, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) (stating that generally social media content "is neither privileged nor protected by any right of privacy"); *Patterson v. Turner Constr. Co.*, 931 N.Y.S.2d 311, 312 (App. Div. 2011).

[23] *See, e.g.,* Pa. Op. 2014-300.

[24] *See, e.g., Gatto v. United Air Lines, Inc.*, No. 10-cv-1090-ES-SCM, 2013 WL 1285285, at *3, 2013 U.S. Dist. LEXIS 41909, at *10 (D.N.J. Mar. 25, 2013); *Torres v. Lexington Ins.*, 237 F.R.D. 533 (D.P.R. 2006); *Lester v. Allied Concrete Co*., 83 Va. Cir. 308 (2011), *aff'd in part, rev'd in part?*, 285 Va. 295 (2013).

[25] D.C. Rule 3.4. *See, e.g.*, NYSBA Guidelines; Pa. Op. 2014-300; N.C. Op. 2014-5; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2014-5.

[26] *See, e.g.*, Pa. Op. 2014-300. Because adjusting privacy settings does not alter the content of social media postings, Rule 3.4(a) does not require content preservation before such adjustment. *Id.*

[27] Rule 1.2(e) states:
(e) 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.

[28] Rule 4.1 states:
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.

the Commission's 2008 Guidance to the use of social media.[29] Communications about initial public offerings pose regulatory risk, and those risks apply fully to issuer social media.[30] Inadequately disclosed interactive internet downloads may constitute unfair or deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act.[31] Other agencies have published guidelines, such as a Guidance on social media issued by the Federal Financial Institutions Examination Council.[32]

### B. Social Media of Adverse Parties, Counsel, and Experts

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of potentially relevant social media postings of adverse parties and their counsel, other agents, and experts.[33] In litigation, discovery requests should expressly include social media as sources, and discovery responses should not overlook them. Transactional practice may require review of social media both informally by investigation and formally by including social media in due diligence requests. In conducting such investigations, a lawyer should take into consideration that some social media networks automatically provide information to registered users or members about persons who access their information.[34] This is sometimes referred to as a digital footprint.

#### 1. Media of Represented Persons

Rule 4.2[35] generally forbids communicating with represented persons without the consent of their counsel. The Rule applies to some aspects of social media investigation. A lawyer's review of a represented person's public social media postings does not violate the Rule because no communication occurs. On the other hand, requesting access to information protected by privacy settings, such as making a "friend" request to a represented person, does constitute a communication that is covered by the Rule.[36]

#### 2. Media of Unrepresented Persons

Rule 4.3[37] governs lawyer contacts with unrepresented persons, including when they are adverse parties. This Rule also applies to social media investigation. As with Rule 4.2, review of public postings of an unrepresented person does not implicate the Rule because it does not constitute a communication. On the other hand, requesting access to information protected by privacy settings would trigger the requirements of Rule 4.3(b). Rules 4.1 and 8.4(c) also apply to such social media communication. To comply with these three Rules, in social media communication with unrepresented persons, lawyers should identify themselves, state that they are lawyers, and identify whom they represent and the matter.[38]

#### 3. Pretexting

Rules 4.1 and 8.4 generally preclude pretexting or other misrepresentation during review of social media by a lawyer or his or her agents, including requesting access to information protected by privacy settings.[39] Unannounced review of publicly available sites usually does not involve pretexting or misrepresentation.[40]

#### 4. Document Preservation

Competent and zealous representation under Rules 1.1 and 1.3 may require imposing on adversaries reasonable litigation holds that cover social media and pursuing spoliation remedies of adversaries who have not preserved relevant social media as required by law.[41]

#### 5. Inadvertent Disclosure

If an investigation of social media reveals inadvertent disclosure of privileged or work product protected information, a lawyer should consider whether Rule 4.4[42] or other law, rules, or orders apply.[43] This is consistent with the responsibility of a lawyer to refrain from

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[29] *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings Exchange Act, Release No. 69279, 105 SEC Docket 4327 (Apr. 2, 2013) (interpreting Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288 (Aug. 7, 2008)).

[30] *See id*. at 5 ("[I]ssuer communications through social media channels require careful Regulation FD analysis comparable to communications through more traditional channels [and] the principles outlined in the 2008 Guidance . . . apply with equal force to corporate disclosures made through social media channels.").

[31] Complaint and Decision and Order, *In Re. Sears Holdings Mgmt. Corp.*, FTC No. C-4264 (Aug. 31, 2009).

[32] Social Media: Consumer Compliance Risk Management Guidance, 78 Fed. Reg. 76,297 (Dec. 17, 2013).

[33] *See id.; see also* NYCLA Op. 745.

[34] *See, e.g.,* NYSBA Guidelines; Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("N.Y.C. Op. 2012-2"); see also N.Y. Cty. Lawyers' Ass'n Comm. On Prof'l Ethics, Formal Ethics Op. 743 (2011) ("NYCLA Op. 743").

[35] Rule 4.2(a) states:

(a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.

[36] *See, e.g.,* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 843 (2010); see also Colo. Bar Ass'n Ethics Comm., Formal Op. 127 (2015) ("Colo. Op. 127"); Ore. State Bar, Formal Op. 2013-189 ("Ore. Op. 2013-189"); San Diego Cty. Bar Ass'n Legal Ethics Comm., Op. 2011-2 ("SDCBA Op. 2011-2").

[37] Rule 4.3(a)(2) and (b) states:

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not. . . .:

(2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.

(b) 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.

[38] *See, e.g.*, Mass Bar Ass'n, Ethics Op. 2014-5; N.H. Bar Ass'n Ethics Comm., Advisory Op. 2012-13/05; *see generally* D.C. Bar Legal Ethics Op. 321 (2003). *But see* SDCBA Op. 2011-; N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2010-02; Colo. Op. 127; Ore. Op. 2013-189; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Pa. Op. 2014-300.

[39] *See, e.g.*, SDCBA Op. 2011-2; *see also* Colo. Op. 127; Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2009-02; Ore. Op. 2013-189; N.Y.C. Op. 2010-02. *See generally* D.C. Bar Legal Ethics Op. 323 (2004) (misrepresentation by government lawyers); Hope C. Todd, Speaking of Ethics: *Lies, Damn Lies: Pretexting and D.C. Rule 8.4(c)*, WASHINGTON LAWYER (Jan. 2015).

[40] The Committee does not express a view about whether pretexting can arise from site publication of terms and conditions for public access.

[41] *See, e.g.,* Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, Bus. L. Today (Am. Bar Ass'n Jan. 2014) (noting "social media content should be included in litigation-hold notices").

[42] Rule 4.4(b) states:

(b) A lawyer who receives a writing relating to the representation of a client and knows, before [reading] the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

[43] *See* D.C. Bar Legal Ethics Op. 256 (1995).

seeking information that is protected by the attorney-client privilege of another party.[44]

#### 6. Trial Evidence and Service of Process

At the time of social media investigation or later, competent and zealous representation under Rules 1.1 and 1.3 may require consideration of how social media information will be authenticated and presented as evidence at trials or hearings.[45]

In some jurisdictions, social media also may be used to effect alternative service on opposing parties.[46]

### C. Social Media of Fact Witnesses and Other Sources of Facts

All of the above considerations about investigation and use of social media of adverse parties apply to non-party sources of facts, including witnesses.

### D. Social Media of Jurors

Competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of jurors or potential jurors to discover bias or other relevant information for jury selection.[47]

Accessing public social media sites of jurors or potential jurors is not prohibited by Rule 3.5 as long as there is no communication by the lawyer with the juror in violation of Rule 3.5(b),[48] and as long as such access does not violate other applicable Rules of Professional Conduct.[49] As noted above, some social media networks automatically provide information to registered users or members about persons who access their information. In the Committee's view, such notification does not constitute a communication between the lawyer and the juror or prospective juror.

*Ex parte* communication with jurors or potential jurors is prohibited by Rule 3.5(b).[50] Because requesting access to a juror's or potential juror's private media sites involves communication with the juror, such requests would violate the Rule.[51] In addition, if a court or judge forbids access to the social media of jurors and potential jurors, then a violation of a court rule or order could raise questions under Rule 3.4(c).[52]

Review of juror or potential juror social media could reveal misconduct by the juror or others. Whether and how such misconduct must or should be disclosed to a court is beyond the scope of the Rules of Professional Conduct, except to the extent that the review has revealed information clearly establishing that a fraud has been perpetrated upon the tribunal[53] under Rule 3.3(d).[54]

### E. Social Media of Judges, Arbitrators, and Regulators

Social media of judges, arbitrators, regulators, and agencies could contain information relevant to cases and other matters in which a lawyer provides representation.

To the extent not prevented by court, agency, or professional responsibility rules, competent and zealous representation under Rules 1.1 and 1.3 may require investigation of relevant information from social media sites of decision-makers. For example, to formulate regulatory advice, a lawyer may need to review public social media of agencies and their decision-makers, while avoiding inappropriate *ex parte* communication, pretexting not authorized by law, and influence prohibited by law.

As with social media of jurors, lawyer review of public social media of judges, arbitrators, regulators, and other neutrals does not constitute communication and therefore is not an *ex parte* contact in violation of Rule 3.5, even if it occurs during the pendency of a case or matter.

The ABA and several ethics opinions have opined that judges can participate in social media, and a lawyer can be a "friend" of judges on social media sites, as long as the contacts comply with the Code of Judicial Conduct; do not undermine the judges' independence, integrity, or impartiality; and do not create an appearance of impropriety.[55] D.C. Rule 3.5(a)[56] prohibits seeking to influence a judge or other official by means prohibited by law.

When no case or proceeding involving a lawyer is pending, Rule 3.5 does not forbid the lawyer from becoming a "friend" of judges, arbitrators, regulators, or other neutrals. Nor does it forbid public or private social media communication with such persons, as long as Rule 3.5(a) is not violated.[57] When a case or matter is pending before a decision-maker, the prohibition of ex parte communication in Rule 3.5(b) applies to all communication, including by social media.[58] In such a circumstance a lawyer should consider

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[44] *See* D.C. Bar Legal Ethics Op. 287 (1998) ("[A] lawyer may not solicit information . . . that is reasonably known or which reasonably should be known to the lawyer to be protected from disclosure by statute or by an established evidentiary privilege.").

[45] *See generally, e.g., Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534 (D. Md. 2007) (Grimm, M.J.) (addressing evidence rules applicable to social media and other internet evidence).

[46] *See, e.g., Baidoo v. Blood-Dzraku*, 5 N.Y.S. 3d 709, (Sup. Ct., N.Y. Cty., 2015) and cases cited therein from the Southern District of New York, the Eastern District of Virginia and the Supreme Court of Richmond County, New York allowing alternative service by Facebook; and from the Southern District of New York, the Eastern District of Missouri, and the Supreme Court of Oklahoma not allowing such service. *See generally Christopher M. Finke, Internet Service Provided: The Movement Towards Service of Process Via Social Media*, U. Balt. L. Rev.: Issues To Watch (Nov. 12, 2015), ubaltlawreview.org/2015/11/12/the-movement-towards-service-of-process-via-social-media.

[47] For example, some courts encourage pretrial investigation of jurors to uncover juror conduct before trials begin. See, e.g., Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (en banc) (per curiam).

[48] See, e.g., NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; NYCLA Op. 743; Ore. Op. 2013-189.

[49] *Accord, e.g.,* ABA Op. 466; Pa. Op. 2014-300. *But see* NYSBA Guidelines; NYCLA Op. 743; N.Y.C. Op. 2010-2.

[50] Rule 3.5(b) states:
A lawyer shall not:
(b) Communicate ex parte with [a judge or juror] during the proceeding unless authorized to do so by law or court order.

[51] *See, e.g.,* NYSBA Guidelines; ABA Op. 466; Pa. Op. 2014-300; Ore. Op. 2013-189; NYCLA Op. 743.

[52] Rule 3.4(c) states:
A lawyer shall not:
(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.

[53] *See, e.g.,* ABA Op. 466; NYCLA Op. 743.

[54] Rule 3.3(d) states:
(d) A lawyer who receives information clearly establishing that a fraud has been perpetrated upon [a] tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

[55] American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013) ("ABA Op. 462"); *accord* N.C. State Bar, Formal Ethics Opinion 2014-8 ("N.C. Op. 2014-8") (as long as no communication occurs during the pendency of a lawyer's case before the judge); Pa. Op. 2014-300 (as long as the purpose is not to influence the judge and no ex parte communication occurs).

[56] Rule 3.5(a) states:
A lawyer shall not:
(a) Seek to influence a judge, juror, prospective juror, or other official by means prohibited by law.

[57] *See id.;* Pa. Op. 2014-300.

[58] *See, e.g.,* NYSBA Guidelines; ABA Op. 462; N.C. Op. 2014-8; *see also Youkers v. State,* 400 S.W.3d 200, 206 (Tex. App. 2013) ("[W]hile the internet and social media websites create new venues for communications, our analysis should not change because an ex parte communication occurs online or offline.").

whether to remove, at least temporarily, the decision-maker as a "friend" or other connection on social media.

**F. Lawyer Social Media**

Many lawyers and law firms have social media accounts to facilitate review of the internet presence of clients and others as discussed above. In addition, lawyers also use social media sites to comment on legal issues, cases, and matters. Although such social media postings, including about litigation, are not necessarily prohibited, the Rules impose some constraints. *See* Opinion 370, which addresses lawyers' use of social media for their own marketing and other purposes.

As with all communications by a lawyer, Rule 1.6 prohibits disclosure in social media postings of client confidences or secrets unless expressly or impliedly authorized by the client or unless another specific exception is provided by the Rules. When a client consents to social media posting related to a matter, the lawyer should be careful not to disclose, without specific client consent, attorney-client privileged information. Purposeful disclosure of privileged information could result in a subject matter waiver, and even inadvertent disclosure could result in waiver of particular communications.[59] Such care also should be taken regarding identification, financial, health, and other sensitive personal information. In addition, social media postings should not violate protective orders or confidentiality agreements.

Regarding trials and other adversary proceedings, Rule 3.6[60] prohibits statements by a lawyer, on social media or otherwise, that the lawyer knows or reasonably should know will create a serious and imminent threat of material prejudice to a proceeding. As noted above, Rule 3.5 forbids communications seeking to influence a judge, juror, prospective juror or other official by means prohibited by law or to disrupt any proceeding or tribunal. Rule 3.8(f)[61] prohibits statements by prosecutors that heighten condemnation of the accused and do not serve a legitimate law enforcement purpose.[62] All of these Rules apply to social media postings by a lawyer.

**IV. Supervision of Lawyers and Staff**

Under Rules 5.1[63] and 5.3,[64] a lawyer should take reasonable measures to ensure that any social media investigation or posting by subordinate lawyers and staff—including personal posting—conforms to the Rules of Professional Conduct, including protection of confidential client information.

**V. Conclusion**

Social media, like other technology applicable to the practice of law, will continue to change. The principles explained in this Opinion should be applied to such change to ensure continuing compliance with the Rules of Professional Conduct.

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*Opinion 372*

**Ethical Considerations in Law Firm Dissolutions**

*Introduction and Scope*

Numerous ethical obligations attach to both a law firm and its members in connection with the process of the dissolution of the firm. These obligations include, without limitation, the obligation to continue to competently, zealously and diligently represent and communicate with clients during the dissolution process; the obligation of the members of the firm, after consultation, to notify clients of the dissolution and provide clients with options under such notice; the obligation to facilitate the choice of new counsel by clients of the dissolving firm; and, the obligation to properly dispose of client files, funds and other property. As used in this Opinion, the term "dissolution" means the process of terminating the law firm's existence as a legal entity. Since dissolution of a law firm is a process and not a single event, the term is not limited to the legal or technical action which is required to terminate the existence of the firm as a legal entity under corporate, partnership, bankruptcy or other applicable law. Certain ethical obligations may apply at various points during the dissolution process itself and other ethical obligations may continue to apply after the firm has been dissolved. These ethical obligations may attach either when dissolution of the firm has been agreed to by its members or, absent such agreement, is nonetheless reasonably foreseeable. This Opinion does not address the departure of members of the firm in and of itself, even in significant numbers, absent an expectation that the firm itself will at some reasonably foreseeable time in the future be dissolved.[1]

**Applicable Rules**

- Rule 1.1 (Competence)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest; General)
- Rule 1.8(i) (Conflict of Interest; Specific Rules)
- Rule 1.9 (Conflict of Interest; Former Client)
- Rule 1.15 (Safekeeping Property)
- Rule 1.16(d) (Declining or Terminating Representation)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.4(b) (Professional Independence of a Lawyer)
- Rule 5.6(a) (Restrictions on Right to Practice)
- Rule 7.1 (Communications Concerning a Lawyer's Services)
- Rule 8.4(c) (Misconduct)

[59] *See, e.g.,* NYSBA Guidelines; D.C. Op. 256.

[60] Rule 3.6 states:
A lawyer engaged in a case being tried to a judge or jury shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of mass public communication and will create a serious and imminent threat of material prejudice to the proceeding.

[61] Rule 3.8(f) states:
(f) The prosecutor in a criminal case shall not:
Except for statements which are necessary to inform the public of the nature and extent of the prosecutor's action and which serve a legitimate law enforcement purpose, make extrajudicial comments which serve to heighten condemnation of the accused.

[62] *See, e.g., United States v. Bowen*, 799 F.3d 336 (5th Cir. 2015).

[63] Rule 5.1(b) states:
(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.

[64] Rules 5.3(b) states:
With respect to a nonlawyer employed or retained by or associated with a 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.

[1] Although the ethical considerations which arise in connection with the lateral movement of lawyers between law firms, as well as law firm mergers and acquisitions, overlap with the ethical considerations which arise in connection with law firm dissolution, this Opinion is limited to the latter. *See* D.C. Legal Ethics Op. 273 (1997).

*Inquiry*

The Committee has received numerous inquiries through the ethics helpline and otherwise related to the ethical considerations that arise in connection with law firm dissolution. Unlike jurisdictions which have a specific rule governing law firm dissolution, the D.C. ethical considerations that arise in connection with law firm dissolution are dispersed throughout the D.C. Rules of Professional Conduct. We believe that it will be helpful to members of the Bar to aggregate the ethical principles of the various applicable D.C. Rules and Opinions in one comprehensive opinion.[2]

*Discussion*

The paramount principle governing the ethical obligations of a law firm and its members in connection with the process of dissolving the firm is that the law firm and its members must continue to competently, zealously and diligently represent and communicate with the clients during the dissolution process. The Rules of Professional Conduct protect the interests of clients by codifying the responsibilities of the legal profession to the public. Thus, despite the many competing responsibilities and potential difficulties of lawyers during the dissolution process, the ethical duties to clients are paramount. The individual lawyers in the firm have an ethical duty to ensure that the matters for which they are responsible are properly handled with diligence and zeal – including completion of their matters if possible – during the dissolution of the firm.[3] Moreover, since engagement letters are typically contracts between the clients and the dissolving firm, and not the individual lawyers, the firm itself has a comparable ethical duty.[4]

**The Dissolution Process**

**Consultation**

When does the process of dissolution of a law firm begin? This question is not susceptible of a bright line test. There are myriad scenarios that lead to the ultimate decision to dissolve a firm. Numerous members of a firm may leave before the remaining partners decide to dissolve the firm. In the Committee's view, the test is: when is there a reasonable expectation that the firm will at some foreseeable time in the future cease to exist as a legal entity? This test may be met by both subjective and objective standards; i.e., the members of the firm may agree to dissolve, or, absent such agreement, a reasonable lawyer considering all of the facts and the conduct of the firm may conclude that dissolution is reasonably foreseeable.

The first step in the dissolution process might well be a decision by the members of the firm, after consultation in good faith, to dissolve the firm. However, we recognize that, in some dissolutions, such consensus and unanimity may be difficult or impossible. Thus, if good faith consultation is impossible or if the authorized members of the firm are unable to agree on dissolution, but there is a reasonable expectation that the firm will at some foreseeable time in the future cease to exist as a legal entity, then individual members of the firm should not be constrained from moving forward.

**Notice to Clients**

The next step in the dissolution process is to notify firm clients of the dissolution as soon as practicable.[5] Although the timing of notice of the firm's dissolution may not be susceptible of precise determination, the ethical mandate is that the notice to clients be *timely*. Specifically, if after the firm dissolves the lawyer will no longer represent the client, Rule 1.16 (d) requires the lawyer to "take timely steps to the extent reasonably practicable to protect the client's interests, including giving reasonable notice to the client, allowing time for the client to employ other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fees or expenses that has not been earned or incurred."[6] Even if the lawyer's continued representation beyond dissolution is anticipated or unknown, under Rule 1.4, the notice should be sent early enough so that, upon receipt by the client, the client has sufficient time to make an informed decision regarding the impact of the firm's dissolution on the client's matter(s) and the client's representation generally.[7]

ABA Formal Opinion 99-14 (1999) concludes that, once the members of a firm agree to dissolve, notification to the clients "can be accomplished by the [responsible] lawyer herself, the responsible members of the firm, or the lawyer and those members jointly." ABA Opinion 99-14 does, however, state that "far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients."

Florida Rule 4-5.8 and Virginia Rule 5.8 specifically govern the dissolution of a law firm in those jurisdictions. Under both jurisdictions' Rules, the lawyers of the dissolving firm may not unilaterally contact clients of the firm unless authorized members of the firm have conferred or attempted to confer and have been unable to agree on a method to provide notice to clients. If no method to provide notice to clients can be agreed upon, the unilateral notice from individual members of the dissolving firm must provide options to the clients that they may choose to be represented by any member of the dissolving firm, other lawyers, or other law firms. If a client of a dissolving law firm fails to advise the lawyers of the client's intention with respect to who is to provide future legal representation, the client is deemed to remain a client of the lawyer who is primarily responsible for representation of the client on behalf of the firm until the client advises otherwise.[8]

In the absence of a specific governing rule in the District of Columbia, and after reviewing the Virginia and Florida Rules, ABA Formal Opinion 99-14, and applicable authority in other jurisdictions, this Opinion provides guidance to members

[2] This Committee does not opine on questions of law outside of the D.C. Rules of Professional Conduct. The ethical questions presented in this inquiry, however, may require consideration of the substantive law that may arise and apply in the context of law firm dissolution, including without limitation the law governing bankruptcy, partnerships, corporations and other business entities, contracts, agency, fiduciary duty, real or personal property, tort, trade secrets and unfair competition. Members of the dissolving firm, and the dissolving firm itself, should consider these as appropriate. Nor, for the most part, does this Opinion address the myriad practical, financial and business considerations related to law firm dissolution.

[3] Rules 1.1 and 1.3.

[4] *Id*.; *see also* Rule 5.1.

[5] See Opinion 273, in which we lay out in some detail the specifics of the required notice to clients with respect to lateral moves. The same principles should generally govern notice to clients with respect to law firm dissolution.

[6] Rule 1.16(d).

[7] Rule 1.4(a) and 1.4(b).

[8] See Florida Rule of Prof. Conduct 4-5.8 and Virginia Rule of Prof. Conduct 5.8. For purposes of the notice required by the Virginia Rule, "client" refers to clients for whose active matters the lawyer has primary responsibility. This excludes closed matters and includes associates as well as partners.

of the D.C. Bar on the best practices for law firm dissolution, including notice to clients.[9]

Joint notice by all members of the firm to the clients is preferred.[10] However, if members of the firm cannot agree to provide notice to the clients, or the terms thereof, then in our view an individual lawyer or group of lawyers in the firm may give unilateral notice to the clients. The lawyer in the firm who had the most significant contact with the particular client, if practicable, should give such unilateral notice. Only if this is not practicable should unilateral notice by other lawyers in the firm be given. This resolution addresses the tension between joint notice by members of the firm to clients about the firm's dissolution and solicitation of the clients by individual lawyers of the dissolving firm for their new firm(s) and also enables lawyers to fulfill their ethical obligations to timely communicate information necessary to allow clients to make informed decisions about their legal representations.

Whether the notice is given jointly by all of the authorized members of the dissolving law firm or unilaterally by individual lawyers in the dissolving law firm, it cannot contain false or misleading statements.[11] It should provide the options to the clients to choose representation by any member of the dissolving firm, representation by any other lawyer, or representation by any other law firm. The notice may not restrict any lawyer's right to practice.[12]

In the Committee's view, the notice should further provide that, if the client does not respond to the notice and choose any of these three options, the client shall be deemed to remain a client of the lawyer who has been primarily responsible for providing legal services to the client until the client advises otherwise. We appreciate that identifying the lawyer in the firm who is "primarily responsible" for providing legal services to the client is not always an easy endeavor and should be determined on a case-by-case basis depending upon the particular facts and circumstances of the representation. For example, a client's overall relationship partner may not be the lead litigation counsel in a particular litigation matter for the client; nonetheless, the lead litigation counsel may well be the lawyer "primarily responsible" for providing legal services to the client in that litigation matter.

**Which Clients Receive Notice?**

All clients affected by the firm's dissolution should be notified. This always includes current clients with active matters. In our view, as a general rule notice need not be given to all former clients whose matters have been closed. However, notice should be given to former clients even if their matters are inactive and their files are closed if the firm is holding files and other property for the presumptive five year period after a matter is closed or if the firm is holding files or other property of intrinsic value, such as an original will or stock certificates.[13] Such clients are clearly affected by the firm's dissolution and should be notified. (See "Client Files" and "Client Trust Funds and Other Property," below, with respect to the ethical requirements for the return of the clients' files, funds and other property.) Moreover, notice to former clients is certainly permissible, although not required.[14]

**Options for Client to Choose Counsel under Notice**

A key principle governing the ethical obligations of a law firm and its members in connection with the process of dissolving the firm is that the clients do not belong to either the law firm or its members. It is axiomatic that a client has the right to retain and discharge a lawyer at will.[15] When a law firm dissolves, therefore, the client may also discharge counsel and either hire new counsel or not. None of the individual members of the dissolving firm "own" the client. Nor does the dissolving law firm itself, as a separate legal entity, "own" the client.[16] It follows, therefore, that as a general rule a client's right to choose counsel may not be impaired by the dissolution of a law firm. The client may choose to continue to be represented by a member of the dissolving firm at her new firm or to be represented by another lawyer or by another firm.

There may be other facts and circumstances, however, which give rise to exceptions to the general rule that the client has the right to choose counsel, and require the consideration of alternatives. For example, a lawyer's former law firm is dissolving and she is joining another law firm. She represents a client at the former law firm who wishes her to continue the representation at the new law firm. However, the new law firm represents another client whose interests are adverse to those of her client, which creates a conflict of interest under Rule 1.7. The conflict of interest cannot be resolved by client consent or otherwise. The lawyer cannot continue to represent the client at the new firm if such representation will result in a violation of the Rules of Professional Conduct or other law.[17] Thus, other ethical obligations may preclude the lawyer's ability to continue to represent her client, even if she and the client wish her to continue the representation.[18]

As another example, a lawyer's former law firm is dissolving and she is joining another law firm that does not have the support and resources with respect to the client's matters as were available at the dissolving firm. This could limit the lawyer's ability to adequately represent her client at the new law firm. This could raise an issue of competent representation under Rule 1.1.

Conversely, there may be situations where the lawyer from the dissolving

[9] This builds on the guidance provided in Opinion 273. However, we caution lawyers in dissolving firms that every notice should be tailored to the particular facts and circumstances surrounding the firm's dissolution, which can be quite varied. There is no "one size fits all" formula for notice to clients when a law firm dissolves.

[10] The ethics opinions of other jurisdictions vary as to whether joint notice, individual notice, or both, is required. *See, e.g.*, Cal. Bar Ethics Op. No. 1985-86 (interpreting the California Rule to require *both* the departing lawyer *and* the law firm to provide notice to the client).

[11] Rules 7.1(a) and 8.4(c).

[12] Rule 5.6(a).

[13] *See* Rule 1.15(a), Rule 1.15(c), Rule 1.16(d), D.C. Legal Ethics Op. 283 (1998).

[14] For example, a lawyer who has had a long and deep relationship with a client, but who has no active matters and is currently holding no client files or other property, may nevertheless consider notifying the former client of her firm's dissolution, as the client may nonetheless view her as its lawyer.

[15] A client has the right to discharge the lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Rule 1.16(a)(3); Rule 1.16, comment [4].

[16] In this respect, the Committee is aware of Restatement (3d) of the Law Governing Lawyers, §9(3), comment i, which suggests that clients belong to the law firm and not to the individual lawyer. The Committee disagrees with any characterization of clients as property of the law firm.

[17] Rule 1.16(a)(1).

[18] If a conflict of interest arises under Rule 1.7(b)(1) by virtue of dissolution of a lawyer's firm and her joining a new firm, and the clients do not consent under Rule 1.7(c), a lawyer should consider whether that conflict was or was not reasonably foreseeable under Rule 1.7(d), and thus whether she may or may not continue to represent the client under the "thrust upon" exception to the conflict rule.

firm wishes to withdraw from representation of her client, but there are limitations on her right to do so. As a general rule, a lawyer may withdraw from representing a client after her firm dissolves if the withdrawal can be accomplished without material adverse effect on the interests of the client.[19] However, the lawyer may be compelled to represent the client at her new firm. For example, the lawyer may notify a court, administrative agency or other tribunal that, upon dissolution of her law firm, she wishes to terminate representation of her client at her new firm, but that tribunal may order the lawyer to continue to represent her client.[20]

Thus, depending upon the specifics of the lawyer-client relationship and the particular facts and circumstances of each case, a lawyer in a dissolving firm should carefully consider whether she has an ethical obligation which precludes or limits her ability to continue to represent her client diligently, zealously and competently at her new firm.

A corollary to the client's right to choose counsel is the lawyer's right, after dissolution of her former law firm, to form, or move to, a new law firm. As a general rule, any agreement restricting the right of lawyers in a law firm to practice after the firm dissolves is unethical.[21] Such an agreement not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer.[22] A long line of Opinions of this Committee (most recently Opinion 368, Lawyer Employment Agreements – Restrictions on Departing Lawyer Who Competes with Former Firm (2015)) has disapproved various restrictions on the mobility of lawyers as a matter of public policy. Underlying each of these Opinions is the intent to preserve clients' access to lawyers who, because of their background and experience, might be the best available talent to represent them.[23] Of course, the ethical obligations discussed above which may limit the client's ability to choose counsel may also limit the lawyer's ability to choose a new law firm.

**Notice to Third Parties**

In addition to the client, notice must be given to certain third parties. Opposing counsel and the tribunal must be notified.[24] In addition, governmental agencies and other non-adjudicative administrative entities before which lawyers of the dissolving firm are appearing may require notification under their own rules and procedures, which are beyond the scope of this Opinion.[25]

**Client Files**

As an ethical matter, at the termination of a representation, upon request of the client, the lawyer must timely surrender the entire file.[26] Such files may be made available for the client to pick up, delivered to the client, delivered to the client's new (or continuing) counsel, destroyed, or delivered to some other person designated by the client. If the files are not necessary to protect the client's interests or otherwise needed for continued representation, the costs of delivery, storage and review of the files may be charged to the client.[27] The lawyer may make a copy of the files at his own cost.[28]

The question often arises as to whether such files may be withheld if the client has not fulfilled his obligation to pay the firm's earned fees and expenses. The District of Columbia permits lawyers to assert and enforce retaining liens against the property of clients for unpaid fees, as a matter of substantive law on which the ethics rules take no position.[29] Rule 1.8(i) provides a narrow exception to Rule 1.16(d): as to files, the lawyer may retain only that portion of the file which constitutes the lawyer's own work product if the client has not paid for the work. Even this narrow exception does not apply if the client has become unable to pay or if withholding the work product might irreparably harm the client's interest. Opinion 250 (1994) states that "retaining liens on client files are now strongly disfavored in the District of Columbia, that the work product exception permitting such liens should be construed narrowly, and that a lawyer should assert a retaining lien only where the exception is clearly applicable and where the lawyer's financial interests clearly outweigh the adversely affected interests of his former client." We stress that a lawyer who relies on the narrow exception of Rule 1.8(i) to withhold any part of a client file does so at his own peril.

For client files maintained solely in electronic form, see Opinion 357 (2010). Absent an agreement to the contrary, a lawyer must comply with a reasonable request by a client to convert electronic records into paper form. In most cases, the client should bear the cost of such conversion, but in certain circumstances the lawyer may be required to bear the cost.

As discussed above, client files are considered "other property" of the client under Rule 1.15(a). Under that Rule and Opinion 283, such files shall be retained for a period of five years after termination of the representation, and under Rule 1.15(c) shall be "promptly delivered" to the client upon direction.

**Client Trust Funds and Other Property**

Under Rule 1.15(a), client trust funds, including retainers, are to be held in separate trust accounts maintained in accordance with Rule 1.15(b), absent other agreement with the client.[30] Other client property is also to be held separately from the lawyer's own property. Under Rule 1.15(c), upon request by the client, the lawyer shall promptly "deliver" to the client any funds or other property that the client is entitled to receive. Under Rule 1.15(e), Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs upon termination of the lawyer's representation.

If, after reasonable but unsuccessful attempts to locate a missing client or a former client for whom a dissolving firm is holding trust funds or other property,

[19] Rule 1.16(b).

[20] Rule 1.16(c).

[21] Rule 5.6(a).

[22] Rule 5.6, comment [1].

[23] *See, e.g.*, D.C. Legal Ethics Op. 335 (2006).

[24] Rule 1.16(c).

[25] As a practical matter notice of the firm's dissolution should also be given to mandatory state bar associations to which lawyers of the dissolving firm belong, other voluntary professional organizations of which it is a member, the firm's malpractice carrier, its accountant, taxing authorities, its bank and other creditors. The dissolving firm may also be required to file notice of dissolution with the D.C. Department of Consumer and Regulatory Affairs.

[26] *See* Rules 1.16(d) and 1.15(c); *see also In re Thai*, 987 A.2d 428, 430 (2009) and D.C. Legal Ethics Ops. 250 (1994), 283 (1998), 333 (2005) and 357 (2010). Opinion 333 reaffirms the District's "entire file" approach; *i.e.*, the file includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer.

[27] Opinion 283.

[28] *See* D.C. Legal Ethics Op. 250 (1994).

[29] Rule 1.8, comments [16], [17], [18] and [19]

[30] Rule 1.15(b) clarifies trust funds which must be held in a D.C. IOLTA account. Rule 1.15(e) provides that "advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement."

the client cannot be located, the firm should consider the funds or other property abandoned and, if the circumstances fall within the District of Columbia's Unclaimed Property Act, dispose of the funds or property as directed by that statute.[31]

**Information about the Firm**

The dissolving law firm should review its website, firm listings and directories to ensure compliance with Rule 7.1. In light of the pending dissolution, no information can be contained therein which is false or misleading. A communication is false or misleading if either it contains a material misrepresentation of fact, or omission of a fact necessary to make the statement considered as a whole not materially misleading, or it contains an assertion about the firm or its services that cannot be substantiated.[32] For example, the website should be updated for a transitional period to disclose the firm's dissolution, to provide contact information for the dissolved firm's former lawyers, and to inform clients how to obtain their files.

If the firm is going to use its firm name and letterhead during the transition period, the letterhead must be updated to accurately reflect the dissolution of the firm and the departure of the firm's lawyers.

**Sole Practitioners**

The Rules recognize the heightened risk to clients upon the dissolution of a solo practice, where such dissolution is due to the death, disappearance or disability of the sole practitioner. In order to protect the interests of a sole practitioner, and ensure continuity of representation of such clients, each sole practitioner should prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client that the lawyer is no longer engaged in the practice of law, and determine whether there is a need for immediate protective action.[33] The D.C. Bar Practice Management Advisory Service provides confidential consultation services and a checklist for closing a law office which may be particularly helpful to sole practitioners.[34]

If such a succession plan has not been prepared by a sole practitioner, there is a procedure for appointment of counsel by the District of Columbia Court of Appeals, on motion of the Board on Professional Responsibility, if a sole practitioner dies, disappears, or is suspended for incapacity or disability and no partner, associate or other responsible attorney is capable of conducting the attorney's affairs.[35]

**Dissolution of a Section 5.4(b) Law Firm**

A unique issue in the District of Columbia arises upon the dissolution of a law firm that includes both lawyer partners and non-lawyer partners under Rule 5.4(b).

The partnership or other organizational document of the firm may specify the methodology to be followed when such a firm dissolves. In any event, the non-lawyer partners of the firm have ethical duties coextensive with those of the lawyer partners of the firm with respect to clients. Thus, the ethical duties of lawyers of dissolving firms discussed above would apply equally to non-lawyer partners of a Rule 5.4(b) firm.[36]

The non-lawyer partners of the firm and the lawyer partners of the firm have an initial duty to provide notice of the firm's dissolution to the other lawyers in the firm and thereafter to the clients. If good faith efforts to agree upon such a notice to the clients are unsuccessful, the individual lawyers and non-lawyers in the firm may unilaterally notify clients of the firm of the firm's dissolution, subject to the constraints discussed earlier in this Opinion.

If a Rule 5.4(b) firm dissolves and the lawyer partner who was providing legal services to the client in tandem with the non-lawyer partner's provision of non-legal services no longer wishes to provide legal services to the client, and there is no other lawyer who is capable of providing legal services to the client, the lawyer partner may have an ethical duty to continue to provide legal services to the client consistent with Rule 1.16 because the non-lawyer partner cannot provide legal services to the client.

**Death, Incompetence or Disability of Lawyer**

Where dissolution of a firm is incident to the death, disability or incompetence of a partner in the firm, so that the partner cannot give notice of dissolution to the clients, one of the surviving, competent lawyers should, in addition to any other ethical duties she may have, provide such notice to clients. This could include a partner, co-counsel, associate or otherwise affiliated lawyer.

*Conclusion*

A lawyer has numerous ethical obligations in connection with the dissolution of his law practice or a law firm of which he is a member. A lawyer must consider the obligations to continue to diligently represent and communicate with clients during the dissolution period, to notify clients of the dissolution, to facilitate the clients' choice of counsel, and to properly dispose of client files, funds or other property. There are additional considerations for the dissolution of Rule 5.4(b) firms and solo practices.

**Published March 2017**

*Opinion 373*

## Court-ordered Representation of Clients in Criminal Domestic Violence Matters Who are Party to Parallel Civil Protection Order Proceedings

*Inquiry*

The D.C. Bar Legal Ethics Committee was informed that attorneys appointed pursuant to the District of Columbia's Criminal Justice Act, 11 D.C. Code, §§ 2601 *et seq*. (2012) (the "CJA"), often represent individual defendants in criminal domestic violence matters who are also respondents in parallel Civil Protection Order ("CPO") proceedings. Typically, these respondents appear in the CPO proceeding *pro se* because there exists no statutory entitlement to a CJA attorney in civil proceedings. Recognizing that criminal domestic violence matters and parallel CPO proceedings often share a common factual and legal nexus, CJA attorneys often attempt to guide their clients in the CPO hearings without entering an appearance in these matters or otherwise undertaking representation of the respondents in these civil proceedings.

[31] *See* Rule 1.15(c) and D.C. Legal Ethics Op. 359 (2011). Generally, such funds escheat to the Mayor.

[32] Rule 7.1(a).

[33] Rule 1.3, comment [5].

[34] http://www.dcbar.org/bar-resources/practice-management-advisory-service/

[35] D.C. App. R. XI, § 15(a).

[36] Rule 5.4(b)(2).

While refraining from entering an appearance in civil proceedings, CJA attorneys may nevertheless attempt to influence portions of these CPO hearings to protect the respondents' rights in the parallel criminal matters. These attempts often involve efforts by CJA attorneys to direct what their clients say or even speaking in court themselves at the CPO hearings.

These facts raise several questions: Are court-appointed CJA attorneys representing clients in criminal domestic violence matters ethically required to enter appearances in parallel CPO proceedings? Relatedly, do the Rules of Professional Conduct allow CJA attorneys—who choose not to enter appearances—to nevertheless guide or influence their clients in the parallel CPO proceedings?[1]

### Applicable Rules

- Rule 1.1(a) (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.3(a) (Diligence and Zeal)
- Rule 1.4(b) (Communication)
- Rule 1.5(b) (Fees)
- Rule 4.2(a) (Communication between Lawyer and Person Represented by Counsel)

*Factual Overview*

### A. Entitlement to Counsel Under the CJA

Indigent persons charged with criminal offenses under District of Columbia law are appointed counsel pursuant to the CJA. *See* 11 D.C. Code, §2601; *Scott v. Illinois*, 440 U.S. 367 (1979) (explaining that an indigent defendant in criminal proceedings has a right to counsel under the Sixth Amendment of the United States Constitution). The underlying purpose of the CJA is "to insure that persons charged with crimes in the District of Columbia, who are financially unable to obtain an adequate defense ... are provided with legal representation."[2] The CJA mandates appointment of counsel for any person charged with a felony, misdemeanor, or other offense involving the possibility of imprisonment in the District of Columbia who cannot afford representation.[3]

The CJA does not provide for appointment of counsel for defendants in civil proceedings, even those that may have a factual overlap with criminal matters in which a CJA attorney is appointed. While the CJA refers to "cases covered by this Act where the appointment of counsel is discretionary," it does not define such cases. 11 D.C. Code, § 2602.

The District of Columbia Court of Appeals establishes specific standards of performance for attorneys appointed pursuant to the CJA.[4] These obligations generally provide that a CJA attorney must "continue to represent the person throughout the proceedings, including disposition of the appeal and of any post-decision proceedings that appointed counsel may elect to initiate … Motions to withdraw are disfavored absent a true conflict between counsel and the client."[5] In addition, the Criminal Division of the Superior Court outlines practice standards to ensure CJA attorneys provide competent representation to individuals in criminal cases,[6] and recommends these lawyers "counsel[] clients concerning matters related to their case."[7]

### B. The CPO and its Relationship with Associated Criminal Proceedings

The Domestic Violence Unit of the Superior Court handles misdemeanors in which the defendant and complainant have an intra-family relationship, as defined by the D.C. Intrafamily Offenses Act, D.C. Code §§ 16-1001 *et seq.* (2014). The Unit also handles requests for CPOs by victims of domestic violence. The CPO is a court order issued in a civil proceeding against the perpetrator of any domestic offense misdemeanor or felony. The CPO is issued when a judge determines that the respondent-perpetrator, more likely than not, committed a crime against the petitioner-victim. Among other things, the CPO prohibits the respondent-perpetrator from coming into physical proximity of the petitioner-victim.[8]

Violation of a Temporary Protection Order ("TPO") or final CPO constitutes criminal contempt, a misdemeanor punishable by a fine, imprisonment for not more than 180 days, or both.[9] Also, if the respondent-perpetrator committed a crime while violating the CPO, that conduct constitutes a separate offense which is separately punishable.

The domestic violence incident underlying the request for a CPO is often the subject of a related criminal proceeding. The District of Columbia has a mandatory arrest policy in cases of domestic violence.[10] The U.S. Attorney's Office for the District of Columbia will typically file criminal charges against a respondent-perpetrator if that individual was arrested for domestic violence. Criminal proceedings arising from the domestic violence incident can occur either before or after the hearing on a temporary protection order or final CPO.

The Public Defender Service for the District of Columbia recognizes that

[1] This Committee does not opine on questions of law outside of the Rules of Professional Conduct. The ethical questions presented in this inquiry, however, demand a contextual understanding of substantive domestic violence law and proceedings in which that law is applied. The accompanying discussion of criminal and civil domestic violence law reflects the Committee's understanding of relevant law for the sole purpose of analyzing the issues presented under the Rules of Professional Conduct.

[2] H.R. Rep. No. 93-1172, 93rd Cong., 2d Sess. 7 (1974).

[3] 11 D.C. Code, § 2601. The federal Criminal Justice Act, 18 U.SC. § 3006A (2016) (the "FCJA"), requires each federal District Court to establish a plan to furnish representation to indigent persons charged with federal crimes, noting that this plan may provide for representation of financially eligible persons involved in "ancillary matters appropriate to the proceedings [for which an FCJA attorney is required]." 18 U.SC. § 3006A(c). The United States Judicial Conference—the congressionally created policy-making arm of federal courts—has promulgated a comprehensive regulatory framework for administering the FCJA in its *Guide to Judiciary Policy*, Vol. 7, Part A (*available online* at http://www.uscourts.gov/rules-policies/judiciary-policies//criminal-justice-act-cja-guidelines) (last visited Sept. 15, 2016).

Section 210.20.30(c) of the *Guide to Judiciary Policy* provides that "[i]n determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary … (2) to contribute in some significant way to the defense of the principal criminal charge; [or] (3) to aid in preparation for the trial or disposition of the principal criminal charge." No comparable District of Columbia guidance exists in connection with administration of its CJA.

[4] *See* D.C. Court of Appeals, *Obligations of Counsel* (2008) (http://www.dccourts.gov/internet/documents/cja_obligations.pdf).

[5] *Id.* at ¶ 4.

[6] *Attorney Practice Standards for Criminal Defense Representation* (2010) ["*Practice Standards*"]

[7] *Practice Standards*, B-2.

[8] *See generally* D.C. Intrafamily Offenses Act, D.C. Code §§ 16-1001—1059 (2014).

[9] *See* Rule 12, D.C. Superior Court Family Division Rules on Intra-Family Proceedings; *see also* D.C. Code § 16-1005(f). A TPO is a temporary measure—lasting up to fourteen (14) days—issued by a judicial officer to provide immediate protective relief enjoining the respondent from having contact with the petitioner until a hearing on the CPO. S*ee* D.C. Code § 16-1004.

[10] *See* District of Columbia Prevention of Domestic Violence Amendment Act of 1990, D.C. § 16-1031 *et seq*.

attorneys representing individual defendants in a criminal domestic violence matter may have involvement in a parallel CPO hearing:

> Defense attorneys representing clients charged in domestic violence cases may find themselves embroiled in litigation they did not expect. In addition to representing a client in a criminal case stemming from an intra-family offense, ***the attorney may need to represent that client in civil protection order litigation involving any number of family law issues, or in a criminal contempt trial***.[11]

Typically, CPO hearings are set within two weeks of the petition requesting temporary relief, and this civil proceeding generally occurs before the related criminal trial.[12]

In *Cloutterbuck v. Cloutterbuck*, the District of Columbia Court of Appeals held that CPO proceedings are, by definition, civil in nature, and that indigent respondents in such proceedings are not entitled to counsel appointed under the CJA.[13] Recognizing that subsequent violation of an issued CPO could lead to imprisonment, the *Cloutterbuck* court nevertheless rejected application of the CJA to the CPO hearing: "We find that the possibility of imprisonment as a punishment for eventual violation of a CPO is too remote as of the time the order is entered to trigger a right to counsel. Furthermore, that outcome is contingent upon respondent's own subsequent behavior."[14]

*Analysis*

**A. The Obligation to Provide Clearly Defined, Competent, and Zealous Representation**

CJA attorneys are appointed by the court and the scope of representation is defined by that judicial appointment. Rules of Professional Conduct governing scope and competence provide guidance on the ethical obligations of CJA attorneys handling criminal domestic violence matters associated with parallel CPO proceedings.

When a lawyer establishes a new attorney-client relationship, Rule 1.5(b) requires, inter alia, that the lawyer communicate in writing the scope of representation to the client. Comment [4] to Rule 1.2 further explains that pursuant to such requirement it is also "generally prudent to explain in writing *any limits* on the objectives or scope of services."[15] Finally, Rule 1.4(b) also requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Read together, these provisions mandate that the CJA lawyer explain clearly to the client the scope of representation, specifying the particular proceeding in which the lawyer is representing the client. In addition, when the lawyer is aware that certain matters or proceedings are excluded from the scope of representation (either by agreement or through court appointment), the lawyer should inform the client accordingly.[16]

**B. Competency in Criminal Domestic Violence Matters Associated with Parallel CPO Hearings**

1. Relationship Between Domestic Violence Criminal Matters and Parallel CPO Hearings

Criminal domestic violence matters associated with parallel CPO hearings typically share a common factual and legal nexus. For example, testimony from the CPO hearing will likely involve the same facts and circumstances at issue in the criminal domestic violence matter; the criminal defendant's ability to invoke her Fifth Amendment rights in one proceeding may be influenced by how and whether she testifies in the other proceeding; both matters may share common discovery materials; and the disposition of the CPO proceeding could impact release status or plea negotiations in the criminal proceeding. For these reasons, the D.C. Public Defender Service notes that defense lawyers handling criminal domestic violence matters may find themselves "embroiled" in related civil litigation.[17]

Similarly, the D.C. Bar Legal Ethics Committee previously recognized the close nexus between criminal domestic violence matters and parallel CPO proceedings. In D.C. Ethics Opinion 263, the Committee concluded that a CPO modification proceeding and an associated criminal contempt matter constituted the same "matter" for purposes of applying the Rule 4.2 prohibition on communications with represented parties:

> While litigation may have many facets to it, those facets typically have at least some facts, evidence and legal principles in common. Activities or developments in one facet of a case rarely fail to have implications in others. That circumstance is well-illustrated in the Inquiry before us, where the core question in a CPO modification motion and in a criminal contempt motion is the same: what, if anything, did the respondent do in violation of the CPO.[18]

While Opinion 263 pertained to communications, its conclusions affirm the existence of a close factual and legal nexus between civil CPO hearings and associated criminal domestic violence matters. This nexus implicates standards of competent representation.

Rule 1.1(a) requires a lawyer to provide competent representation to a client and states that such "representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Comment [5] to Rule 1.1 explains that competence includes "adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs." Rule 1.3(a) mandates that a "lawyer shall represent a client zealously and diligently within the bounds of law."

Elements of competent and zealous representation are fact-and matter-specific, involving contextual analysis of the governing legal regime and underlying details of specific cases. While there is no uniform standard to determine what constitutes competent or zealous representation in criminal domestic violence matters associated with parallel CPO hearings, the close legal and factual relationship between the two proceedings strongly suggests that CJA attorneys appointed in the criminal matter should remain mindful of and attentive to the parallel civil proceeding.

Thus, for example, the CJA attorney should seriously consider informing her client that developments in the civil proceeding may have case-dispositive implications for the client's criminal domestic violence matter. The CJA attorney should

[11] Public Defender Service, Criminal Practice Institute Manual at 40.1 (2015) ["CPI Manual"] (emphasis added).The CPI Manual is issued by the Public Defender Service for the District of Columbia as a comprehensive primer on the criminal law in the District of Columbia.

[12] *See* CPI Manual at 40.12.

[13] 556 A.2d 1082 (D.C. 1989).

[14] *Id*. at 1084.

[15] Rule 1.2, Comment [4]

[16] *See also* D.C. Legal Ethics Op. 330 (July 2005)

[17] *See* CPI Manual at 40.1.

[18] D.C. Legal Ethics Op. 263 (January 1996).

also seriously consider advising her client on how evidence and testimony presented in the CPO hearing will likely have consequences in the criminal matter. Moreover, the CJA attorney should herself strongly consider the importance of attending the CPO hearing—even if she does not enter an appearance—so she might stay apprised of developments and remain available to offer guidance to her client, if the facts and circumstances of the individual case so require.[19] And, critically, as discussed above, the CJA attorney should explain to her client that her court-appointed representation extends only to the criminal matter, and not any associated CPO proceeding notwithstanding the common facts and circumstances underlying both.[20]

2. Propriety of Counseling a Client in the CPO Proceeding Without Entering an Appearance

If CJA counsel appointed to represent a defendant in a criminal proceeding determines that her participation in the parallel CPO proceeding is unnecessary, she should ensure the client is informed of this delineation. Moreover, the CJA counsel should remain vigilant that exclusion of the CPO matter does not bar the provision of competent client service.[21] However, even without entering an appearance in the parallel CPO proceeding, the CJA attorney may nevertheless provide guidance to her client in the civil matter.

In D.C. Legal Ethics Opinion 330, the Committee concluded that the provision of unbundled legal services was ethically permissible under the D.C. Rules. (Generally, 'unbundling' refers to the separation of the legal tasks typically performed together into discrete components, only some of which the client contracts with the lawyer to provide.). The analytical underpinning of LEO 330 is that Rule 1.2 expressly provides that a lawyer and client may agree to the provision of legal services short of a full representation.[22] The context in which the limitations of the lawyer's services arise in this particular inquiry are distinct, however, because the limitations on the scope of the lawyer's representation are largely defined by the court's appointment of the CJA attorney in the criminal matter. That is to say, the lawyer has been appointed by the court to represent the client in the criminal matter only, and any duties the lawyer has in connection with the civil case arise solely from her obligation to provide competent, diligent, and zealous representation in the criminal matter. In this sense, the CJA attorney is neither limiting the scope of her representation in the criminal matter nor engaging in the provision of limited scope services in connection with the CPO. Rather, she is keeping abreast of other significant legal matters involving her client that may impact the matter in which she represents her client.

The Committee also considered, and rejected, the possibility that an attorney's presence at a CPO hearing when such attorney has not entered a formal appearance, but seems to be providing assistance to a litigant, could be considered "misleading" to the court. In Opinion 330, the Committee concluded that nothing in the D.C. Rules requires lawyers to notify the court of their involvement in a matter outside of entering an appearance, even when they are "ghostwriting" briefs and clients appear *pro se* in the matters in which the briefs are filed:

> After carefully examining the D.C. Rules and opinions from various jurisdictions, we conclude that nothing in the D.C. Rules of Professional Conduct requires attorneys who assist *pro se* litigants in preparing court papers to place their names on these documents or otherwise disclose their involvement. . . . Some opponents of the practice of "ghostwriting" court documents, as it is frequently called, argue that the chief sin of this practice is that it misleads the court into thinking a litigant is proceeding without legal assistance and thus granting special solicitude to the litigant. This, however, is an issue for the courts to identify if they perceive a problem with the practice.

We reach a similar conclusion here. Although the court may well prefer the attorney to enter an appearance in the CPO proceeding, it is not unethical (by virtue of its being misleading) for an attorney to choose not to do so. Should the court inquire of the lawyer, the lawyer must respond that he or she represents the litigant in a related criminal matter.

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This opinion neither mandates nor discourages a CJA attorney appointed in a criminal domestic violence matter from entering an appearance in a parallel CPO proceeding. However, if the CJA attorney chooses not to enter an appearance in the CPO proceeding, she should explain clearly to her client that the CJA authorizes representation only in the criminal matter, and not any related civil proceeding such as the CPO hearing. In addition, the CJA attorney should seriously consider advising her client on the implications that testimony and evidence adduced in the civil proceeding might have on the criminal domestic violence matter. Moreover, the CJA attorney may well deem it necessary to attend the CPO hearing and provide guidance to her client to ensure competent representation in the criminal domestic violence matter.

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*Opinion 374*

## Ethical Obligations Regarding Prospective Client Information

*Introduction*

A lawyer's ethical obligations to prospective clients are set forth in Rule 1.18 of the D.C. Rules of Professional Conduct ("the D.C. Rules"). On its face,

[19] *See* Rule 1.1(a); *Practice Standards*, B-2 (recommending CJA attorneys counsel clients concerning matters related to their case).

[20] *See* D.C. Rule 1.4(b). As detailed above, in certain circumstances, zealous and competent representation may very well require CJA counsel to attend the CPO hearing and offer advice to her client during that hearing. While the D.C. Bar Legal Ethics Committee cannot address the compensation of CJA counsel for tasks involving the CPO hearing, the close legal and factual nexus between this civil proceeding and the criminal domestic violence matter strongly suggests that the D.C. Superior Court might consider authorizing payment for work closely associated with providing zealous and competent representation in a Court-appointed matter. *Cf. Guide to Judiciary Policy*, § 210.20.30(c) (explaining that, in connection with the FCJA, federal district courts should consider a variety of factors in determining whether to authorize compensation in matters ancillary to that for which counsel was appointed: "[T]he court should consider whether such representation is reasonably necessary (1) to protect a constitutional right; (2) to contribute to some significant way to the defense of the principal criminal charge; [or] (3) to aid in preparation for the trial or disposition of the principal criminal charge . . . ").

[21] *See* Rules 1.1, Rule 1.2, Comment [5], and D.C. Rule 1.5(b).

[22] *See* Rule 1.2(c).

[1] A "prospective client" is "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." D.C. R. Prof'l Conduct 1.18(a). As the commentary to Rule 1.18 explains, however, "[a] person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' . . . ." D.C. R. Prof'l Conduct 1.18 cmt. [3].

Rule 1.18 imposes only two obligations on a lawyer. First, regardless of whether a client-lawyer relationship ensues, Rule 1.18(b) prohibits "a lawyer who has had discussions with a prospective client" from "us[ing] or reveal[ing] information learned in the consultation, except as permitted by Rule 1.6." Because "the duty of confidentiality . . .attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established," a lawyer's obligations under Rule 1.6 also extend to information relating to a prospective client consultation—*e.g.*, notes regarding the lawyer's mental impressions of the prospective client or matter, legal research, or other information obtained through subsequent investigation.[2] Second, Rules 1.18(c) and (d) prohibit a lawyer from "represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received a confidence or secret from the prospective client," unless both the affected client and the prospective client have given informed consent.[3]

Where a prospective client elects not to retain the lawyer's services, or the lawyer is either unwilling or unable to represent the prospective client, two questions remain. First, what ethical obligation, if any, does a lawyer have to preserve either the information that the lawyer learned in the prospective client consultation or other information relating to the consultation? Second, what ethical obligation, if any, does a lawyer have to turn over such information to the prospective client, either at the time that the lawyer and/or prospective client decide not to form a client-lawyer relationship or thereafter?[4]

Until such time as a final decision is made regarding whether to form a client-lawyer relationship, a lawyer has an obligation under Rules 1.18 and 1.15 to safeguard property, including intangible property, entrusted to the lawyer by the prospective client. For example, in addition to tangible property, a prospective client may entrust a lawyer with certain intellectual property during a prospective client consultation that the lawyer must safeguard while evaluating whether to represent the prospective client. Once a final decision is made not to form a client-lawyer relationship, Rules 1.18 and 1.15 require the lawyer to return such property to the prospective client or otherwise dispose of it in accordance with the prospective client's instructions. In the absence of any substantive legal or contractual obligation to do so, however, the lawyer has no obligation to preserve or turn over to a prospective client information learned in or relating to a prospective client consultation—including the lawyer's notes or other research or information that the lawyer generates or obtains—in which the prospective client has no property interest.[5,6]

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information
- Rule 1.7 (Conflict of Interest: General
- Rule 1.15 (Safekeeping Property)
- Rule 1.16 (Declining or Terminating Representation)
- Rule 1.18 (Duties to Prospective Clients)
- Rule 8.4 (Misconduct)

*Discussion*

A lawyer may obtain prospective client information from an initial consultation, subsequent investigation to determine whether the lawyer is willing and able to represent the prospective client, or both. As the commentary to Rule 1.18 explains:

> It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The client may disclose such information as part of the process of determining whether the client wishes to form 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. . . .[7]

In addition, a lawyer may want to investigate the prospective client's claims or conduct preliminary legal research before forming a client-lawyer relationship. Rules 1.6 and 1.18 require a lawyer to protect the prospective client's confidences and secrets to the same extent that the lawyer must protect the confidences and secrets of a client.[8]

Under Rule 1.18(c), a lawyer or other lawyers in the lawyer's law firm may be prohibited from representing a client based on information that a prospective client has disclosed in a consultation.[9]

[2] *See* D.C. R. Prof'l Conduct 1.6 cmt. [9] ("Although 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, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established.").

[3] If a lawyer is disqualified from representing a client under Rule 1.18(c), "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter," unless "(1) both the affected client and the prospective client have given informed consent, or (2) the disqualified lawyer is timely screened from any participation in the matter." D.C. R. Prof'l Conduct 1.18(c) & (d).

[4] The questions whether and at what point a lawyer and prospective client form a client-lawyer relationship are matters of substantive law beyond the scope of this opinion. When such a relationship is formed, however, a lawyer's ethical obligations to preserve and turn over information to the client are governed by Rules 1.16(d) and 1.8(i). *See* D.C. Legal Ethics Op. 333 (2005).

[5] The questions whether and to what extent a prospective client may have a property or other substantive legal interest in such information are beyond the scope of this opinion, as is the question whether any substantive legal obligation outside the Rules of Professional Conduct prohibits destruction of the information. Although this Committee does not opine on questions of law outside of the Rules of Professional Conduct, we are unaware of any authority holding that a prospective client has a property interest in a lawyer's notes or other research or information that the lawyer generates or obtains as the result of a prospective client consultation.

[6] We note that "an attorney's ethical duties to a client arise not from any contract but from the establishment of a fiduciary relationship between attorney and client." *In re Ryan*, 670 A.2d 375, 379 (D.C. 1996). Thus, where a lawyer and prospective client decide to form a client-lawyer relationship, the lawyer must satisfy the requirements of D.C. Rules 1.16(d) and 1.8(i), regardless of any contractual agreement. *Cf. id.* at 380 ("Because ethical responsibilities exist independently of contractual rights and duties, we hold that any supposed failure of a client to fulfill a retainer agreement is no defense to a disciplinary charge.").

[7] D.C. R. Prof'l Conduct 1.18 cmt. [3].

[8] *See* D.C. R. Prof'l Conduct 1.6 cmt. [9] ("Although 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, the duty of confidentiality imposed by this rule attaches when the lawyer agrees to consider whether a client-lawyer relationship shall be established. . . ."); D.C. R. Prof'l Conduct 1.18(b) & cmt. [3] ("Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as permitted by Rule 1.6. . . . Such information is generally protected by Rule 1.6, even if the client or lawyer decides not to proceed with the representation. . . . The duty to protect confidences and secrets exists regardless of how brief the initial conference may be. . . .").

[9] *See* D.C. R. Prof'l Conduct 1.18(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 a confidence or secret from the prospective client, 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).").

To minimize the risk of disqualification, "a lawyer considering whether or not to undertake a new matter may limit the initial interview only to information that does not constitute a confidence or secret, if the lawyer can do so and still determine whether a conflict of interest or other reason for non-representation exists."[10] In addition, "[a] lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter."[11] A lawyer and prospective client also may enter into an agreement in which the prospective client consents to the lawyer's subsequent disclosure and use of information learned in or related to the prospective client consultation.[12]

Where a prospective client "entrusts valuables or papers to the lawyer's care," the commentary to Rule 1.18 directs a lawyer to follow Rule 1.15.[13] Rule 1.15(a) requires a lawyer to "hold property of . . . third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property" and to identify and safeguard such property.[14] Rule 1.15(c) generally requires the lawyer to "promptly deliver" and, upon request, "render a full accounting regarding such property" to the prospective client.[15] By its terms, however, Rule 1.15 does not require a lawyer to preserve or turn over documents or other information generated by or at the direction of the lawyer—including notes, legal research, or information obtained through subsequent investigation—unless the prospective client has a property interest in the information.[16]

Where a prospective client elects not to retain a lawyer's services, or the lawyer is either unwilling or unable to represent the prospective client, the D.C. Rules impose no obligation on the lawyer to preserve information learned in or related to the prospective client consultation in which a prospective client has no property interest. Similarly, a lawyer has no obligation under the D.C. Rules to turn over to a prospective client, either at the time that the lawyer and/or prospective client decide not to form a client-lawyer relationship or thereafter, information learned in or related to a prospective client consultation.

Rule 1.16(d) requires a lawyer, in connection with any termination of representation, to "take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled." Where a prospective client elects not to retain a lawyer's services or the lawyer is either unwilling or unable to represent the prospective client, however, the prospective client is not a "client" and there is no representation to terminate. Accordingly, Rule 1.16(d) would not apply.

*Conclusion*

As the commentary to Rule 1.18 notes, "prospective clients should receive some but not all of the protection afforded clients."[17] Thus, although a lawyer must safeguard and return documents or other property entrusted to the lawyer by a prospective client while evaluating whether to form a client-lawyer relationship, absent a substantive legal or contractual obligation to do so, a lawyer has no obligation under the D.C. Rules to preserve or turn over to a prospective client information learned in or related to a prospective client consultation, when a client-lawyer relationship is not established.[18]

**Published April 2018**

*Opinion 375*

**Ethical Considerations of Crowdfunding**

Lawyers are generally free to represent clients who pay for legal services through crowdfunding. The ethical implications of crowdfunding a legal representation vary depending on the lawyer's level of involvement in the crowdfunding. When the client directs the crowdfunding and the lawyer is merely aware of it, the lawyer incurs no specific ethical obligations although the lawyer should consider potential risks associated with receipt of such funds and may counsel the client on the wisdom of publicly sharing confidential information. When the lawyer directs the crowdfunding, the lawyer must comply with the Rules governing a lawyer's receipt of money from third parties. Further, a lawyer who directs the crowdfunding should be cognizant of ethical obligations regarding fee agreements, communications with donors, and the management of the funds raised.

**Applicable Rules**

- Rule 1.2 (Scope of Representation)
  Rule 1.3 (Diligence and Zeal)
  Rule 1.4 (Communication)
  Rule 1.5 (Fees)
  Rule 1.6 (Confidentiality of Information)

[10] *See* D.C. R. Prof'l Conduct 1.18 (c) & cmt. [4].

[11] *Id.* at cmt. [5].

[12] *See id.* ("[T]he prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.").

[13] D.C. R. Prof'l Conduct 1.18 cmt. [9] ("For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.").

[14] *See* D.C. R. Prof'l Conduct 1.15(a) ("A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.").

[15] *See* D.C. R. Prof'l Conduct 1.15(c) ("Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.").

[16] A lawyer's failure to safeguard or return documents or other property that a prospective client entrusts to the lawyer also may implicate Rules 8.4(b) and (c). *See* D.C. R. Prof'l Conduct 8.4(b) & (c) ("It is professional misconduct for a lawyer to . . . [c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; [or] [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

[17] D.C. R. Prof'l Conduct 1.18 cmt. [1].

[18] A lawyer may choose to preserve information learned in or related to a prospective client consultation for a variety of reasons: for example, to assist the lawyer in detecting and avoiding future conflicts of interest; to defend against allegations that the lawyer violated Rule 1.6 and/or 1.18; or merely to maintain a positive relationship with prospective clients who later may need the information. If a lawyer chooses to do so, or to turn over such preserved information, however, the lawyer should be mindful of any potential conflicts of interest that may arise if the lawyer's possession or subsequent disclosure of the information could be detrimental to a current client. *See* D.C. R. Prof'l Conduct 1.7(b)(4) ("Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if . . . [t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party . . . ."). In addition, as stated *supra* at n.5, the question of whether any substantive legal obligation outside the Rules of Professional Conduct prohibits destruction of prospective client information is beyond the scope of this opinion.

Rule 1.8 (Conflicts of Interest: Specific Rules)
Rule 1.15 (Safekeeping Property)
Rule 2.1 (Advisor)
Rule 4.1 (Truthfulness in Statements to Others)
Rule 5.4 (Professional Independence of a Lawyer)
Rule 8.4 (Misconduct)

*Inquiry*

The Committee has received numerous inquiries asking whether and how lawyers may ethically raise money (or accept money raised) via crowdfunding to pay for legal services for one or more clients. In general, crowdfunding is the process of raising money from third parties for the benefit of another. While the term is most often used to describe the practice of raising small amounts of money from numerous people through social media and other platforms, as used in this opinion, "crowdfunding" refers to the solicitation and acceptance of such funds to pay for someone else's legal representation.[1]

Crowdfunding may provide financial resources for individuals who might otherwise be unable to secure counsel. This opinion outlines the ethical considerations of crowdfunding and provides guidance about doing so consistent with the D.C. Rules of Professional Conduct ("Rules").

Crowdfunding is generally structured in one of two ways: 1) equity-based funding, in which the investor retains an ownership interest in either the recipient (here, the law firm or its client) or in future recoveries/earnings/profits of the firm or matter, or 2) donation-based funding, in which the donor receives no financial interest in the legal matter,[2] but may receive other incentives. This opinion focuses solely on donation-based funding and does not address equity-based funding, though some of the same ethical considerations apply.[3]

*Analysis*

The Committee notes, at the outset, that the ethical implications of crowdfunding a legal representation vary depending on the lawyer's level of involvement in the crowdfunding.

## I. Lawyer's Receipt of Funds Raised by Client

There is nothing in the Rules prohibiting a lawyer from accepting funds from a client who has raised or is raising money through crowdfunding. It is not unusual for clients to rely on money collected from family or friends to pay for legal services. The practical reality that a client may, through social media or other platforms, cast a broad net and collect funds from acquaintances and strangers does not, standing alone, impose specific ethical obligations on a lawyer. However, because there may be heightened risk of fraud, money laundering, and other criminal activities in connection with any such exchange of funds, a lawyer should be cognizant of such risks and take reasonable precautions to avoid unwittingly engaging or assisting in unethical or illegal conduct.

For lawyers, ethical risk accompanies the legal risk. When illegal conduct of a client is suspected or known, specific ethical duties arise under the Rules.[4] For example, when a lawyer suspects or knows that a client has obtained funds to pay for the legal representation in a manner that is illegal or otherwise poses risk for the client, the lawyer has ethical obligations to counsel the client on such risks and/or the limits of what the lawyer is able to do for the client under the ethics rules and in light of the lawyer's own obligation to comply with the law.[5]

A lawyer should consider counseling his or her client regarding disclosures to third parties. Crowdfunding typically entails some level of disclosure to third parties about the predicate need for counsel. Because of their financial support, crowdfunding contributors may be interested in the status of or information about the client's matter. Due to the risk of waiver of the attorney-client privilege, or simply for strategic reasons, a lawyer who knows that a client is crowdfunding should provide the appropriate level of guidance to the client regarding disclosures to third parties, whether such disclosures occur on a social media platform or privately in discussions with friends and family.[6] In addition, depending on the circumstances, a lawyer may also consider discussing the wisdom of the client's funding choices under Rule 2.1, which provides that "[i]n 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."

## II. Crowdfunding by a Lawyer

A lawyer who undertakes or exerts control over the crowdfunding effort has specific ethical responsibilities under the Rules.

### A. Lawyer's Acceptance of Fees from Third Parties

Whether a lawyer may accept compensation from third parties for legal fees is governed by the requirements of Rule 1.8(e). The Rule states that,

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

[1] Some D.C. lawyers have expressed an interest in starting a general "benevolent fund" that would allow them to raise money for the purpose of providing legal representation to clients unable to pay the lawyers' fees. The Committee notes that lawyers who wish to engage in such fundraising along with the provision of legal services may need to do so through a separate nonprofit organization with the appropriate level of supervision and review by an independent board of advisors and in accordance with applicable law.

[2] The language used to describe crowdfunding arrangements varies. In this opinion, the Committee uses the term "donation-based funding" to describe arrangements in which contributors have no expectation of receiving any personal economic return in exchange for their financial contributions. While contributors may enjoy philanthropic good will and perhaps receive non-confidential information about the legal representation, they will not receive a financial interest in the matter or any recovery, nor will their donated funds be repaid absent express agreement (see part II D. Management of Funds).

[3] For a helpful summary of crowdfunding terminology and approaches, see N.Y. State Bar Ass'n Comm on Prof'l Ethics Formal Op. 1062 (2015).

[4] *See, e.g.*, Rule 1.2(e) (prohibiting a lawyer from assisting a client in criminal or fraudulent conduct), Rule 8.4(b) (prohibiting a lawyer from engaging in criminal acts), and Rule 8.4(c) (prohibiting a lawyer from engaging in dishonest conduct). Lawyers must also be cognizant of their obligations under substantive law to avoid participating in or counseling their clients on activity that may constitute money-laundering. *See* American Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 463 (2013). Similarly, crowdfunding does not alter a lawyer's professional responsibilities prohibiting the knowing acceptance of illegally obtained funds as payment for services. *See* "Houston, We Have a Problem: Clients Who Engage in Unlawful Conduct During Your Representation," Winter / Spring 2015 Edition of the ABA White Collar Crime Committee Newsletter, pages 1, 9-11, discussing ABA Model Rule 1.2(d) (ethical issues and other considerations when criminal proceeds are used to pay attorneys' fees).

[5] *See* Rule 1.2(e) (permitting a lawyer to "discuss the legal consequences of any proposed course of conduct with a client" and to "counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning, or application of the law") and Rule 1.4(b) (requiring a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation").

[6] For further discussion of this topic, see D.C. Legal Ethics Opinion 371(2016)(Social Media II: Use of Social Media in Providing Legal Services).

> (1) The client gives informed consent after consultation;
> (2) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) Information relating to representation of a client is protected as required by Rule 1.6.

Thus, when a lawyer assists a client in crowdfunding a legal representation, each provision of Rule 1.8(e) must be met. With respect to Rule 1.8(e)(1), "informed consent" is a defined term under Rule 1.0(e), and "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."

Under Rule 1.8(e)(2), the lawyer must ensure there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. Rule 5.4(c) also prohibits a lawyer from allowing a person who pays the lawyer to provide legal services to a third party from "direct[ing] or regulat[ing] the lawyer's professional judgment in rendering such legal services." In the context of crowdfunding, a lawyer may not allow donors, whether family members or strangers, to exert undue influence with respect to the objectives of the representation or the legal strategies employed. This duty remains unchanged notwithstanding the social media and other connections that often accompany crowdfunding.

In addition to the guidance a lawyer provides to the client regarding disclosures to third parties (as discussed in part I), under Rule 1.8(e)(3) a lawyer is also prohibited from voluntarily sharing a client's confidential information with donors. Rule 1.6 provides that, in the absence of the client's informed consent or other enumerated exception, a lawyer shall not use or reveal a client's confidences or secrets. While lawyers should always be mindful of their duty of confidentiality, the informal nature of communications made through social media platforms warrants a reminder of this duty when using these platforms for crowdfunding.

### B. Fee Agreements

Although it may be tempting to forgo a written engagement agreement in a crowdfunded representation that has the appearance of being "free" from the client's perspective, lawyers must meet the requirements of Rule 1.5 regarding fees. Specifically, Rule 1.5(b) requires that, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the 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."[7] Even when a lawyer has regularly represented a client such that a written engagement agreement may not be required, crowdfunding can trigger areas of confusion that may not be present in a traditional client-self pay situation, such as ownership of excess crowdfunds raised and responsibility for payment if crowdfunds fall short of legal fees and expenses incurred. Accordingly, the Committee strongly encourages lawyers to have a written fee agreement for every representation involving crowdfunding by the lawyer.

### C. Communications with Donors and Prospective Donors

A lawyer who conducts the crowdfunding on behalf of a client must ensure that the communications used to solicit the funds are truthful.[8] The level of detail and transparency required will depend on the circumstances but must take into account Rule 1.6 and any other confidentiality obligations. For instance, a lawyer should avoid providing specific information about how the funds will be used to effectuate the legal strategy. A lawyer's professional obligations to exercise his or her independent judgment and to zealously represent the client remain paramount, regardless of the source of the funds.[9] The Committee recommends informing contributors that their donated funds are nonrefundable, that they will not receive confidential information about the client's matter, and that they may not interfere with or otherwise exert control over the lawyer's work.

### D. Management of Funds

The fact that crowdfunds come from sources other than the client does not alter the fact that they are client funds and must be treated as such consistent with the Rules.

Funds collected on behalf of a client by the lawyer through crowdfunding must be treated as advanced fees. Unless there is an agreement with the client under Rule 1.15(e), these funds must be placed in trust for the client, as required by Rules 1.15(a) and (b). The lawyer should invoice the client and transfer funds to the operating account only as fees are earned and expenses incurred, or as otherwise consistent with the guidance provided in D.C. Legal Ethics Opinion 355.[10] A lawyer should monitor any fundraising activity that he or she controls, as a lawyer who solicits and receives excessive funds on behalf of his or her client may run the risk of violating one or more ethics rules.[11] To mitigate this risk, a lawyer should have a plan (approved by the client) to terminate crowdfunding when it appears that sufficient funds have been raised.

Although lawyers are generally able to seek informed consent, under Rule 1.15(e), to place unearned fees and expenses in a lawyer's or law firm's operating account rather than the trust account, the Committee recommends caution around this exception when crowdfunding. Crowdfunding increases the risk that a lawyer could be perceived as seeking an unreasonable fee under Rule 1.5(a).[12] This is in part because of the ease by which the amount of money in excess of what is required to fund the representation may be raised and in part because some clients may exercise less scrutiny over the lawyer's bills since the client is not personally, or at least not solely, responsible for payment. Placing crowdfunds in a trust account until the lawyer earns the fee or incurs the expense ensures that there is a clear delineation of lawyer funds and client funds.

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[7] Comments [1] through [3] to Rule 1.5 further describe how a lawyer may fulfill his or her duties under Rule 1.5(b).

[8] *See* Rules 4.1 (Truthfulness in Statements to Others) and Rule 8.4(c) ("A lawyer should not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.).

[9] Rule 5.4(c) (see discussion supra Part II.A) and Rule 1.3 (Diligence and Zeal).

[10] Rule 1.15 obligates lawyers to treat unearned fees and expenses, including "flat" or prepaid fees, as the property of the client until the money has been earned, unless a different arrangement is reached. See Rule 1.15(e). This analysis, which was promulgated by the D.C. Court of Appeals in *In re Mance*, 980 A.2d 1196 (2009), is outlined in D.C. Legal Ethics Opinion 355 (2010).

[11] *See, e.g.*, Rule 4.1 (Truthfulness in Statements to Others), Rule 8.4(c) (which prohibits a lawyer from engaging in dishonest or deceitful conduct) and Rule 1.5(a) (which prohibits a lawyer from seeking an unreasonable fee).

[12] The Philadelphia Bar Association Professional Guidance Committee highlighted the possibility of an unreasonable fee as a risk of crowdfunding a litigation. *See* Phila. Bar Ass'n Prof'l Guidance Comm., Op. 2015-6.

Crowdfunding may also increase the risk of disputed ownership of funds. For example, if a donor claims that he or she donated more money than intended, or directed it to the wrong recipient, a lawyer would mitigate his or her ethical risk by ensuring such funds remain in trust until they are earned.[13]

In the absence of an appropriate agreement, unearned crowdfunds are the property of the client and should be returned to the client upon the matter's conclusion or termination of the representation, unless the client directs the lawyer to do otherwise. A matter may conclude for any number of reasons, including a natural conclusion, the client's decision not to pursue the case, settlement or any other resolution, or because the attorney-client relationship terminates, and each has different implications for prepaid legal fees and expenses, including crowdfunds. Pursuant to Rule 1.5(b), this point should be addressed with clients in engagement agreements and may be included in disclosures to donors, subject to Rule 1.6.

A lawyer may suggest that the client donate excess crowdfunds to a charity of the client's choice. Ultimately, however, the lawyer must abide by the client's decision and/or an appropriate agreement regarding disposition of unearned crowdfunds.

The Committee believes it would be unethical for a lawyer personally to claim unearned crowdfunds at the conclusion of a representation. Unlike a contingency fee case, where a lawyer may on occasion obtain a "windfall" due to an unexpected early settlement or other turn of events (and runs an equal risk of earning nothing at all if an unfavorable outcome results), in this situation the lawyer incurs no equivalent risk. A lawyer who claims unearned fees at the conclusion of such a representation risks violating Rule 1.5(a).

*Conclusion*

Although the term crowdfunding is relatively new, payment by third parties for another's legal representation is not. The Rules apply to a lawyer's receipt and disposition of all funds received in connection with a client representation, regardless of their source.

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[13] Rule 1.15(d) requires a lawyer to keep disputed funds in trust.

*Opinion 376*

## Mandatory Arbitration Provisions in Fee Agreements

Fee agreements containing mandatory arbitration provisions are "ordinary fee arrangements," and the requirements of Rule 1.8 which addresses business transactions between lawyers and clients do not apply. The standard for obtaining client consent to fee agreements containing mandatory arbitration provisions is set forth in Comment [13] to Rule 1.8, and Legal Ethics Opinions 211 and 218 are superseded by Comment [13] and this opinion.

**Applicable Rules**

- Rule 1.2 (Scope of Representation)
- Rule 1.0(e) (Definition of "Informed Consent")
- Rule 1.4 (Communication)
- Rule 1.5 (Fees)
- Rule 1.8 (Conflict of Interest: Specific Rules)

*Inquiry*

The Committee has received an inquiry as to whether D.C. Legal Ethics Opinions 211 and 218 state the current requirements for a mandatory arbitration provision in a fee agreement to comply with the D.C. Rules of Professional Conduct, in light of the 2007 amendments to the D.C. Rules of Professional Conduct, in particular Comments [1] and [13] to Rule 1.8 (hereinafter "Comment [1]" and "Comment [13]").[1]

*Discussion*

Legal Ethics Opinion 211 (Fee Agreements; Mandatory Arbitration Clauses) and Legal Ethics Opinion 218 (Retainer Agreement Providing for Mandatory Arbitration of Fee Disputes Is Not Unethical) were issued by the Committee in May 1990 and June 1991, respectively. In the more than twenty-five years since, the use of arbitration as a means for dispute resolution has proliferated, and this development, together with the 2007 amendments to the D.C. Rules of Professional Conduct, have led the Committee to determine it is the appropriate time to revisit these opinions. A brief summary of these two prior opinions and the 2007 amendments to the Rules is set forth below.

### A. Opinion 211

The retainer agreement at issue in Opinion 211 contained a provision requiring the firm and the client to arbitrate claims by the firm against its client for unpaid fees and claims against the firm for malpractice. In analyzing whether such mandatory arbitration provisions in fee agreements would be permitted, the Committee looked to Rule 1.8(a) and to D.C. Legal Ethics Opinion 190 (Retainer Agreement Mandating Arbitration of Attorney-Client Disputes) (1988), which was issued prior to the promulgation of Rule 1.8. The Committee disagreed with the pre-Rule 1.8(a) conclusion in Opinion 190 that a lawyer could include a mandatory arbitration provision provided that the lawyer made full disclosure to the client of any rights the client may waive by agreeing to arbitration and that the lawyer must not create arbitration procedures that violated DR 6-102(A); Opinion 190 did not require the client to obtain advice from independent counsel.

In Opinion 211, the Committee determined that Opinion 190 was "incorrect in its belief that the complex nature of arbitration could be adequately disclosed to a lay client." In reaching this determination, the Committee was guided by its belief that it was "unrealistic" to expect that lawyers could provide their clients with sufficient information regarding arbitration so that the client could give his informed consent to a mandatory arbitration provision.

The Committee also relied on Rule 1.8(a), which requires independent review by counsel of any "business transaction" between a lawyer and a client. The Committee acknowledged, however, that a mandatory arbitration provision did not "precisely fit the language of Rule 1.8(a)." It also described mandatory arbitration provisions as "atypical" for fee agreements and on that basis determined that lawyers must bring attention to that provision at the time the fee agreement is entered into so it can be considered fully by the client. Ultimately, the Committee concluded that "mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions

[1] Rule XIII of the District of Columbia Court of Appeals' Rules Governing the Bar ("Rules Governing the Bar") states that: "[a]n attorney subject to the disciplinary jurisdiction of this Court shall be deemed to have agreed to arbitrate disputes over fees for legal services and disbursements related thereto when such arbitration is requested by a present or former client…." The arbitration shall take place before the ACAB, unless the client and attorney agree otherwise. *See* Rule XIII of the Rules Governing the Bar.

or Rule 1.8(a) unless the client is in fact counseled by another attorney."

**B. Opinion 218**

Opinion 218 was issued by the Committee not long after Opinion 211 and also addressed mandatory arbitration clauses in fee agreements. Unlike Opinion 211, however, Opinion 218 was limited to fee disputes. The inquiry addressed in Opinion 218 was brought to the Committee by the Attorney-Client Arbitration Board ("ACAB"), an arbitration service provided by the D.C. Bar to its members and their clients to resolve solely disputes about legal fees. The ACAB inquired about the impact of Opinion 211 on fee agreements providing for mandatory arbitration of fee disputes before the ACAB.

The Committee distinguished the mandatory arbitration provisions in fee agreements under the ACAB rules from the arbitration provision at issue in Opinion 211. Unlike the possible AAA arbitration discussed in Opinion 211, the ACAB rules and procedures are relatively simple. The fees are low and the arbitrators are not compensated. In addition, the Committee determined that the ACAB staff was able to advise clients who were contemplating signing fee agreements with mandatory arbitration provisions about fee arbitration, its advantages and disadvantages, as well as its alternatives.

Based on these features of a fee arbitration before the ACAB, the Committee determined in Opinion 218 that a client could be adequately informed of the pros and cons of mandatory arbitration so that the client could make a decision about whether to enter into a fee agreement that contained a provision requiring mandatory arbitration under the ACAB's rules and procedures. The Committee required, however, that "the client be advised in writing that counseling and a copy of the ACAB's rules are available through the ACAB staff and further that the lawyer encourage the client to contact the ACAB for counseling and information prior to deciding whether to sign the agreement and that the client consent in writing to mandatory arbitration."

**C. 2007 Amendments**

The February 2007 amendments to the D.C. Rules of Professional Conduct added two comments to Rule 1.8 that directly impact Opinions 211 and 218. Comment [1] to Rule 1.8 states that paragraph (a) "does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5 . . . ." In addition, Comment [13] states: "Rule 1.8(g) does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, to the extent that such agreement is valid and enforceable and the client is fully informed of the scope and effect of the agreement."

*Analysis*

For the reasons discussed below, the conclusions reached by the Committee in Opinions 211 and 218 are not consistent with amended Comments [1] and [13] to Rule 1.8. These comments, when applied to mandatory arbitration provisions in fee agreements, require the Committee to loosen the requirements set forth in Opinions 211 and 218.[2]

**A. The Effect of Comment [13] on Opinions 211 and 218**

Comment [13] speaks specifically to agreements to arbitrate legal malpractice claims and deems such agreements permissible provided that the client is "fully informed of the scope and effect of the agreement." This explanation is in conflict with the mandates of Opinion 211, which required much more, including that the client must in fact receive advice from independent counsel regarding the arbitration provision. Comment [13] recognizes the evolution and proliferation of arbitration as an alternative dispute resolution method that has occurred since the issuance of Opinion 211.[3] Because of this change, clients are now likely to be able to understand the "complex nature" of arbitration in a way they might not have been able to in the early nineties when arbitration was less common.

In light of Comment [13], the Committee determines that the more onerous requirements imposed by Opinion 211 are no longer required. The same is true for Opinion 218, which deals with a narrow subset of arbitration provisions – those limited to fee arbitrations before the ACAB. Comment [13] specifically addresses agreements to arbitrate legal malpractice claims, and it was arbitration agreements with this scope that caused the Committee great concern in Opinion 211. To the extent Comment [13] has rendered such agreements generally permissible as long as the client is "fully informed of the scope and effect of the agreement," more narrow agreements (i.e., those limited to the arbitration of fee disputes) should not have different, more burdensome requirements related to obtaining client consent.

**B. Application of Comment [1] to Rule 1.8 to Fee Agreements Containing Mandatory Arbitration Provisions**

Although the 2007 amendments to Comment [13] standing alone are enough to convince the Committee that agreements between lawyers and clients to arbitrate fee disputes do not fall within the scope of Rule 1.8(a), the 2007 amendments to Comment [1] of Rule 1.8 also lend support to such a conclusion.

Comment [1] explains that the purpose of the requirements of paragraph (a) is to prevent "the possibility of 'overreaching' when a lawyer participates in a "business, property or financial transaction with a client." However, Comment [1] now specifically states that the requirements of 1.8(a) "do not apply to *ordinary fee arrangements between client and lawyer,* which are governed by Rule 1.5…." The Comment also provides a specific example of a "non-ordinary fee arrangement" that would subject a lawyer to the requirements of 1.8(a), namely, "when a lawyer accepts an interest in a client's business or other non-monetary property as payment of all or some of the fee."

We conclude that fee arbitration provisions are *ordinary fee arrangements* within the meaning of Comment [1] to Rule 1.8(a). First, in the many intervening years since the Committee issued Opinion 211, the use of arbitration clauses in fee agreements has grown considerably, and the Committee's description in Opinion 211 of such clauses as "atypical" is no longer accurate. As the American Bar Association ("ABA") Standing Committee on Ethics and Professional Responsibility noted as early as 2002: "The use of binding arbitration provisions in retainer agreements

[2] A lawyer's failure to comply with an obligation or prohibition imposed by a D.C. Rule of Professional Conduct is a basis for invoking the disciplinary process. *See* D.C. Rules, SCOPE [3]. The Comments to the D.C. Rules are promulgated by the District of Columbia Court of Appeals. Although they do not add obligations to the Rules, they provide guidance for interpreting the Rules and practicing in compliance with them. *Id.* at [1]. Comment [13] was promulgated by the District of Columbia Court of Appeals after Opinions 211 and 218 were issued by this Committee. Comment [13] therefore controls the use of mandatory arbitration clauses in fee agreements, and the conflicting guidance offered in Opinions 211 and 218 must not be followed.

[3] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 425 (2002).

has increased significantly in recent years." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 425 (2002). The increase in mandatory arbitration provisions in fee agreements reflects the overall trend towards greater reliance on arbitration to resolve commercial and other disputes.

Second, the example in Comment [1] of a non-ordinary fee arrangement, "when a lawyer accepts an interest in a client's business or other non-monetary property as payment of all or some of the fee" underscores the specific harm for which the protections of Rule 1.8(a) are deemed necessary: to ensure fairness to the client when the lawyer may be in a better position by virtue of legal skill and training to assess the value of a client's business or non-monetary property and therefore potentially take advantage of the client. As the Committee explains in D.C. Legal Ethics Opinion 300 (Acceptance of Ownership Interest in Lieu of Legal Fees) (2000):

> We agree with the commentators who have written on the subject …that a stock-as-fees arrangement is subject to Rule of Professional Conduct 1.8(a), which governs certain transactions with or related to clients…. In many respects, Rule 1.8(a) codifies the well-established common law principle that a lawyer occupies a fiduciary position vis-à-vis his client, which means that all transactions between lawyer and client are suspect and must be fair to the client.

However, this specific concern is not present when a lawyer and client agree to arbitrate rather than litigate future fee disputes. So long as a client is fully informed of the extent and scope of such an agreement as required by Comment [13], and the client agrees to such a provision before any dispute arises, the selection of an arbitration forum as the setting in which fee disputes will be resolved does not give a lawyer any particular advantage over his or her client. Rather, it is part and parcel of any ordinary fee agreement.

As an ordinary fee arrangement, the requirements of Rule 1.8(a) do not apply (*i.e.*, the client need not be given a reasonable opportunity to seek the advice of independent counsel or give informed consent in writing), and the further obligation imposed by Opinion 211, namely, that the client "is in fact counseled by another attorney," should no longer apply as well. This conclusion is wholly consistent with the Committee's analysis of the effect of Comment [13] on Opinions 211 and 218.[4]

Comment [13] makes clear that it is permissible for a lawyer and a client to agree to arbitrate legal malpractice claims provided that the "agreement is valid and enforceable" and the "client is fully informed of the scope and effect of the agreement." Comment [13] does not require that the client be given the reasonable opportunity to seek the advice of independent counsel or that the client give informed consent in writing as is required by Rule 1.8(a), let alone go as far as Opinion 211, to require that the client "in fact [be] counseled by another attorney."

Indeed, the only way to square Comment [13] and Comment [1] in the context of mandatory arbitration provisions in fee agreements is to conclude that such arbitration agreements are "ordinary" and Rule 1.8(a) does not apply. This result is also appropriate given the Committee's own recognition, when it relied on Rule 1.8(a) in reaching its conclusion in Opinion 211, that a mandatory arbitration provision did not "precisely fit the language of Rule 1.8(a)." This is particularly true in light of the clarifying amendments to Comments [1] and [13] that explain the meaning of the Rule.

### C. The Requirement That The Client Be "Fully Informed"

Comment [13] to Rule 1.8 permits a lawyer and client to agree to arbitrate legal malpractice claims as long as the "client is fully informed of the scope and effect of the agreement." Although the phrase "fully informed" is not defined elsewhere in the comments to Rule 1.8, the definition of the term "Informed Consent" in Rule 1.0(e) is instructive. "'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."

The definition of "Informed Consent" contains a description of the nature and extent of information that must be presented to a client in order to obtain that client's consent to a "proposed course of conduct." In the Committee's view, that description ably summarizes the information that must be shared with a client in order for that client to be "fully informed." Indeed, a fully informed client is the prerequisite to obtaining "Informed Consent." Therefore, Rule 1.0(e), along with Comment [13] to Rule 1.8, should guide a lawyer's communications to a client regarding a mandatory arbitration provision in a fee agreement. Put another way, in order for a client to be "fully informed" about the "scope and effect" of a mandatory arbitration provision, a lawyer should communicate "adequate information and explanation about the material risks of and reasonably available alternatives" to entering into a fee agreement that contains such a provision.

For a client to appreciate the "scope and effect" of a mandatory arbitration provision, the lawyer must provide a client with sufficient information about the differences between litigation in the courts and arbitration proceedings. As a general matter, a discussion regarding at least the following differences between the two methods of dispute resolution is prudent: (1) the fees incurred; (2) the available discovery; (3) the right to a jury; and (4) the right to an appeal. As with the application of the informed consent standard, the scope of this discussion depends on the level of sophistication of the client.[5]

*Conclusion*

Legal Ethics Opinions 211 and 218 are superseded by Comments [1] and [13] to Rule 1.8 and this opinion. Mandatory fee agreements are ordinary fee arrangements and are thus not subject to the requirements of Rule 1.8(a). Comment [13] clarifies that mandatory arbitration provisions in fee agreements are permissible, provided that the requirements set forth in Comment [13] are met.

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[4] While the ethics rules no longer require that the client be advised in writing that the ACAB staff is available to provide counseling, the ACAB staff remains available to advise a lawyer's client who is contemplating signing a fee agreement with a mandatory provision about fee arbitration, its advantages and disadvantages, as well as its alternatives. Lawyers may continue to voluntarily provide information about this resource to a client.

[5] In December 2018, the D.C. Bar Board of Governors amended Section 8 of the ACAB Rules of Procedure. Section 8(b)(iii) now provides, "The ACAB will enforce an attorney/client agreement to arbitrate a fee dispute if the agreement: (1) is valid and enforceable, (2) is signed by all parties to the dispute, and (3) encompasses fee disputes in the scope of the disputes to be arbitrated. Further, the client must have been adequately informed of the scope and effect of a mandatory arbitration provision, consistent with D.C. Bar Legal Ethics Committee Opinion 376 (copy attached). In this instance, the ACAB can compel a client to arbitrate a fee dispute filed by a lawyer…."

*Opinion 377*

## Duties When A Lawyer is Impaired

*Introduction*

The District of Columbia Legal Ethics Committee has examined the ethical duties of partners; other managerial or supervisory lawyers and subordinate lawyers; and non-lawyer employees to take appropriate measures when they reasonably believe another lawyer in the same law firm or government agency is suffering from a significant impairment that poses a risk to clients.[1] A related question involves the duties owed to clients and the profession when an impaired lawyer leaves a law firm or government agency, particularly when the lawyer may continue to practice law, regardless of whether clients are, or may be, terminating their relationship with the firm in order to remain clients of the departing lawyer.[2]

This Opinion deals only with mental impairment, which may be a chronic or temporary condition arising out of or related to age, substance abuse, a physical or mental health condition or other circumstance affecting the lawyer. This Opinion supplements the guidance contained in Legal Ethics Opinion 246, with a specific focus on the issue of impaired lawyers, whose conduct may or may not trigger mandatory reporting obligations under the Rules, as discussed herein. This Opinion also relies, in part, upon ABA Committee on Ethics and Professional Responsibility Formal Opinion 03-429 (2003).

The impairment of a lawyer may fluctuate over time, regardless of its cause. However, if a lawyer's periods of impairment are on-going or have a likelihood of recurrence, then partners, or other lawyers with managerial or supervisory authority may have to conclude that the lawyer's ability to represent clients is materially impaired.

A range of ethics rules are implicated, including those setting forth the duties owed by lawyers to clients and the profession, and those addressing issues of supervising lawyers and non-lawyer employees. At the outset, and as discussed within this opinion, the Committee recognizes that there are tensions between ethical duties that arise under the D.C. Rules of Professional Conduct (the "Rules") and requirements or prohibitions that may exist under the substantive law, specifically with respect to employee privacy and other rights. Lawyers and law firms must be cognizant of the legal landscape in which these difficult issues occur.[3]

Mental impairment may lead to an inability to competently represent a client as required by Rule 1.1, to complete tasks in a diligent and zealous manner as required by Rule 1.3, and to communicate with clients about their representation as required by Rule 1.4.

Rule 5.1 requires partners or other lawyers with managerial or supervisory authority to make reasonable efforts to ensure that all lawyers and those under their supervision comply with the applicable Rules and to ensure that their law firm or government agency has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules. These provisions require managerial or supervisory lawyers who reasonably believe or know that a lawyer is impaired to closely supervise the conduct of the impaired lawyer because of the risk of violations of the Rules and resulting harm to clients. Rule 5.2 may also apply to subordinate lawyers if they know of and ratify the conduct of the impaired lawyer.

Rule 8.3 requires a lawyer, regardless of managerial or supervisory authority, to report an impaired lawyer to the appropriate professional authorities including, but not limited to, the District of Columbia Office of Disciplinary Counsel,[4] if the impaired lawyer has committed a violation of the Rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law, unless such disclosure would be prohibited under the duty of confidentiality owed to clients under Rule 1.6 or other law. *See* Footnote 3. Further, if the firm or government agency removes the impaired lawyer from a matter, it may have an obligation under Rule 1.4 to discuss with the client the change in staffing on the matter. The duty to discuss removal of government lawyers from a matter may be different because of government policies or regulations.

If the impaired lawyer resigns, is removed or otherwise leaves the law firm, the firm may have additional disclosure obligations under Rule 1.4 to clients who are considering whether to remain with the firm or to transfer their representation to the departing lawyer. However, the firm should be cautious to limit any disclosures to necessary information permissible to disclose under applicable law. The obligation to report misconduct under Rule 8.3 is not eliminated if the impaired lawyer leaves the firm.

Beyond the ethical obligations embodied in the D.C. Rules, a fundamental purpose of identifying and addressing lawyer impairment is to encourage individuals who are suffering from mental impairment to seek and obtain assistance and treatment. This purpose should not be forgotten as lawyers, firms and agencies seek to comply with the ethical mandates discussed herein.

### Background on Impairment Issues in the Legal Profession:

In 2016, the ABA Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation published the results of national research on the issue of substance abuse and other mental health concerns among American lawyers. The study reported rates of substance abuse among lawyers that were far higher than those in other professions. The results also showed that the most common barrier for a lawyer seeking help was fear of others finding out and general concerns about confidentiality.

Roughly a quarter of the study participants identified their substance abuse

[1] Whether two or more lawyers constitute a "firm" or a "law firm" can depend on specific facts. *See* Rule 1.0(c). While the Rules exclude government agencies or other government entities within the definition of "firm" or "law firm," the Rules do not exempt lawyers practicing in a government agency or other government entity, who are otherwise subject to the District of Columbia Rules of Professional Conduct, from the ethical obligations set forth herein. *See, e.g.*, 28 U.S.C. § 530B.

[2] An additional question, dealing more broadly with obligations to report a lawyer that is not employed by the same law firm or agency, may be answered by reference to D.C. Legal Ethics Opinion 246 (*A Lawyer's Obligation to Report Another Lawyer's Misconduct*) (1994). Lawyers that may be concerned about the impairment of lawyers outside their firm or agency over whom they do not have managerial or supervisory authority may nonetheless find the guidance within this Opinion instructive.

[3] This Opinion addresses only the ethical obligations of lawyers when faced with an impaired lawyer. There may also be legal obligations imposed under the District of Columbia Human Rights Act, the Americans with Disabilities Act, the Family Medical Leave Act, the Health Insurance Portability and Accountability Act or other state or federal laws that are beyond the scope of this Committee and this Opinion. There may also be fiduciary or contractual obligations imposed by partnership or employment agreements with an impaired lawyer. Further, as discussed in this Opinion, lawyers employed in government agencies may have obligations imposed by their department or agency with regard to reporting obligations.

[4] The duty to report is not limited to the District of Columbia Office of Disciplinary Counsel. If the reporting lawyer is aware that the impaired lawyer is also a member of other bars or another profession that is subject to professional regulation, then the duty to report may also extend to reporting to those other entities.

or mental health issues as having first started prior to law school. In August 2017, the National Task Force on Lawyer Well-Being, a commission comprised of lawyers, judges, academics and medical professionals, issued a report, *The Path To Lawyer Well-Being: Practice Recommendations for Positive Change*,[5] which addresses issues of substance abuse and impairment and provides recommendations and action plans for lawyers, law firms and other appropriate communities.

**Applicable Rules**

- Rule 1.1 (Compentence)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.16 (Declining or Terminating Representation)
- Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- Rule 5.2 (Subordinate Lawyers)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.3 (Reporting Professional Midconduct)
- Rule 8.4 (Misconduct)

*Discussion*

This Opinion addresses three potential scenarios that impose obligations under the Rules with respect to a lawyer who is known by other lawyers or staff in the same law firm or government agency to be suffering from an impairment. First, the opinion addresses the obligations of partners and other managerial and supervisory lawyers to take steps to prevent an impaired lawyer from violating the Rules, to develop policies addressing impairment, and to create a firm or agency culture that allows subordinate lawyers and other personnel to report concerns regarding the impairment of a lawyer without reprisal. Second, it addresses the reporting obligations of a lawyer who knows that an impaired lawyer in the same firm or agency has violated the Rules. Third, it addresses the obligations of lawyers when an impaired lawyer leaves a firm.

The Committee agrees with ABA Formal Opinion 03-429 that, "[i]mpaired lawyers have the same obligations under the [Rules] as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation." Importantly, Rule 1.16(a) prohibits a lawyer from representing a client or requires a lawyer to withdraw if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."[6] Managerial and supervisory lawyers should be aware that an impaired lawyer may be unaware, or in denial, that the impairment has impacted the lawyer's ability to represent clients. If the impaired lawyer does not or will not take affirmative steps to mitigate the consequences of the impairment, then the lawyer's partners, managers, or supervisors are obligated under Rule 5.1 to take steps to ensure the lawyer's compliance with the Rules.

**A. Duties of partners, managerial lawyers or supervisory lawyers who reasonably believe that another lawyer is or may suffer from significant impairment.**

Rule 5.1(a) requires that partners and comparable managerial lawyers in a firm or government agency make reasonable efforts to ensure that the firm or agency has in effect measures giving reasonable assurance that all lawyers conform to the Rules. The Rule also requires partners and managerial lawyers to make reasonable efforts to establish internal procedures and policies designed to provide reasonable assurance that all lawyers will conform to the Rules of Professional Conduct. *See* Rule 5.1, Comments 1 & 2. Similarly, Rule 5.1 requires lawyers having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct. *See* Rule 5.1(b).[7]

What constitutes a "reasonable" effort or assurance is not defined, because the reasonableness of any measures will depend, in part, on the firm or agency's size, structure and the nature of its practice. *See* Rule 5.1, Comment 3. Measures should, however, include processes ensuring that the firm or agency can identify and address issues of impairment among its lawyers. Whether other measures such as a written policy or a reporting procedure are appropriate will depend, in part, on the factors set out in Comment 3. For example, a written policy might be unnecessary for a solo practitioner, although it may be appropriate for a solo practitioner to instruct or provide resources for office staff on addressing issues of potential impairment in the workplace.

The Committee does not believe that a written policy regarding impairment is required in order to comply with Rule 5.1. As noted above, whether a firm or agency is required under Rule 5.1 to have written policies or procedures to address impairment issues depends largely on the type and size of the firm or agency. However, even if a written policy is reasonably determined to be unnecessary, firms and agencies may want to have a written policy to provide consistency in the guidance available to lawyers and other firm or agency personnel. Firms and agencies should strongly consider implementing practices and procedures that encourage and support reporting of concerns or observed impairment to the appropriate firm or agency personnel. Such procedures may include establishing a reporting hotline, permitting anonymous reporting or designating a "neutral" firm or agency lawyer who does not supervise or manage subordinate lawyers or non-lawyer employees to receive reports. Such measures can encourage reporting by removing concerns regarding reprisal or retaliation against subordinate lawyers and non-lawyer employees. Firm and agency reporting procedures should strike the balance of encouraging reports without mandating reports from these subordinate lawyers and non-lawyer employees, except as may be required by Rule 8.3.

The firm or agency's ultimate ethical obligation is to protect the interests of its clients.[8] To accomplish this task, a firm or agency should consider the following steps appropriate when dealing with an impaired lawyer: (1) speaking with the impaired lawyer about the perceived

[5] https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportFINAL.pdf

[6] Rule 1.16(a)(2).

[7] Supervisory lawyers are "'lawyers who have supervisory authority over the work of other lawyers [and nonlawyers] in the office' regardless of their status in the organization. . . . 'Even if a lawyer is not a partner or other general manager, he or she may have direct supervisory authority over another lawyer. . . .' The key to responsibility under paragraph (b) is the relationship between the two lawyers in the matter. The supervisory lawyer 'need not be over the entirety of the second lawyer's practice. . . [Rule 5.1(b)] would apply to direct supervision in a particular case, or to one partner [or manager] who has been given supervisory authority over another partner [or manager's] work in a case or practice area.'" ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-467 (Sept. 8, 2014) (quoting RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 5.1-2(b), at 1009 (2014); GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, THE LAW OF LAWYERING § 42.3 (3d ed., Supp. 2010); first, third and fourth alterations in the original).

[8] *See* Rule 1.3.

impairment and need for remediation; (2) requiring the impaired lawyer to seek assistance or professional evaluation as a condition of continued employment; or (3) referring the lawyer to the Bar's confidential Lawyer Assistance Program. It may also be appropriate to provide the lawyer a list of firm-developed referrals or resources for education or assistance/consulting with outside mental-health professionals or other medical professionals. Depending on the circumstances, it may also be appropriate for the firm or government agency to consult with mental-health or medical professionals about the lawyer, prior to engaging in any remedial activities. To the extent such consultation is sought, the firm should ensure that its disclosures regarding the lawyer comply with applicable laws. *See* Footnote 3.

Firms and agencies should seek to create a culture of compliance that encourages reporting within the organization, including by lawyers and staff who do not have managerial or supervisory responsibilities. Although there is no provision in the Rules requiring subordinate lawyers to take steps to ensure that another lawyer's conduct complies with the Rules, Rule 5.2 requires subordinate lawyers to abide by all Rules, even when acting at the direction of others.[9] Subordinate lawyers should be reminded that (1) even when acting at the direction of another, a subordinate lawyer should not take actions that would ratify the misconduct of an impaired lawyer, and (2) if reporting is mandatory under Rule 8.3, then a subordinate lawyer's duties may be discharged only by a report to the Office of Disciplinary Counsel, as discussed below. Rule 5.3 imposes upon lawyers an obligation to ensure that non-lawyers employed by or otherwise associated with lawyers engage in conduct that is compatible with the professional obligations of the lawyers.

If a managerial or supervisory lawyer in a law firm or agency receives a report from a lawyer or staff member, the managerial or supervisory lawyer must investigate and, if it appears that the report is meritorious, take appropriate measures to ensure that the impaired lawyer's conduct conforms to the Rules. If the firm or agency declines to take action, then the reporting lawyer should seek guidance as to the lawyer's professional responsibilities from the Bar's Legal Ethics Helpline or from appropriate legal ethics advisors within or outside the lawyer's organization.

If the firm or agency makes reasonable efforts to ensure compliance with the Rules, as set forth in Rule 5.1, then managerial and supervisory lawyers will not be ethically responsible for the impaired lawyer's violation of the Rules, unless they knew of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action. *See* Rule 5.1(c)(2).

To protect more directly the interests of the client, the firm or agency should consider whether the impaired lawyer has a duty to refrain from practicing or if the lawyer must withdraw from representation under Rule 1.16(a)(2). Depending on the circumstances, the firm or agency may determine that it is appropriate to limit the ability of the impaired lawyer to handle legal matters or to deal with clients. Depending on the nature of the lawyer's practice, and the effect the impairment has on the lawyer's abilities, it may be appropriate to change the lawyer's work environment or duties, such as removing the lawyer from trials or negotiations, and assigning tasks such as legal research or drafting. However, if the lawyer is performing any legal tasks, the firm or agency is responsible for supervising the work performed by the lawyer and the work product produced by the lawyer.

Rule 1.4 imposes a requirement that clients be reasonably informed of the status of a matter. Depending on the role that the impaired lawyer played on the legal team, the circumstances surrounding the removal of an impaired lawyer from the case may be material to the representation and therefore need to be disclosed, in order to allow the client to make informed decisions regarding the representation. Assuming disclosure does not violate substantive law, clients should be informed of sufficient facts about the lawyer's impairment to permit a reasonable client to decide whether and how to continue the representation and to make a decision about the client's matter. Comment 2 to Rule 1.4 states that the lawyer "must be particularly careful to ensure that decisions of the client are made only after the client has been informed of all relevant considerations. The lawyer must initiate and maintain the consultative and decision-making process if the client does not do so and must ensure that the ongoing process is thorough and complete." If it is determined that disclosures are required by Rule 1.4 and permissible under law, then lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer's privacy or other legal rights. It may not be appropriate, under the substantive law, to disclose any details regarding the nature (or suspected nature) of the impairment because, while it may be material to a client that a lawyer is being removed from the matter, the specific reasons for removal would likely not be material to the client's ability to make an informed decision with regard to its matter or its continuing relationship with the firm.[10]

**B. Rule 8.3 Obligations to Report Violations of the Rules.**

Rule 8.3 imposes a mandatory reporting obligation, under certain circumstances, on every lawyer with respect to other lawyers' violations of the Rules. As set forth in Rule 8.3(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 appropriate professional authority.

However, pursuant to Rule 8.3(c), "this rule does not require disclosure of information otherwise protected by Rule 1.6 or other law." If reporting requires the disclosure of protected client information, the report may only be made with the client's informed consent.

Rule 8.3 does not distinguish among managerial, supervisory or subordinate lawyers with respect to their reporting obligations and requires reporting when there is knowledge that another lawyer has committed a violation of the rules that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer.[11]

[9] Rule 5.2(b) provides that "a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

[10] Nothing in this Opinion should be interpreted to alter or diminish any obligation to make disclosures otherwise required under the Rules. For example, if the impaired lawyer committed malpractice or violated the standard of care in the representation, such conduct would have to be disclosed to the client under the Rules. Similarly, violations of the Rules may have to be reported to the Office of Disciplinary Counsel as set forth in Rule 8.3. The disclosure of such conduct, however, does not require the disclosure of the lawyer's personal information protected under the law.

[11] The Committee notes that the reporting obligation requires that a lawyer report actual knowledge of a Rule violation implicating the lawyer's honesty,

In Opinion 246, we adopted the four-part test established by other jurisdictions for determining whether the standard under Rule 8.3 is met. The duty to report is obligatory only if:

> (l) the reporting lawyer has actual knowledge of the violation;
>
> (2) reporting can be accomplished without disclosure of client confidences or secrets;[12]
>
> (3) the violation involves a disciplinary rule; and,
>
> (4) the violation raises a substantial question as to honesty, trustworthiness or fitness to practice law.

Government lawyers are advised to review department or agency guidance that may impose additional obligations before disclosing information protected by Rule 1.6, including an obligation to report allegations of misconduct internally for the purpose of reviewing the allegations and determining whether and what information should be disclosed in connection with a referral to the appropriate disciplinary authorities. *See, e.g.*, Justice Manual §§ 1-4.300, 1-4.340.

If the duty to report is triggered under Rule 8.3, it is mandatory. Reliance on the expectation that another lawyer will make a report is insufficient to discharge duties under Rule 8.3. That said, a firm or agency may make a report on behalf of a lawyer or a group of lawyers who have a reporting obligation. In such instances, a single report submitted on behalf of one or more lawyers with an obligation to report will discharge the reporting obligation of each lawyer. Except as constrained by Rule 1.6, the lawyer's duty is to make a report to the appropriate professional authority. If the impaired lawyer is licensed to practice in the District of Columbia, the report must be made to the Office of Disciplinary Counsel. Even if the firm or agency determines that the impaired lawyer did not violate the Rules and that, therefore, there is no duty to report under Rule 8.3, or if obligations imposed by Rule 1.6 or other law prohibit reporting, it may still be appropriate to encourage the lawyer to seek the assistance of the D.C. Bar Lawyer Assistance Program in an effort to provide assistance and support to the impaired lawyer. In addition, the Lawyer Assistance Program may serve as a resource for law firms, government agencies and lawyers navigating an employee's impairment.

**C. What is the duty of a managerial or supervisory lawyer when a lawyer with a significant impairment leaves the law firm?**

In addition to any duty to report, managerial or supervisory lawyers may have a duty to any current client of the firm who is represented by the departing lawyer to ensure that the client has sufficient information to make an informed decision about continuing to be represented by the impaired lawyer.

The Committee believes that the approach adopted by the Philadelphia Bar Association in Philadelphia Bar Association Ethics Opinion 2000-12 is instructive. The Philadelphia Bar suggested taking a direct approach with the departing lawyer, urging the departing lawyer not to solicit the firm's clients or to indicate that the departing lawyer would handle their cases in any kind of substantive way.

However, if the departing impaired lawyer intends to solicit current firm clients to follow the lawyer to a new practice, then Rule 1.4(b) requires a managerial or supervisory lawyer to explain the situation to the clients to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation, again assuming that the explanation is not prohibited by law. This obligation exists whether or not the firm had taken previous steps to protect the clients, including but not limited to supervising the impaired lawyer or removing the impaired lawyer from the matter and informing the clients of such removal.[13] In the end it remains the clients' decision whether to follow the departing lawyer to a new practice, to remain with their current firm, or to retain a new firm.

Any communication with firm clients should be carefully worded to convey only demonstrable facts about the lawyer's departure. Managerial and supervisory lawyers should be careful to disclose only necessary and material information to the clients, balancing truthful disclosures with the impaired lawyer's privacy rights under the substantive law. Law firms are advised to consult the substantive law regarding what may or may not be said. *See* Footnote 3. If disclosure of information relating to the circumstances surrounding the lawyer's departure is prohibited under substantive law, then no such disclosure may be compelled under the Rules. In this regard, the Committee believes that the existence of policies and procedures addressing the handling of issues of impairment within the law firm or government agency are helpful to demonstrating compliance with the Rules.

If a communication intended to request that the clients remain with the law firm will be sent by the law firm, then it should be drafted to avoid making false or misleading communications about the firm's services or any misrepresentations that violate Rule 8.4(c). The law firm should avoid any action that might be interpreted as an endorsement of the impaired lawyer or the lawyer's competence, such as sending a joint letter regarding the lawyer's departure from the firm, or other correspondence from the law firm that could be considered an endorsement of the services of the departing attorney. The law firm may, of course, send a letter to its clients encouraging them to remain with the firm, but cannot reasonably prevent the departing lawyer from independently doing the same, provided that such communications are consistent with the departing lawyer's ethical, legal or contractual obligations to the firm.[14] To the extent the guidance in this Opinion endorses the use of a separate letter from the law firm to the clients, the Committee notes that the circumstances regarding the departure of an impaired lawyer from a law firm are extraordinary and warrant a departure from advice previ-

trustworthiness or fitness to practice law; even if the violating lawyer is not affiliated or employed with the reporting lawyer. Rule 8.4(g) allows for voluntary reporting of conduct to Disciplinary Counsel, so long as there is no threat to seek criminal charges or disciplinary charges *solely* to obtain an advantage in a civil matter. A complaint or report filed in good faith cannot be said to have been filed solely for the purpose of gaining an advantage in a civil matter. *See* D.C. Legal Ethics Opinion 220 (*Threats to File Disciplinary Charges*) (1991).

[12]Rule 8.3(c) was amended in 2007 to include a limitation on the duty to report when prohibited by "other law." Opinion 246 should now be read consistent with that amendment.

[13]The Committee envisions a possible scenario in which the impaired attorney's response to being confronted regarding the impairment is to leave the firm to practice elsewhere. In such cases, the firm may not have had the opportunity to remove the impaired lawyer from client matters, to take other protective measures, or to inform clients of the removal of the impaired lawyer from matters. As noted herein, however, the duty to address an issue of impairment, to communicate material information to a client or to mitigate harm may first arise long before the lawyer decides to leave the law firm.

[14]*See* D.C. Legal Ethics Opinion 273 (*Ethical Considerations for Lawyers Moving From One Private Law Firm to Another*) (1997).

ously provided on the issue of departing lawyers.[15]

If an impaired lawyer leaves a firm and does not take firm clients, or the firm later learns that a former firm client has retained the impaired lawyer, then the law firm has no duty to supply those clients with facts about the impaired lawyer, as long as the firm avoids any action that might be interpreted as an endorsement of the services of the impaired lawyer or the lawyer's competence.

*Conclusion*

In circumstances where a law firm or government agency addresses the issue of an impaired lawyer, there is a crucial balancing between protecting the interests of the clients and properly discharging the law firm or government agency's obligations to protect the privacy of the lawyer under substantive law. Having appropriate policies and procedures designed to encourage reporting and to address issues of impairment within the law firm or government agency are important steps in ensuring that an impaired lawyer does not violate the Rules and that partners, and managerial and supervisory lawyers properly discharge their duties under the Rules.

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*Opinion 378*

## Acceptance of Cryptocurrency as Payment for Legal Fees

It is not unethical for a lawyer to accept cryptocurrency in lieu of more traditional forms of payment, so long as the fee is reasonable. A lawyer who accepts cryptocurrency as an advance fee on services yet to be rendered, however, must ensure that the fee arrangement is reasonable, objectively fair to the client, and has been agreed to only after the client has been informed in writing of its implications and given the opportunity to seek independent counsel. Additionally, a lawyer who takes possession of a client's cryptocurrency, either as an advance fee or in settlement of a client's claims, must also take competent and reasonable security precautions to safeguard that property.

**Applicable Rules**

- Rule 1.1 (Competence)
- Rule 1.5 (Fees)
- Rule 1.8 (Conflice of Interest: Specific Rules)
- Rule 1.15 (Safekeeping Property)

*Background*

Cryptocurrency is a virtual asset—digital money—that exists only in electronic form. It is completely decentralized, meaning there is no controlling authority, and it is not issued by any government or backed by any tangible security or real estate. Instead, cryptography (mathematical algorithms that are used to encode and decode information) controls the creation of new "coins" of a particular cryptocurrency and secures and records transactions. The resulting data is maintained in a virtual transaction ledger called a "blockchain," which is distributed to every computer on that cryptocurrency's network. The blockchain is a continually-expanding chronological record of transactions; it is comprised of "blocks" of information that include the source of cryptocurrency being transacted, its destination, and a date/time stamp. The most well-known cryptocurrencies are Bitcoin and Ethereum, but there are thousands of others.

Cryptocurrency, once acquired, may be spent like currency or held as an investment asset, like gold. Its algorithmic existence is "stored" in digital "wallets" maintained by online platforms ("hot wallets") or offline on a computer's hard drive, a USB port, or even paper ("cold wallets"). A cryptocurrency wallet also stores private and public keys, which are strings of alphanumeric characters that enable their holder to receive or spend cryptocurrency. The public key is shared to allow others to send currency to a wallet. The private key allows its holder to access her wallet by writing in the public ledger, effectively spending the associated cryptocurrency.

The U.S. Internal Revenue Service (IRS) describes "virtual currency," *i.e.*, cryptocurrency, as "a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value."[1] Based on this definition, the IRS treats cryptocurrency as property rather than currency for U.S. federal tax purposes. And, despite having no physical existence and being "spendable" like money, cryptocurrency does seem similar to a commodity such as gold in that its exchange value is tied directly to market demand. But cryptocurrency as an asset is far more volatile than gold—one Bitcoin, for example, was worth $5,647.53 on September 19, 2017; $17,056.55 on December 11, 2017; $7,826.99 on February 5, 2018; $3,295.27 on December 10, 2018; and $10,241.35 on September 9, 2019.[2]

The nature of digital currency- as a new technology, a volatile alternative currency or asset, or client property- raises ethical challenges for lawyers that simply do not exist with fiat currency. But lawyers cannot hold back the tides of change even if they would like to, and cryptocurrency is increasingly accepted as a payment method by vendors and service providers, including lawyers.[3] Accordingly, the Committee provides this Opinion to assist lawyers who accept or even require payment of fees or settlement in cryptocurrency (or whose clients do) to meet their ethical obligations.

### 1. Reasonableness of the Fee Arrangement

Rule 1.5(a) states that "[a] lawyer's fee shall be reasonable." The rule includes a list of factors to be considered in determining the reasonableness of a fee, most of which concern the nature of the representation, the attorney's level of experience, and the client's needs and sophistication. Only two enumerated factors explicitly mention fees: whether the lawyer's fees are consistent with the customary rates charged in that locality for similar services,[4] and whether a fee is fixed or contingent.[5]

Rule 1.5(a) does not address terms of payment, and there is nothing in the "reasonableness" standard that prohibits

[15] *See* D.C. Legal Ethics Opinion 372 (*Ethical Considerations in Law Firm Dissolutions*) (2017) *citing* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-414 (1999).

[1] I.R.S. Notice 2014-21, I.R.B. 2014-16 (Apr. 14, 2014).

[2] Cryptocurrency's volatility is related to many factors, including the relatively limited adoption of digital currency, small market size, risk of security breaches, and lack of regulatory oversight and institutional investment. *See* https://www.blackwell-global.com/why-are-cryptocurrencies-so-volatile/ (last visited November 12, 2019).

[3] According to a November 2019 article, Quinn Emanuel Urquhart & Sullivan, Perkins Coie, Steptoe & Johnson LLP, Frost Brown Todd, and "a slew of smaller firms as well as solo practitioners have embraced the payment structure" of cryptocurrencies. Samantha Stokes, *Quinn Emanuel Says Clients Can Pay In Bitcoin*, available at https://www.law.com/americanlawyer/2019/11/05/quinn-emanuel-says-clients-can-pay-in-bitcoin/?slreturn=20200016135954.

[4] Rule 1.5(a)(3).

[5] Rule 1.5(a)(8).

lawyers from accepting potentially volatile assets as payment for fees; indeed, Comment 4 to Rule 1.5 states that "[a] lawyer may accept property . . . such as an ownership interest in an enterprise," as payment. Moreover, this Committee has previously acknowledged that a lawyer may accept an ownership interest in a client, including shares of corporate stock, as an *advance payment* on services to be rendered. *See* D.C. Bar Legal Ethics Opinion 300 (July 2000).[6]

Opinion 300 is particularly helpful in framing the reasonableness analysis applicable to digital currency. In that opinion, the Committee addressed the question of whether a lawyer could serve as part-time general counsel to a limited liability company in exchange for a 20% interest in the company and a share of future profits. We noted that "the pertinent question" was not "whether such a fee arrangement is ethical in principle; it clearly is. Rather, the question is whether a *particular* ownership-in-lieu-of-fees arrangement is 'reasonable,' which calls for an analysis of reasonableness factors similar to that we have described in prior opinions." *Id.* (emphasis added). We emphasized that a lawyer's disclosures and explanation of the risk of paying advance fees in stock would be particularly relevant, as we "had no doubt that reasonableness would be measured, at least in part, by the extent to which the client's acceptance of the fee arrangement was informed by its understanding of [the] financial implications." *Id.*

We conclude that payment of fees in cryptocurrency is more akin to payment in property than payment in fiat currency. The financial implications of paying for a lawyer's services in a cryptocurrency will vary depending on the fee arrangement. A client who receives a bill for services rendered and elects to immediately transfer bitcoins to an attorney's wallet can be certain of the value of the payment, while a client who pays a lawyer an advance for services to be performed cannot predict the value of that cryptocurrency in a week, much less a month or a year. Therefore, the reasonableness of a fee agreement involving cryptocurrency will depend not only on the terms of the fee agreement itself and whether or not payment is for services rendered or in advance, but also on whether and how well the lawyer explains the nature of a client's particularized financial risks, in light of both the agreed fee structure and the inherent volatility of cryptocurrency.

### 2. Acceptance of Cryptocurrency Under Rule 1.8(a)

We agree with the conclusion of the New York City Bar Association's Committee on Professional and Judicial Ethics that an agreement to accept an advance retainer in cryptocurrency, or an agreement requiring a client to pay future earned fees in cryptocurrency, is subject to Rule of Professional Conduct 1.8(a) governing business transactions with clients.[7]

The D.C. rule, like the New York rule, reflects the fiduciary nature of the lawyer-client relationship.[8] It requires lawyers to ensure that all business dealings with clients are fundamentally fair, providing that:

> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless: (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) The client consents in writing thereto.

Like the New York City Bar, we do not believe Rule 1.8(a) is implicated when a client opts to pay attorney's fees in cryptocurrency after receiving a bill, calculated in dollars, for fees already earned and costs incurred. An attorney may agree to accept the corresponding amount of cryptocurrency as a matter of client convenience without taking any special precautions beyond what is required by Rule 1.5 because this is a straightforward exchange involving no additional variables or special knowledge.

If, however, a lawyer and client agree that the client will provide cryptocurrency to be held by the lawyer as an advance fee against services to be performed, or if the lawyer's fees will be calculated in cryptocurrency (*e.g.*, the client agrees to pay one Bitcoin per month), then the lawyer and client are entering into a potentially adverse pecuniary relationship under Rule 1.8. This is because any such agreement necessarily involves considerable uncertainty about the future value of the cryptocurrency at the time the fee will be earned or, in the case of settlement, at the time the payments to third parties and the client will be made.

Rule 1.8(a), like Rule 1.5(a), requires a lawyer to adequately disclose the terms and implications of the fee arrangement, which must be reasonable. But Rule 1.8(a) goes significantly further: a lawyer who enters into a business relationship with a client must provide to the client written disclosure of the terms of the agreement and a reasonable opportunity to confer with independent counsel, and must obtain from the client written, informed consent to the agreement. Additionally, Rule 1.8(a) adds an independent ethical obligation to ensure that the fee arrangement is not only reasonable, but also "fair" to the client.

But at what point in the engagement is fairness to be determined? This question is particularly important when assessing the fairness of an agreement to accept and hold a volatile asset like cryptocurrency—or stocks, or future profits, or foreign currency—as advance fees for services not yet rendered. Once again, Opinion 300, concerning accepting stocks or partial ownership of a client in lieu of fees, is instructive:

> Rule 1.8(a) and the commentary thereto are silent on how fairness is to be determined, and whether it is to be determined only by reference to facts and circumstances existing at the time the arrangement is accepted by the parties, or by reference to subsequent developments (for example, a huge appreciation in the value of the shares received as fees such that the lawyer is effectively compensated at 100-fold the reasonable value of his services). For ethics purposes (and not for purposes of assessing common law fiduciary duties), we believe that the "fairness" of the fee arrangement should be judged at the time of the engagement. In other words, if the fee arrangement is "fair and reasonable to the client" at the time of the

[6] Indeed, Bar Associations across the country have long agreed that a lawyer may accept fees in stock or equity interest in a client so long as the lawyer ensures that the client fully understands the financial implications and the terms are objectively fair to the client. *See* ABA Op. 00-418 (July 7, 2000), "Acquiring Ownership in a Client in Connection with Performing Legal Services"); N.Y.C. Eth. Op. 2000-3.

[7] N.Y.C. Eth. Op. 2019-5.

[8] "Because a lawyer occupies a multifaceted position of trust with regard to the client . . . there is an ever present fiduciary responsibility that arches over every aspect of the lawyer-client relationship, including fees. *Connelly v. Swick & Shapiro*, P.C., 749 A.2d 1264, 1268 (D.C. 2000) (internal citations omitted).

> engagement, no ethical violation could occur if subsequent events, beyond the control of the lawyer, caused the fee to appear unfair or unreasonable.

Opinion 300 at fn 5; *see also* Restatement (Third) of the Law Governing Lawyers § 126, comment e (2000) ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as the facts later develop.")

Applying these principles, any fee arrangement that calculates fees in cryptocurrency, or that allows or requires a client to either provide an advance fee or accept a settlement payment from a third party in cryptocurrency, should be assessed for fairness at the time that it is agreed upon, based on the facts then available. For so long as the value of digital currency remains predictably volatile, this is a fact the lawyer must ensure that his or her client understands.

The information that must be disclosed to a particular client in writing under Rule 1.8(a) will, of course, vary. As a general matter, in addition to terms concerning billing rates and frequency, a lawyer accepting cryptocurrency should consider including a clear explanation of how the client will be billed (*i.e.* in dollars or cryptocurrency); whether and how frequently cryptocurrency held by the lawyer will be calculated in dollars, or otherwise trued-up or adjusted for accounting purposes and whether, upon that accounting, market increases and decreases in the value of the cryptocurrency triggers obligations by either party; whether the lawyer or the client will be responsible for cryptocurrency transfer fees (if any); which cryptocurrency exchange platform will be utilized to determine the value of cryptocurrency upon receipt and, in the case of advance fees, as the representation proceeds (*i.e.*, as fees are earned) and upon its termination; and who will be responsible if cryptocurrency accepted by the lawyer in settlement of the client's claims loses value and cannot satisfy third party liens.[9]

**3. Competently Safeguarding Cryptocurrency**

Rule 1.15(a) requires, among other things, that a lawyer "appropriately safeguard" the property of clients and third parties.[10] Paragraph (e) addresses advance fees, and provides that "advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement," and, that, even if the client does consent to a different arrangement,[11] any unearned or unincurred portion of an advance fee must be returned upon termination of the lawyer's services. *See also* Rule 1.16(d).[12] These rules, of course, apply to all advance fees, regardless of how they are funded. But, as with issues related to valuation, safeguarding cryptocurrency raises unique challenges.

The first rule of professional conduct is that lawyers must provide competent representation to their clients. See Rule 1.1. Although the Comments to Rule 1.1 do not specifically reference technology, we agree with ABA Comment [8] to Model Rule 1.1 that, to be competent, "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Consistent with D.C. Bar Legal Ethics Opinion 371, which addressed lawyers' use of social media, a lawyer must have the skill required to exercise reasonable professional judgment regarding the use of technology, including digital currency, within the lawyer's legal practice.

In the case of cryptocurrency, competence requires lawyers to understand and safeguard against the many ways cryptocurrency can be stolen or lost. Because blockchain transactions are unregulated, uninsured, anonymous, and irreversible, cryptocurrency is regularly targeted for digital fraud and theft. For example, cryptocurrency online wallets and exchange platforms may be fraudulent; legitimate wallets and platforms may be subject to security breaches; and private keys used to transfer cryptocurrency out of a person's wallet are vulnerable to network-based threats like hacking and malware if stored in a hot wallet (a device or system connected to the internet). Additionally, private keys that are stored in a cold wallet (hardware, offline software, or paper) can be irretrievably lost, in which case the associated digital currency is likely permanently inaccessible. Just as with fiat currency or any client property, a lawyer must use reasonable care to minimize the risk of loss.

*Conclusion*

We do not perceive any basis in the Rules of Professional Conduct for treating cryptocurrency as a uniquely unethical form of payment. Cryptocurrency is, ultimately, simply a relatively new means of transferring economic value, and the Rules are flexible enough to provide for the protection of clients' interests and property without rejecting advances in technologies. So long as the fee agreement between a lawyer and her client is objectively fair and reasonable (and otherwise complies with Rules 1.5 and 1.8), and the lawyer possesses the requisite knowledge to competently safeguard the client's digital currency, there is no prohibition against a lawyer accepting cryptocurrency from or on behalf of a client.

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*Opinion 379*

**Attorneys' Charging Liens and Client Confidentiality**

An attorney whose fees are secured by a charging lien against the client's future recovery in a matter may give notice of the existence of the charging lien to successor counsel or another likely holder of the property subject to the lien if the attorney's representation in the matter is terminated before there is a recovery. Absent the former client's consent, however, the notice must not contain information about the client's lack of resources, the client's past refusals to pay, or any other information gained in the professional relationship that would be embarrassing, or likely to be detrimental, to the client. Any further efforts to enforce the lien or collect the fees must

[9] The lawyer bears the burden of proving that the transaction was fair and the client was adequately informed, and ambiguities will be construed in favor of the client. *See, e.g. In re Martin*, 67 A.3d 1032, 1041 (D.C. 2013) ("[A]ny ambiguity in the [contingent fee] agreement would be interpreted against Martin, who drafted the agreement. *See Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc*., 747 A.2d 564, 567 (D.C. 2000) (stating that ambiguities in contracts will be 'construed strongly against the drafter.' ")); ABA Opinion 00-418.

[10] Rule 1.15(a) also requires that lawyers maintain trust funds to hold money belonging to clients or third parties. Because cryptocurrency has been designated by the IRS as property rather than money, and because it cannot be deposited into a trust fund without being converted to money, this requirement is not applicable.

[11] Any "different arrangement" must be fair to the client. "At a minimum, a lawyer must explain to the client 'the basis for this arrangement and . . . how [the client's] rights are protected by the arrangement.'" *In re Mance*, 980 A.2d 1196, 1207 (D.C. App. 2009), as amended (Oct. 29, 2009) (*quoting In re Sather*, 3 P.3d 403, 410 (Colo. 2000) (*en banc*)).

[12] *See also In re Mance*, *id.* at 1202.

comply with the Rules of Professional Conduct governing fee disputes between lawyers and clients. Disclosures of client confidences can be made only to the minimum extent necessary to collect the fees, and even then protective orders and filings *in camera* or under seal should be used to the maximum extent possible to protect client confidential information from exposure to third parties without a need to know.

**Applicable Rules**

- Rule 1.5 (Fees)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.8(i) (Lawyer Liens)
- Rule 1.15 (Safekeeping Property)
- Rule 1.16 (Declining or Terminating Representation)

*Discussion*

Historically, an attorney's toolkit to collect fees included two different kinds of liens: (1) a "retaining lien" against client files and other client property in the lawyer's possession, and (2) a "charging lien" against the proceeds of a claim that the lawyer pursued on the client's behalf when the lawyer and the client "contracted with the understanding that the attorney's charges were to be paid out of the judgment recovered." *See generally Wolf v. Sherman*, 682 A.2d 194, 197 (D.C. 1996). "A charging lien does not depend upon an agreement that the attorney shall have a lien upon the judgment; in fact, only in the absence (or inadequacy) of an express lien does the question of a possible equitable lien arise." *Id.* at 198. As discussed below, an attorney's ability to use a retaining lien was substantially circumscribed by the adoption of the District of Columbia Rules of Professional Conduct in 1991. However, no specific changes were made with respect to charging liens. The question presented to the Committee here is whether a discharged lawyer's confidentiality obligation to the former client under Rule 1.6 precludes the lawyer giving notice of the lien to the former client's successor counsel or another likely custodian of the funds or property subject to the lien. The answer is no.

**A. Retaining Liens**

Where authorized, a retaining lien empowers a terminated attorney to hold hostage the client's file and other property in the lawyer's possession until the bill is paid or, in some jurisdictions, until a court orders release of the file. Such an order may be conditioned on the client posting a bond to secure the terminated attorney's fee claim, or by imposing a charging lien on the eventual proceeds of the case. *See, e.g., Security Credit Systems, Inc. v. Perfetto*, 662 N.Y.S.2d 674 (N.Y. App. Div. 1997) (discussing New York practice).

The greater the client's need for the file, the more effective the retaining lien is in motivating the client to pay quickly. In order to prevent harm to the client, however, some jurisdictions limit or eliminate the ability of attorneys to use retaining liens in the circumstances where the lien would be most effective.

The District of Columbia is such a jurisdiction. Since 1991, when the Rules of Professional Conduct replaced the earlier Code of Professional Responsibility, two of the then-new rules have circumscribed the ability to enforce a retaining lien. Under Rule 1.8(i):

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, but a lawyer shall not impose a lien upon any part of a client's files, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Under Rule 1.16(d):

> In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . . The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i).

As discussed in Legal Ethics Opinion 230, file materials that are not "work product" are not subject to any retaining lien. We concluded in that opinion that the inquiring attorney in that matter could not retain the originals of promissory notes and a letter of credit.

While the first sentence of Rule 1.8(i) holds out the possibility of a retaining lien as to the lawyer's own work product to the extent that the client has not paid for it, the second sentence takes that option away if the client is "unable to pay" or when withholding the work product "would present a significant risk to the client of irreparable harm." Rule 1.8(i). As a practical matter, this takes the assertion of a retaining lien off the table in situations where such a lien would be the most powerful.

This was a substantial change from practice prior to 1991 under the Code of Professional Responsibility. As several of our earlier opinions illustrate, the former Code was much more permissive of the use of retaining liens, although there were some limits. *See generally* D.C. Legal Ethics Opinions 59, 90, 103 & 107.

**B. Charging Liens**

Charging liens exist under common law in some jurisdictions and by statute in others. Case law in New York memorably describes that state's charging lien as "a device to protect counsel against 'the knavery of his client,' whereby through his effort, the attorney acquires an interest in the client's cause of action." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 177 (2d Cir. 2001) (quoting *In re City of New York*, 157 N.E.2d 587, 590 (N.Y. 1959)). "The lien is predicated on the idea that the attorney has by his skill and effort obtained the judgment, and hence 'should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures.'" *Id.* (quoting *Williams v. Ingersoll*, 89 N.Y. 508, 517 (1882)).

The charging lien in the District of Columbia is a creature of local common law:

> At common law an attorney had what is known as a charging lien on the judgment or decree obtained for his client for services rendered in procuring it to the extent of his taxable costs and expenses. In many of the United States an attorney's charging lien is created by statute, and is, of course, limited by its terms. In some of the states in which there is no statute the attorney's lien has been extended by court decision to cover reasonable compensation for his services, and in those jurisdictions it is held that such lien may be enforced by resort to equity.
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> In the District of Columbia there is no statute, but the rule on the subject has been stated to be that it is an indispensable condition to the establishment of an attorney's lien on a particular fund — not in possession — that there should be a distinct appropriation of the fund by the client, or an agreement that the attorney should be paid out of it. This rule is now the established law in this jurisdiction.

*Pink v. Farrington*, 92 F.2d 465, 466 (D.C. Cir. 1937). *Accord Wolf v. Sherman*, 682 A.2d at 197 ("The District's rule on charging liens is narrower than the English common law rule.").

The lien may be asserted by giving notice to successor counsel or to others who are likely to have control of the encumbered property before it is distributed to the client. In *D.C. Redevelopment Land Agency v. Dowdey*, for example, prior counsel successfully enforced a charging lien against a government agency that condemned property that the lawyer had saved from foreclosure. 618 A.2d 153 (D.C. 1992). The original landowner in that case had retained the attorney to delay foreclosure until the property was condemned. The attorney's fee agreement entitled him to one-third of the property's equity value, *e.g.,* the proceeds of the eventual condemnation to the landowner. Despite having had notice of the attorney's charging lien, the condemning authority paid the prior landowner without joining the attorney to the litigation that was intended to adjudicate entitlement to those proceeds. The court held that the condemning authority bore the risk of having to make a double payment in those circumstances under condemnation law. *See id*. at 162.[1]

**C. Attorneys' Fee Issues When A Client Changes Counsel in the Middle of a Contingent Fee Representation.**

"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." Rule 1.16 cmt. [4]. However, "where a [terminated] lawyer has a valid lien covering undisputed amounts of property or money, the lawyer may continue to hold such property or money to the extent permitted by the substantive law governing the lien asserted." Rule 1.16 cmt. [11] (citing Rules 1.8 and 1.15(b)).

In contingent fee representations, a lawyer who is discharged without cause is generally entitled to a fee if the client ultimately prevails in the underlying matter. In the District of Columbia, the amount of that fee depends on how much work the lawyer did before being discharged. If the discharged attorney "had substantially performed" and was "at all times ready, able and willing to complete what remained to be done," "the attorney is entitled to the full amount of his fee" if the client subsequently recovers. *Kaushiva v. Hutter,* 454 A.2d 1373, 1375 (D.C. 1983) (citations omitted) However, "[w] here an attorney, before discharge, has performed only inconsequential services of little benefit to the client, even if these services were all that could have been expected of him, he may recover only in *quantum meruit*." *In re Waller*, 524 A.2d 748, 750 (D.C. 1987) (citing *Friedman v. Harris*, 81 U.S.App.D.C. 317, 318, 158 F.2d 187, 188 (1946) (attorney who had merely filed suit entitled only to *quantum meruit*)).[2]

The client's potential liability to predecessor counsel for any recovery in a contingent fee case is so well understood that successor counsel may have an affirmative obligation to warn the client about it in their initial negotiations about successor counsel's fee. Such was the conclusion of the American Bar Association's Standing Committee on Ethics and Professional Responsibility in ABA Formal Opinion 487 (2019).

The ABA's conclusion focused on the requirements of Model Rules 1.5(b) and (c). Under the former, "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation." The latter authorizes contingent fees where not prohibited but requires contingent fee agreements to be in a writing "signed by the client" and to disclose a number of things, including "the method by which the fee is to be determined," "litigation and other expenses to be deducted from the recovery," "whether such expenses are to be deducted before or after the continent fee is calculated," percentages accruing to the lawyer in the event of settlement, trial or appeal, and "any expenses for which the client will be liable" even if not the prevailing party.

The ABA committee concluded that "[a] contingent fee agreement that fails to mention that some portion of the fee may be due to or claimed by the first counsel . . . is inconsistent with the requirements of Rule 1.5(b) and (c)." ABA Formal Opinion 487, at 2. The ABA highlighted the concern if this were to occur with the following illustration:

> Assume, for example, that a client retains a lawyer in a matter and enters into a written fee agreement in which the lawyer is entitled to one-third of any recovery. The client then decides to terminate the lawyer, without cause, and hires new counsel. The successor counsel takes the matter on the same terms as the predecessor counsel (one-third of any recovery) but the successor counsel's written fee agreement is silent on whether that one-third is in addition to or in lieu of the one-third specified in the predecessor counsel's fee agreement, and no such disclosure is made in a separate document provided to the client. In these circumstances, the client may not know whether the client must pay one or both lawyers or the amount of the fees owed. The client may be aware of the right to terminate a lawyer's representation at any time but may not be aware that termination does not necessarily extinguish an obligation to pay prior counsel for the value of the work performed – the *quantum meruit* claim – or in some cases a termination amount specified in the predecessor counsel's fee agreement. If the predecessor counsel was not terminated for cause, that lawyer may be entitled to payment for the fair value contributed to the case before being terminated. Under those circumstances, "a contingency client should be advised by the successor attorney of the existence and effect of the discharged attorney's claim for fees on the occurrence of the contingency as part of the terms and conditions of the employment by the successor attorney."

ABA Formal Opinion 487 at 3 (footnotes omitted).

[1] In some jurisdictions, charging liens are available in non-contingent fee matters in which the attorney is to be paid on an hourly basis without regard to whether the litigation is successful. *See generally* John C. Martin, *Attorney Charging Liens: A Primer* (2016), available at https://www.sfgh.com/siteFiles/News/Attorney%20Charging%20Liens.pdf. That appears not to be the case in the District of Columbia given the requirement of an express or implicit agreement with the client that the attorney is to be paid from the proceeds of the representation. Accordingly, the rest of this opinion will focus on contingent fee representations. We note, however, that the availability of a common law charging lien is irrelevant and unnecessary if the attorney's agreement with the client gives the attorney an express lien on any proceeds of the representation as security for the attorney's fee claim. *See Wolf v. Sherman,* 682 A.2d at 198 & 200-201. The existence and elements of a charging lien claim are, of course, questions of law beyond the purview of this Committee.

[2] However, "[a] client has the ultimate authority to control his affairs; thus, he may settle a claim regardless of his attorney's efforts to prosecute it." *King & King, Chartered v. Harbert Int'l, Inc.,* 503 F.3d 153, 156 (D.C. Cir. 2007) (citing *Barnes v. Quigley*, 49 A.2d 467, 468 (D.C. 1946)). Similarly, there can be no *quantum meruit* compensation when the client chooses to discontinue a case because of his reasonable assessment that there is no chance of recovery. *Id.* at 157. "Otherwise, a contingent-fee client, convinced he had no chance of success, would have to continue his case just to avoid *quantum meruit* liability. Such a policy would encourage litigants to take unwarranted risks and prolong litigation simply to avoid paying attorney fees—a predicament that mocks the ideal of client control." *Id.*

D.C. Rules 1.5(b)[3] and (c)[4] differ in some respects from their counterparts in the Model Rules. On this issue, however, we believe that our Rule 1.5 also requires successor counsel in a contingent fee matter to alert the client that prior counsel may have a claim to a fee from any eventual recovery. Absent such disclosure, many clients would not fully understand the basis or rate of the fees for which they might ultimately be liable.

The ABA opinion also discussed certain obligations that successor counsel would have to prior counsel under the "Safekeeping Property" obligations of Rule 1.15:

> Where a disagreement persists between the predecessor counsel and the client, or predecessor counsel and successor counsel, about the amount of the predecessor counsel's fees from the proceeds obtained by the successor counsel, the successor counsel must comply with Rule 1.15 and substantive law in notifying predecessor counsel of the receipt of the funds and in deciding how to handle the funds. . . . If there is a dispute as to whether some or all of those funds should be paid to the predecessor counsel by the client but there is a claim to the proceeds by that counsel, the successor counsel must hold the disputed portion of the funds in a client trust account pursuant to Rule 1.15(e).

ABA Formal Opinion 487 at 6-7.

D.C. Rule 1.15 imposes similar obligations to the extent that successor counsel is aware of prior counsel's claim against funds recovered for the client:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
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> (c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.
>
> (d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

In Legal Ethics Opinion 293, we provided guidance on the disposition of the property of clients and others where ownership of that property is in dispute. We concluded:

> In certain situations, a lawyer is obligated to safeguard funds that come into the lawyer's possession where ownership interests are claimed by both the lawyer's client and a third party or parties. If the third party has a "just claim" to the property that the lawyer has a duty under applicable law to protect against wrongful interference by the lawyer's client, the lawyer must hold any disputed portion of the property until the dispute has been resolved.[5]

Legal Ethics Opinion 293.

We gave extensive guidance on what would and would not be a "just claim" that the lawyer needed to respect in considering distributions of funds:

> In general, a "just claim" that the lawyer must honor pursuant to Rule 1.15 is one that relates to the particular funds in the lawyer's possession, as opposed to merely being (or alleged to be) a general unsecured obligation of the client. The problems addressed by this opinion most commonly arise in the context of the disbursement of settlement funds or proceeds of a transaction, such as the sale of real estate. In those cases, several types of claims that frequently are received by lawyers are illustrative of "just claims" that would require the lawyer to give notice, make disbursement promptly where there is no dispute, and safeguard the funds in the event of a dispute until the dispute is resolved. These are:
>
> 1. an attachment or garnishment arising out of a money judgment against the client (or ordered judicially prior to judgment) and duly served upon the lawyer, regardless of whether the attachment or garnishment is related to the matter being handled by the lawyer…;
>
> 2. a statutory lien that applies to the proceeds of the suit being handled by the lawyer…;
>
> 3. a court order relating to the specific funds in the lawyer's possession…; and
>
> 4. a contractual agreement made by the client and joined in or ratified by the lawyer to pay certain funds in the possession of the lawyer (e.g., client expenses in consideration of the supplier's agreement to forebear collection action during the pendency of the lawsuit) to a third party, regardless of whether such an agreement arises

[3] "When the lawyer has not regularly represented the client, the basis or rate of the fee, the scope of the lawyer's representation, and the 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."

[4] "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation, other expenses to be deducted from the recovery, whether such expenses are to be deducted before or after the contingent fee is calculated, and whether the client will be liable for expenses regardless of the outcome of the matter. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and if there is a recovery, showing the remittance to the client and the method of its determination."

[5] The source of the phrase "just claim" is Comment [8] to Rule 1.15:

> 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 shall not unilaterally assume to arbitrate a dispute between a client and the third party.

> from the matter being handled by the lawyer….

Legal Ethics Opinion 293 (citations omitted).

"Where such a 'just claim' exists, the lawyer is ethically obliged to disregard her client's demand for the property. Thus, this rule concerning 'just claims' is an exception to the general principle of client loyalty." *Id*. (citations omitted).

We have no doubt that a charging lien is a "just claim" that successor counsel cannot ignore in disbursing the proceeds of the representation.[6] However, we noted in Opinion 293 that Rule 1.15 "does not apply to claims of which the lawyer lacks knowledge." The issue for this opinion is whether prior counsel's confidentiality obligation to the client precludes prior counsel from giving notice of the charging lien to successor counsel or other likely custodians of encumbered funds or property. The answer is no.

**D. Confidentiality Obligations Generally in Matters Relating to Unpaid Fees and Terminations of Representations**

Rule 1.6 defines a lawyer's confidentiality obligation to the lawyer's current and former clients. The obligation extends to both "confidences" and "secrets."

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.

Rule 1.6(b).

This rule is broader than the attorney-client privilege because it includes both privileged information (defined as a "confidence") and non-privileged information gained within the professional relationship that fits within the rule's definition of a "secret." While encompassing more than is covered by the evidentiary privilege, the confidentiality obligation in D.C. has outer limits. If some specific bit of information gained in the professional relationship is neither a "confidence" nor a "secret," the rule's confidentiality obligations do not apply to it.[7]

There is an exception to the confidentiality obligation for fee disputes: "A lawyer may use or reveal client confidences or secrets: . . . to the minimum extent necessary in an action instituted by the lawyer to establish or collect the lawyer's fee." Rule 1.6(e)(5). However, this exception is limited to "an action instituted by the lawyer" to collect or establish the fee. The client's mere refusal to pay does not trigger this confidentiality exception. Disclosure can only be made within the context of that "action."

Even when it applies, the fee dispute exception does not authorize unfettered use by the lawyer of every confidence and secret obtained from the delinquent client. Disclosures may be made in "the action" only "to the minimum extent necessary" to establish or collect the fee. As explained in the comments to Rule 1.6:

> Subparagraph (e)(5) permits a lawyer to reveal a client's confidences or secrets if this is necessary in an action to collect fees from the client. 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. Subparagraph (e)(5) should be construed narrowly; it does not authorize broad, indiscriminate disclosure of secrets or confidences. The lawyer should evaluate the necessity for disclosure of information at each stage of the action. For example, in drafting the complaint in a fee collection suit, it would be necessary to reveal the "secrets" that the lawyer was retained by the client, that fees are due, and that the client has failed to pay those fees. Further disclosure of the client's secrets and confidences would be impermissible at the complaint stage. If possible, the lawyer should prevent even the disclosure of the client's identity through the use of John Doe pleadings.
>
> If the client's response to the lawyer's complaint raised issues implicating confidences or secrets, the lawyer would be permitted to disclose confidential or secret information pertinent to the client's claims or defenses. Even then, the rule would require that the lawyer's response be narrowly tailored to meet the client's specific allegations, with the minimum degree of disclosure sufficient to respond effectively. In addition, the lawyer should continue, throughout the action, to make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of in camera proceedings.

Rule 1.6 cmts. [26] & [27].

Lawyers may terminate representations of clients who do not pay their fees. Under Rule 1.16(b)(3), "a lawyer may withdraw from representing a client if . . . [t]he 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." If the matter is before a court or other tribunal, however, the tribunal's

[6] We understand that the engagement agreements of some lawyers include an explicit lien in the lawyer's favor on any proceeds of the representation to the extent that the lawyer's fees are not paid or otherwise secured. As noted above, an equitable charging lien is unnecessary when there is an express lien. *See generally Wolf v. Sherman,* 682 A.2d at 198 & 200-201. Such an express lien would also be a "just claim" for purposes of Rule 1.15 whether the lien claimant had agreed to work on an hourly fee, a flat fee, or a contingent fee.

[7] The "confidences" and "secrets" approach used in D.C. Rule 1.6 differs from Model Rule 1.6, which makes confidential "information relating to the representation of a client." The ABA's "confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rule 1.6 cmt. [3]. In the mid-1980s, when the District was considering whether to adopt the Model Rules of Professional Conduct, the District rejected the ABA approach as "broader than warranted" and recommended retention of Disciplinary Rule (DR) 4-101 approach from the District's then-controlling Code of Professional Responsibility. *Proposed Rules of Professional Conduct and Related Comments Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar* at 52, ¶ 38 (Nov. 19, 1986). DR 4-101 used the "confidences" and "secrets" formulation now reflected in D.C. Rule 1.6(b). A number of other jurisdictions also retained the confidences and secrets formulation of the confidentiality obligation or its functional equivalent. The rules in New York and Virginia, for example, deleted the defined terms "confidence" and "secret" but replaced them with the phrases that the Code of Professional Responsibility used to define those words. *See* New York Rule 1.6(a) (" '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) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."); Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client…."). *See also* California Bus. & Prof. Code § 6068(e)(1) ("It is the duty of the attorney to do all of the following: . . . To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.").

permission to withdraw may also be required. Rule 1.16(c).

Rule 1.6 limits what a lawyer can say in a motion seeking to withdraw from a representation. Unlike "an action instituted by the lawyer" to collect a fee, there is no specific exception to Rule 1.6 for withdrawal motions. In *In re Gonzalez*, 773 A.2d 1026 (D.C. 2001), a lawyer was admonished for revealing too much in a motion to withdraw from a representation. *Accord In re Ponds*, 876 A.2d 636 (D.C. 2005). The lawyer in the *Gonzalez* case had made no attempt to keep sensitive client information away from opposing counsel and out of public filings. The court noted that:

> Gonzalez could have submitted his documentation in camera, and that he could also have made appropriate redactions of the material most potentially damaging to his clients (e.g., his allegations that A.A. had misrepresented facts to him and his suggestion, in one of the letters, that a demand of $90,000 by the plaintiffs in the underlying litigation might be reasonable).

773 A.2d at 1032.

ABA Formal Opinion 476 (2016) provides extensive guidance about confidentiality issues in withdrawal motions under the Model Rules. It concluded:

> In moving to withdraw as counsel in a civil proceeding based on a client's failure to pay fees, a lawyer must consider the duty of confidentiality under Rule 1.6 and seek to reconcile that duty with the court's need for sufficient information upon which to rule on the motion. Similarly, in entertaining such a motion, a judge should consider the right of the movant's client to confidentiality. This requires cooperation between lawyers and judges. If required by the court to support the motion with facts relating to the representation, a lawyer may, pursuant to Rule 1.6(b)(5), disclose only such confidential information as is reasonably necessary for the court to make an informed decision on the motion.

In finding that some limited disclosure was possible if steps to avoid such disclosure were unsuccessful, the ABA opinion relied on Model Rule 1.6(b)(5), which allows a lawyer to reveal client confidential information "to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."

Although that section does not mention fee collection matters specifically, this is the part of Model Rule 1.6 that allows lawyers to use client confidential information in fee disputes with lawyers. In relying on that section to authorize some disclosures in the withdrawal context, the ABA opinion noted that "motions to withdraw based on a client's failure to pay fees are generally grounded in the same basic right of a lawyer to be paid pursuant to the terms of a fee agreement with a client." ABA Opinion 476, at 4.

### E. Application of These Principles to Giving Notice of a Charging Lien

With that background, may an attorney seek to enforce his or her charging lien by giving notice of it to successor counsel or to another likely custodian of the funds or property to which the lien relates? We believe that the attorney may, for the reasons discussed below.

The District's confidentiality rule only applies to "confidences" and "secrets," as defined in Rule 1.6. Attorney fee agreements are not normally within the scope of the attorney-client privilege. *See generally* 1 Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 131-40 (6th ed. 2017). Nor are billing statements, at least not when time entries containing privileged or confidential information are redacted. *Id*. at 157-62. The existence of the lien is certainly not a "confidence."

However, the existence of the lien would be a "secret" within the protections of Rule 1.6 if it were "information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Whether something is a "secret" for purposes of Rule 1.6 depends on the facts and circumstances in a particular matter.

However, the client has the power to make any information gained in the professional relationship a "secret" for purposes of Rule 1.6 by "request[ing]" that the information "be held inviolate." We will assume for purposes of this opinion that the client has invoked that power with respect to the information that would need to be included in the notice of a charging lien. Indeed, a sophisticated client might even attempt to use that power to avoid having to pay for prior counsel's services by:

- Ordering prior counsel not to tell others about his or her charging lien; and
- Ordering successor counsel not to inform prior counsel that the client prevailed and that there is a fund from which prior counsel might be able to seek a fee.

Such skullduggery will not stand. "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." Rules of Professional Conduct: Scope cmt. [1].

We previously concluded in Opinion 293 that lawyers must disregard client instructions to ignore "just claims" by third parties to funds in the lawyer's possession. "Where such a 'just claim' exists, the lawyer is ethically obliged to disregard her client's demand for the property. Thus, this rule concerning 'just claims' is an exception to the general principle of client loyalty."[8]

More precisely on point is California Legal Ethics Opinion 2008-175 answering the question "What are a successor attorney's ethical obligations when her client in a contingency fee matter instructs her not to notify prior counsel, who has a valid lien against the recovery, of the fact or the amount of a settlement?" In that opinion, a client (Client) retained an attorney (A) to pursue a legal malpractice claim on a one-third contingent fee basis. After an investigation uncovered potential problems with the claim, A recommended that Client authorize a $150,000 pre-suit settlement offer. Believing the claim to be worth much more, Client fired A and retained another attorney (B) without A's knowledge on a one-third contingent fee basis. Client did mention A's earlier involvement to B. Then things got complicated:

> After months of intensive litigation, Client settles his malpractice case against Former Attorney for $150,000. Attorney A is not aware that the legal malpractice case has been filed so he has not filed a notice of lien. On the defense side, no one is aware of Attorney A's lien as he was discharged prior to suit being filed. As a result, the settlement check is made payable solely to Client and Attorney B.
>
> Having learned of the terms of the original fee agreement between Client and Attorney A, Attorney B presents Client with an accounting showing $100,000 payable to Client and $50,000 in attorney's fees to be divided between Attorney B and Attorney A.

[8] D.C. Legal Ethics Opinion 293 (2000).

> Client endorses the $150,000 check for deposit into Attorney B's Client Trust Account ("CTA"), demands the immediate payment of the $100,000 due him, and signs the accounting after adding the following handwritten statement: "I authorize the payment of $50,000 in attorneys' fees to Attorney B. I prohibit payment of any fee to Attorney A, and I prohibit Attorney B to disclose the fact or the amount of the settlement to Attorney A."

The California opinion concluded that, notwithstanding Client's instructions, Attorney B had to alert Attorney A of the fact and the amount of the settlement so that A could seek to enforce his charging lien as to up to one third of the recovery. Part of its analysis reflected an attorney's obligations to third party claimholders under California's equivalent of Rule 1.15. That analysis reached largely the same conclusions as our Opinion 293.

In order to permit that disclosure to Attorney A notwithstanding the client's instructions to the contrary, the California committee also had to find an exception to every California attorney's rigorous confidentiality obligation "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code § 6060(e)(1). It found that exception in a California Supreme Court approved comment to then-California Rule 3-310 authorizing disclosure of client confidential information "as authorized or required by the State Bar Act, these Rules, or other law."

As explained below, the opinion found a "required by law" exception to confidentiality for the fact and the amount of the settlement, but also held that further disclosures potentially harmful to the client would be prohibited:

> Based upon the authorities cited in our discussion of [the trust account issue] above, we conclude that disclosure to Attorney A of the fact and amount of the settlement between Client and Former Attorney is both authorized and required under applicable ethical rules and case law.
>
> First, Attorney B is required by law to take affirmative steps to permit Attorney A to assert any claims he has pursuant to his valid lien against the $50,000 attorney's fee recovery. In this regard, Attorney B is required by law to disclose the fact and the amount of the settlement to Attorney A because, as a fiduciary to Attorney A, Attorney B has an affirmative duty to notify the lienholder of the settlement as well as an affirmative duty not to conceal material facts from Attorney A.
>
> Second, disclosure of the fact and amount of settlement to Attorney A is authorized by law. Attorney B cannot unilaterally decide what portion of the $50,000 total fee can be disbursed from trust to pay her own fee. Thus, without disclosure to Attorney A, Attorney B has no basis upon which to calculate and to remove from trust the portion of the fee she earned, leaving both attorneys uncompensated. In that regard, we note that under California law attorneys are expressly released from the duty to maintain client secrets in order to obtain compensation for services rendered.
>
> While Attorney B is both authorized and required to disclose the fact and the amount of the settlement, there is no justification for her to disclose to Attorney A, without Client's consent, privileged confidential information such as the Client's demand that the fact and the amount of the settlement be concealed from Attorney A. Thus, Attorney B must keep that statement confidential even though it could potentially work to Attorney B's advantage in negotiating with Attorney A over his *quantum meruit* claim.
>
> Once Attorney A has been notified of the settlement, both attorneys must remain mindful of their duty of confidentiality to Client in attempting to reach an accord, amicably or through legal process, on the proper allocation of fees. Moreover, should the attorneys resort to legal process to resolve any dispute over allocation of the fee, Attorney B should provide Client with notice and an opportunity to participate should Client so desire. In any legal proceeding, the presiding officer will be in a position to limit the disclosure of confidential information to the greatest extent possible.

California Opinion 2008-175, at 5-6 (citations omitted).

The D.C. Rules also have a "required by law" exception. Under Rule 1.6(e)(2)(A), "[a] lawyer may use or reveal client confidences or secrets . . . when permitted by these Rules or required by law or court order." While the adoption of the D.C. Rules of Professional Conduct in 1991 specifically limited rights that lawyers previously had with respect to retaining liens, as discussed above, none of the new rules purported to limit charging liens. Indeed, Rule 1.8(i) begins by authorizing a lawyer to "acquire and enforce a lien granted by law to secure the lawyer's fees or expenses." The remainder of that rule pares back the lawyer's prior rights with respect to retaining liens but does nothing to limit use of charging liens.

Given that historical background and our prior Opinion 293, we agree with the California opinion that client demands for secrecy cannot preclude all communications relating to the assertion and enforcement of charging liens. Thus:

- When the attorney with the charging lien reasonably believes it necessary to protect the lien to give notice of that lien to successor counsel or to another potential holder of the funds or property subject to the lien, that notice may be given even if the client objects to it.
- When successor counsel reasonably believes it necessary to give notice to prior counsel under our Opinion 293 respecting "just claims" by third parties to funds in the lawyer's possession, that notice must be given even if the client objects to it.

However, care should be taken before making any further disclosures. As in fee disputes between lawyer and client, disclosures should be made only "to the minimum extent necessary" to protect the lien claim. Rule 1.6(e)(5). *See also In re Gonzalez, supra* (respecting disclosures in a motion to withdraw from a representation). Moreover,

> the lawyer should . . . make every effort to avoid unnecessary disclosure of the client's confidences and secrets and to limit the disclosure to those having the need to know it. To this end the lawyer should seek appropriate protective orders and make any other arrangements that would minimize the risk of disclosure of the confidential information in question, including the utilization of in camera proceedings.

Rule 1.6 cmt. [26].[9]

*Conclusion*

An attorney whose fees are secured by a charging lien against the client's future recovery in a matter may give notice of the existence of the charging lien to suc-

9The standards for proving a fee claim at trial are typically different than what would be required initially to assert a charging lien for that fee. As such, we would question the ethical propriety of serving copies of invoices upon an opposing counsel as part of a charging lien notification package

cessor counsel or another likely holder of the property subject to the lien if the attorney's representation in the matter is terminated before there is a recovery. Absent the former client's consent, however, the notice must not contain information about the client's lack of resources, the client's past refusals to pay, or any other information gained in the professional relationship that would be embarrassing, or likely to be detrimental, to the client. Any further efforts to enforce the lien or collect the fees must comply with the rules governing fee disputes between lawyers and clients. Disclosures of client confidences can be made only to the minimum extent necessary to collect the fees, and even then protective orders and filings *in camera* or under seal should be used to the maximum extent possible to protect client confidential information from exposure to third parties without a need to know.

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*Opinion 380*

## Conflict of Interest Issues Related to Witnesses

This Opinion examines certain recurring conflict of interest issues related to witnesses. Such issues can arise under D.C. Rules of Professional Conduct 1.7 and 1.9, and when they arise, Rule 1.10(a) can impute resulting conflicts within law firms, as that term is defined in Rule 1.0.

Section I outlines the practice scenarios in which these conflicts are most likely to arise: (A) issuing subpoenas to current or former clients; (B) advising current or former clients who are potential witnesses about Fifth Amendment rights; and (C) cross-examining current or former clients. Section II addresses the existence and resolution of unavoidable conflicts: (A) the creation of thrust-upon conflicts involving unforeseen witnesses and (B) the imputation of conflicts of interest across a firm. Section III offers practice suggestions for anticipating, identifying, preventing, and resolving conflicts of interest related to witnesses.

### Applicable Rules

- Rule 1.0 (Terminology)
- Rule 1.1 (Competence)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)

*Introduction*

Conflicts under Rules 1.7 and 1.9 can arise from the many differing interests of clients and former clients who know, or may know, facts related to litigation. For example, such clients may prefer not to become witnesses and therefore not to be subpoenaed to testify. If they testify, they may prefer not to have their testimony challenged by cross-examination. Or they may prefer not to disclose certain information even though it is relevant to the litigation. Some witnesses may want to obtain an advantage from being witnesses. Some witnesses may want to avoid becoming targets in criminal prosecutions or parties in civil litigation.

The interests of client-witnesses can conflict with the interests of other clients, including clients currently involved in litigation. Litigation parties usually have interests in mustering all evidence in support of their cases, as well as in limiting or qualifying adverse evidence. Consequently, their lawyers may issue subpoenas and conduct cross-examinations. At the same time, both parties and witnesses have interests in obtaining counsel of their choice and in competent, diligent, and zealous representation by that counsel.[1]

Whether or not a witness-conflict arises, is imputed to an entire law firm, or is waivable by affected clients or former clients will depend on the facts and circumstances. Some commonly recurring scenarios are discussed below.

### A. Subpoenaing current or former clients who do not want to testify

The representation of witnesses and any related conflicts of interest are subject to Rules 1.7 and 1.9. Generally, these Rules detail the circumstances constituting conflicts of interest arising from current client (Rule 1.7) and former client (Rule 1.9) representations. As reflected in the Rules and highlighted below, avoiding current or former client conflicts associated with witnesses involves considerations of loyalty and confidentiality together with ensuring delivery of diligent and competent representation.[2]

One common question is whether issuing a subpoena to a current client, or to a former client in a substantially related matter, always constitutes a conflict. Ethics committees that have examined this question have reached different conclusions.[3] For example, the California Standing Committee on Professional Responsibility and Conduct concluded that serving a discovery subpoena "is an adverse action such that a concurrent client conflict of interest arises."[4] The New York City Bar was not so absolute in its approach, concluding in Opinion 2001-3 that "[s]ubpoenaing a current client on behalf of another current client ordinarily entails a conflict of interest that requires that the attorney obtain informed written consent from both clients." (emphasis added.) On the related subject of cross-examining a client, the ABA in Formal Opinion 92-367 opines that cross-examination "will likely" constitute a conflict. (emphasis added.)

The Committee disagrees with California's opinion that the issuance of a subpoena to a current client is a *per se* conflict of interest. In our view, subpoenaing a current client creates a conflict only if the client objects, or if it is reasonably foreseeable that the client will object to any aspect of the subpoena or to the burden and costs it creates.

A client-witness, or former client-witness, may want to help a lawyer's litigation client but may prefer to receive a subpoena because the witness might receive a financial or other benefit in connection with a deposition or court appearance only if a subpoena were issued. Issuance of that subpoena would not create a conflict. However, if a client-witness or former-client witness preferred not to testify for any reason, subpoenaing that witness would create

[1] *See* Rule 1.1 regarding the provision of competent representation, Rule 1.3 regarding the provision of diligent and zealous representation, and Rule 1.7(c)(2) regarding conflict waivers.

[2] These issues are addressed in detail in the context of responding to third-party subpoenas in D.C. Bar Legal Ethics Opinion 381 (2021).

[3] *See generally, e.g.,* Virginia Ethics Opinion 1882 (2015) (explaining that concurrent representation of two clients in unrelated criminal matters requires withdrawal from both representations if one client offers to provide incriminating information to prosecutors regarding the other client); California Ethics Opinion 2011-182 (2011); N.Y. City Bar Opinion 2001-3 (2011); Connecticut Bar Opinion 99-14 (1999) (determining that lawyer could not have reasonably concluded that cross-examination of a current client in an unrelated matter constituted a waivable conflict based on the facts underlying the litigation and the nature of the representation); ABA Formal Opinion 92-367 (1992).

[4] *See* California Formal Opinion No. 2011-182.

a conflict because of the compulsion to testify.

We therefore agree with the New York City Bar that the issuance of a subpoena to a current client, or to a former client in a substantially related matter, will ordinarily, but not always, result in a conflict.

**1. Rule 1.7(a) – Current clients' adverse positions or interests in the same matter**

Rule 1.7(a) states, "A lawyer shall not advance two or more adverse positions in the same matter," and defines the limited circumstances in which representation of conflicting interests is absolutely prohibited even with the informed consent of all involved clients. When a lawyer undertakes the joint representation of a litigation party and a witness in the same litigation, Rule 1.7(a) therefore prohibits the lawyer from subpoenaing the witness on behalf of the party if the witness would not want to testify for any reason.[5] The lawyer cannot on behalf of the litigation party advance the position that the witness should be required to testify and at the same time advance the position on behalf of the witness that he should not be required to testify as demanded by the subpoena.

Such a conflict could arise in a joint representation of an employer and an employee-witness whose interests appear aligned at the beginning of a litigation. Later, factual questions about which they disagree could arise, or their substantive interests related to the litigation could change. If the employee-witness does not want to testify at that later point, because she does not want to be cross-examined or because she now disagrees with the purpose of the litigation, issuing a subpoena would constitute a non-waivable conflict under Rule 1.7(a). Similarly, the employee-witness may be willing to testify while his or her employment continues but not willing to testify after that employment ends. If the joint representation continues after the end of employment, issuing a subpoena would constitute a non-waivable conflict.

**2. Rule 1.7(b) – Concurrent clients' adverse positions or interests not in the same matter**

Rule 1.7(b) protects the same client-witness interests protected by Rule 1.7(a) when a lawyer represents a subpoenaing litigation party and at the same time, in an unrelated matter, represents a client who happens also to be a witness in the party's case, even if the client-witness is represented by another law firm in the litigation.[6] Unlike conflicts arising in the same matter under Rule 1.7(a), however, conflicts arising under Rules 1.7(b)(1) through (4) are waivable, and Rule 1.7(c) permits a lawyer to seek informed consent to the lawyer's continued representation. Specifically, Rule 1.7(c)(1) requires informed consent from "each potentially affected client . . . after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation."[7] Consent may only be sought, however, if the lawyer reasonably believes "that the lawyer will be able to provide competent and diligent representation to each affected client."[8]

Under Rule 1.7(b)(1)[9], a conflict would arise if a matter involves a specific party or parties and "a position to be taken by one client in a matter is adverse to a position taken or to be taken by another client in the same matter even though the other client is unrepresented or represented by a different lawyer."

Example. If a lawyer's client, who happens also to be a witness in another client's case, does not want to be subpoenaed for any reason, Rule 1.7(b)(1) applies because litigation is a "matter involv[ing] a specific party or parties" and the position taken by the party issuing the subpoena is adverse to the position of the witness who objects to testifying.

Under Rule 1.7(b)(2) or (b)(3),[10] a conflict would arise if the representation of either a client-witness or a client-party would be or likely would be adversely affected by the representation of the other client.

Examples of client-witness interests. In one example, a lawyer represents a client-witness in a business transaction unrelated to a trial in which the lawyer represents a party where the business client will be a witness. If the business transaction would be or likely would be disrupted by public testimony of the witness, a conflict would result from the issuance of a trial subpoena. In another example, a lawyer represents a client-witness in obtaining a security clearance that the client needs to expedite in order to obtain a new job. If the clearance would be or likely would be delayed if the client has to report to the Department of Defense the fact of recent testimony, a conflict would result from a subpoena. In each example, the lawyer would need to obtain the informed consent of the client-witness after informing the client of the possible negative consequences of testifying. The lawyer would also have to be satisfied objectively and subjectively that the lawyer would be able to provide competent and diligent representation to each client. In the first example, the lawyer would need to have a reasonable belief that she would be able to address the disruption to the business transaction without harm to the client. And in the second example, the lawyer would need a reasonable belief that a timely clearance could be obtained notwithstanding reporting requirements and potential resulting delays.

Examples of client-party interests. As a general proposition, a client-party issuing a subpoena has an interest in ensuring that all available evidence is mustered for the party's benefit. In the examples above, if the business client or security-clearance client of the lawyer objects

[5] *See* D.C. Bar Legal Ethics Opinion 217 (1991).

[6] *Accord* N.Y. City Bar Opinion 2017-6.

[7] *See also* Comment [27] to Rule 1.7 ("Adequate disclosure requires such disclosure of the parties and their interests and positions as to enable each potential client to make a fully informed decision as to whether to proceed with the contemplated representation."). As with all conflict waivers, the need to obtain informed consent does not relieve the lawyer of the duty under Rule 1.6 to maintain the confidences and secrets of all current and former clients or seek consent to disclose. If a lawyer cannot provide adequate information to a client or prospective client to obtain informed consent, then the representation that the waiver would permit, if it could have been obtained with disclosure of the necessary information, cannot proceed: "If a lawyer's obligation to one or another client or to others or some other consideration precludes making such full disclosure to all affected parties, that fact alone precludes undertaking the representation at issue." *Id.*

[8] Rule 1.7(c)(2). *See also* Comment [30] to Rule 1.7 ("Generally, it is doubtful that a lawyer could hold such a belief where the representation of one client is likely to have a substantial and material adverse effect upon the interests of another client, or where the lawyer's individual interests make it likely that the lawyer will be adversely situated to the client with respect to the subject-matter of the legal representation.").

9 Rule 1.7(b)(1) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: (1) that matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer; . . . ."

[10] Rule 1.7(b)(2) and (b)(3) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . . (2) such representation will be or is likely to be adversely affected by representation of another client; [or] (3) representation of another client will be or is likely to be adversely affected by such representation; . . . ."

to the subpoena, a conflict would result if the lawyer's client-party would be or likely would be adversely affected by the absence of evidence. Rule 1.7(c)(1) would then require the lawyer to obtain the client-party's informed consent to not issue the subpoena. Under Rule 1.7(c)(2), even if the client-party consented, the lawyer also reasonably would have to believe that she could provide competent and diligent representation, for example, in the absence of the witness or, as another example, if conflict counsel were employed.[11] Such a determination usually would take into consideration factors like the importance of the involved issue, the availability of other evidence to address the issue, or the effect of using conflict counsel.[12]

Regarding Rule 1.7(b)(4),[13] in some circumstances, the lawyer's own interests may give rise to a "punch-pulling" conflict, which could render compliance with 1.7(c)(2) difficult.[14]

Example. A witness in another client's upcoming trial also happens to be a long-standing and lucrative client of the lawyer in other unrelated matters. The client-witness might be an important source of testimony in the trial. At the same time, however, there are other sources of facts—maybe documents alone or documents and other witnesses—to prove the fact that the client-witness would be asked to establish. In any event, for a reason unrelated to any matters in which the lawyer represents the client-witness, the witness would prefer not to testify but will consent to receiving a subpoena. Whether or not to issue the subpoena to the client-witness is left to the sound judgment of the lawyer. Depending on the facts, then, "the lawyer's own financial . . . or personal interests," given the lawyer's relationship with the client-witness, could cause a Rule 1.7(b)(4) "punch pulling" conflict against the interests of the client-party on the judgment-call question whether a subpoena should issue to the witness. In the event of a "punch-pulling" conflict, informed consent by the client-party under Rule 1.7(c) again would be required, and the lawyer reasonably would have to believe that the lawyer would be "able to provide competent and diligent representation" to the client-party.

**Rule 1.9 – Former-client adverse positions or interests**

Under Rule 1.9, 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." A lawyer who is considering issuing a subpoena to a former client must consider whether the current matter is "the same or . . . substantially related" to the former client's matter,[15] and whether issuance of the subpoena would be considered "materially adverse."[16] In determining whether matters are substantially related, a lawyer should consider, among other things, whether "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."[17]

In its discussion of Rule 1.7(a) above, the Committee explains that a lawyer cannot on behalf of one client advance a position requiring another client in the same matter to testify and at the same time advance the position on behalf of the other client that she should not be required to testify. Such positions are inherently adverse. Similarly, in the former client context, the coercive effect of a subpoena creates material adversity if a former client does not want to testify in a substantially related matter. In the event of a conflict in a substantially related matter, the lawyer may not properly issue the subpoena without the informed consent of the former client.

**B. Potential conflicts in connection with advising current or former clients about Fifth Amendment rights**

In D.C. Legal Ethics Opinion 232 (Multiple Clients/Criminal Matters), the Committee considered another context in which a client-witness conflict might arise in another client's unrelated matter. The specific inquiry involved a lawyer seeking to represent a client-witness in asserting his Fifth Amendment rights not to testify in a murder case against a current client of the lawyer's partner who was represented in the murder case by another law firm. Neither the murder case defendant nor the client-witness wanted the witness to testify. The Committee concluded that there was no conflict under Rule 1.7(b)(1) on the facts of the inquiry because the assertion of Fifth Amendment rights was not adverse to the interests of the murder-case defendant. In the words of Rule 1.7(b)(1), there was no adversity of the "positions" of the witness and the defendant.

At the same time, the Committee opined that a Rule 1.7(b)(1) conflict would arise under the Rule if the client-witness "should later decide that it is in his interest to bargain his testimony against [the murder-case defendant] for some advantage." In that event, the prospect of adverse "positions" would have

[11] "Conflicts counsel" is the designation generally applied to the retention of a lawyer from a different firm engaged solely to represent the client on the discrete, severable aspect of the matter that gave rise to the conflict. *See* generally Ronald D. Rotunda, *Resolving Client Conflicts by Hiring 'Conflicts Counsel*,' 62 Hastings L. J. 677 (2011) (concluding that use of conflicts counsel is a useful tool to ameliorate the costs of disqualifying lawyers, while protecting legitimate client interests in confidentiality and loyalty). The use of conflicts counsel is consistent with our conclusion in D.C. Legal Ethics Opinion 343 (2008). In that opinion, we explained a lawyer may limit the scope of an engagement to a discrete legal issue or stage of litigation to avoid a conflict of interest under Rule 1.9.

[12] Similar considerations about informed consent and competent, diligent, and zealous representation apply to each of the Rule 1.7 and 1.9 witness contexts discussed in this opinion.

[13] Rule 1.7(b)(4) states: "Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . . (4) the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests."

[14] "Punch pulling" is a boxing term that refers to a fighter purposefully hitting his adversary with less than full force – as if the fighter pulled back a punch before making contact. In the professional responsibility context, a punch pulling conflict refers to circumstances where a lawyer is less zealous in advocating for, or advising, a client out of concern over the impact on the lawyer's representation of another client.

[15] The substantial relationship test of Rule 1.9 has a different scope than that of Rule 1.6 in connection with confidential information: "Matters are 'substantially related' for purpose of this rule if they involved 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." Comment [3] to Rule 1.9.

[16] The meaning of "material adversity" is determined by the principles of Rule 1.7, including the specific language of the Rule and the principles discussed in Comments [7] and [8] to Rule 1.7. *See also* Comment [1] to Rule 1.9.

[17] *See* Comment [3] to Rule 1.9; D.C. Legal Ethics Opinion 343 (2008) (discussing factors in determining whether matters are substantially related, as well as the rebuttable presumption that confidences were exchanged if the substantial relationship factors are met).

arisen because the client-witness could decide to testify when the client-defendant wanted the witness not to testify. In coming to this conclusion, the Committee concluded that the Fifth-Amendment bargaining and the murder-case defense involved the same "matter" under the Rule, and that waiver of the conflict would require the informed consent of both witness and defendant.

D.C. Legal Ethics Opinion 232 also noted that Rule 1.7(b)(2) would be implicated if a lawyer counseled a current client-witness not to testify against a current client-party when that advice might be adverse to the interests of the current client-witness. For example, if the refusal to testify were not legally warranted, the witness might be held in contempt of court. In this hypothetical, informed consent from the murder case defendant and the client-witness would be required after "full disclosure of the possible adverse consequences" of the advice.

Today, we add that a Rule 1.7(b) conflict would also arise if it were in the client-witness's interest to invoke the Fifth Amendment when the witness's testimony would assist the defense of the client-defendant.

### C. Cross-examining current or former clients

D.C. Legal Ethics Opinion 232 also provides a framework for addressing cross-examination conflict issues.

#### 1. Concurrent clients

To begin with, the prospect of a lawyer's cross-examination of a current client-witness in the trial of another client of the lawyer obviously would occur in the same "matter" for the purpose of both Rule 1.7(a), if there were a joint representation, and 1.7(b)(1), if the defendant were represented in the criminal case by another firm.

If a lawyer were representing both a party and a witness in the same case, Rule 1.7(a) would prohibit any cross-examination of the witness adverse to any position that the witness took on direct examination. Informed consent could not remove this conflict.

The question then arises whether all cross-examinations of a client-witness who would testify adversely to a client-party on direct examination are conflicted under Rule 1.7(a), which prohibits only advancing "two or more adverse positions in the same manner." The Committee concludes that there may be circumstances in which a lawyer could cross examine a client-witness who testifies adversely to a client-party on direct examination without running afoul of Rule 1.7(a) with the informed consent of both the client-witness and client-party.

Example. In a civil trial, a lawyer represents both a corporate defendant and a former employee of the defendant as a witness. The plaintiff calls the former employee-witness in the plaintiff's case in chief, and the witness (a) authenticates documents that reflect meeting communications adverse to the interests of the defendant; and (b) testifies that the witness clearly recalls the communications. Rule 1.7(a) would prohibit the lawyer from attempting to establish on a cross-examination that the documents were not authentic or that the communications did not occur. On the other hand, a cross examination in the nature of a redirect might not be prohibited. The lawyer might ask the witness (a) to authenticate other documents that ameliorate the adverse impact of the plaintiff's exhibit on the defense case without contradicting the witness's testimony; (b) to testify about other ameliorative communications to the same effect as the additional documents; or (c) to explain the technical meaning of one of the communications reflected in the plaintiff's exhibit. If such an examination were not adverse to any position taken by the witness on direct examination or the redirect, or to any position taken or to be taken by the corporate defendant, these circumstances should not constitute a conflict under Rule 1.7(a).

If a lawyer represented a party in litigation and if a current client of the lawyer in an unrelated matter also happened to be a witness in that litigation, while represented by other counsel, Rule 1.7(b)(1) again would preclude any cross-examination of the witness adverse to any position that the witness took on direct examination without the informed consent of each client. In contrast to a Rule 1.7(a) conflict, however, the Rule 1.7(b)(1) conflict is waivable pursuant to the terms of Rule 1.7(c).

Rules 1.7(b)(2) and (b)(3) also could be implicated in circumstances involving cross examination of the client-witness.

Example. A lawyer represents a party in highly publicized litigation. Following pretrial depositions, the lawyer understands that he may need to cross-examine a certain witness at trial by seeking authentication and introduction of certain documents. The lawyer then is asked to represent the witness as a client in unrelated business negotiations in which both sides of that negotiation agree that certain documents will not be exchanged. They include the documents that the lawyer may need to introduce at trial through the witness. Introduction of those documents on the public record likely would adversely affect the witness-client's business negotiating position, and the lawyer is aware of that fact. Under Rule 1.7(b)(2), representation of the witness in the business negotiations would require her informed consent to the conflict of interest arising by her authentication and introduction of the documents, as well as the informed consent of the litigation client. Of course, in seeking informed consent, the lawyer must remain mindful of protecting client confidences and secrets in accordance with Rule 1.6(a). The obligation to maintain confidences and secrets limits the information the lawyer may properly disclose to both the prospective client and existing client in seeking informed consent unless further consent to disclose relevant confidences and secrets for this purpose is obtained. In addition, the lawyer must "reasonably believe" that she is able to provide competent and diligent representation to both clients in accordance with Rule 1.7(c)(2). In particular, the lawyer would need to assess whether requiring the client-witness to authenticate particular documents at trial is consistent with his obligations to deliver competent and diligent representation to the client-witness in the business negotiation.

A conflict under Rule 1.7(b)(3) could arise if a lawyer's cross-examination similar to the previous example might adversely affect the interests of an existing client in a different matter.

Example. A lawyer represents a client in ongoig business negotiations in which both sides agree that certain documents will not be exchanged. The lawyer is then asked by a new client to try a highly publicized case, in which the business client is a witness and the new client is a party. At the time of this request, the lawyer understands that she will need to cross-examine the business client by asking him to authenticate documents covered by the agreement in the business negotiations. If foregoing use of those documents at the trial likely would adversely affect the litigation client's interests, a conflict would arise under Rule 1.7(b)(3). Again, provided the lawyer is able to seek informed consents without disclosing or using client confidences or secrets in violation of Rule

1.6(a), undertaking representation of the litigation client again would require compliance with Rule 1.7(c)(2).[18]

The two previous examples also could present a Rule 1.7(b)(4) punch-pulling conflict against the interest of the litigation client because the business client is a significant and lucrative client.[19] Because of the lawyer's "responsibilities to or interests in" the business client witness, the lawyer's professional judgment about whether to introduce the documents at trial at all or about whether or how to cross-examine the witness could be adversely affected, and informed consent would be required from the litigation client.

If either client were not willing to provide that consent, then the lawyer would not be able to undertake the representation of the client-witness in the first example or of the client-party in the second example.

**2. Former client**

Under Rule 1.9 the same interest analysis, resulting conflicts, and need for informed consents discussed above could apply, depending on the timing of the facts, if a lawyer cross-examined a former client-witness in any matter that was the same as or "substantially related" to a matter in which the lawyer had formerly represented the witness. Furthermore, we note that the Court of Appeals held in *Pinkney v. United States*, 851 A. 2d 479, 487-788 (D.C. 2004), that a prior representation of a witness was substantially related to a later representation of a different client even though the two representations involved different subject matters.[20]

In *Pinkney*, a criminal defendant challenged the trial court's decision to disqualify his defense counsel (Wood) because of Wood's prior and concurrent representation of a government witness (Henderson). Henderson was to testify at Pinkney's criminal trial on behalf of the government about defendant's alleged jailhouse confession. Wood had previously represented Henderson in an unrelated criminal matter, and was currently representing him in two other unrelated criminal matters. Relying on precedent from the Second and Seventh Circuits, the District of Columbia Court of Appeals acknowledged that the subject matter of Wood's representation of Pinkney was unrelated to the subject matter of his prior representation of Henderson. 851 A.2d at 487-88. Nevertheless, Wood's diligent and competent representation of Pinkney would require Wood to attack Henderson's credibility, implicating confidences and secrets learned in the prior representation:

> [B]ecause [Pinkney's] defense would necessarily involve refuting Mr. Henderson's testimony, it would consist mostly of attacking his credibility on cross-examination. . . . 'Because this impeachment could be accomplished by eliciting specific instances of misconduct involving matters of truthfulness, and because the trial court found that it was likely that [defense counsel] gained knowledge of such instances involving [the witness] through their attorney-client relationship, the trial court found that [defense counsel's] prior representation of [the witness] was relevant to 'the issues and determinations presented in the instant case.' [B] ecause impeachment of Mr. Henderson would be an important part of the defense, issues concerning Henderson's credibility were therefore 'substantially related' to Mr. Wood's representation of [Pinkney]. We think the approach taken by the Second and Seventh Circuits is sound, and thus we conclude that the court did not abuse its discretion in disqualifying Mr. Wood.

*Id*. (quoting *United States v. O'Malley*, 786 F.2d 786, 792 (7th Cir. 1986)).[21] As highlighted in *Pinkney*, evaluating whether two matters are "substantially related" under Rule 1.9 requires the lawyer to not only consider whether they involve the same transaction or legal dispute, but also whether there "is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[22]

**D. Thrust-Upon Conflicts**

In rare circumstances, a Rule 1.7(b)(1) witness conflict may arise that was not reasonably foreseeable at the outset of the representation. In that case, even in the absence of informed consent, Rule 1.7(d) may allow a lawyer to cross-examine the client-witness in an unrelated matter. Rule 1.7(d) provides:

> If a conflict not reasonably foreseeable at the outside of representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph(c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

The example below illustrates this thrust-upon conflict situation.

Example. A lawyer represents the buyer in a lengthy real estate transaction. The lawyer then undertakes representation of a company in defense of a fast-track patent case. Near the end of discovery in the patent case, the plaintiff adds as a new expert witness: the lawyer's real estate client. Even if the expert witness did not want to be cross-examined (or subpoenaed) by his or her lawyer, Rule 1.7(d) might apply if the addition of this particular expert witness was not reasonably foreseeable at the outset of the representation and the cross-examination would not adversely affect the real estate deal.

**E. Imputation and Confidences or Secrets Regarding a Witness**

Rule 1.6(a) forbids disclosure or use by a lawyer of the confidences or secrets of the lawyer's current clients, and Rule 1.6(g) continues this obligation after termination of the attorney client relationship.[23]

[18] When the facts of this example are viewed from the perspective of the prospective party client, the conflict arises under 1.7(b)(2) rather than (b)(3). If the business client were not willing to waive the conflict under 1.7(b)(3) to allow the introduction of the documents, the lawyer could not introduce them, which could adversely affect the party's litigation position. Just like the business client could decide to take the risk under 1.7(b)(3) and waive the conflict, the prospective party client could decide to take the litigation risk and provide informed consent to litigate the case without introduction of the business documents. The lawyer could accept this waiver assuming compliance with Rule 1.7(c)(2).

[19] As a general matter, whenever a client-witness's interest may cause a conflict, the possibility of a "punch-pulling" conflict related to the client-party's (or client-co-witness's) interest should be considered.

[20] Because it is beyond the scope of this Committee, we do not address the application of Sixth Amendment jurisprudence to cross examination of current or former clients in criminal trials.

[21] After concluding that disqualification of Wood was not an abuse of discretion, the Court of Appeals remanded the case to the trial court, faulting it for denying Pinkney's motion to reinstate Wood. *See* 851 A.2d at 490-91. The Court explained the trial court was required to consider whether Wood's conflict of interest still existed after the government no longer sought to call Henderson as a witness in Pinkney's criminal trial.

[22] Comment [3] to Rule 1.9.

[23] Rule 1.6(a) states: "Except when permitted under paragraph (c), (d), or (e), a lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; [or]

In connection with client witnesses, a lawyer may determine that she cannot satisfy Rule 1.7(b)(4): she is unable to provide competent and diligent legal services with independent judgment for a new client without drawing on her knowledge of the confidences or secrets of another current or former client that only the lawyer herself possesses. These confidences or secrets are unrelated to the substance of the representation and involve information that other lawyers at the firm are unlikely to have learned during the representation. The question then arises whether Rule 1.10 imputes a disqualification to the lawyer's entire firm even though other firm lawyers do not know, and have not had access to, those confidences and secrets. In the Committee's opinion, the answer to this question is no.

Example: A lawyer with a firm is considering representation of a defendant (Prospective Client A) in a criminal trial. The lawyer knows the prosecution intends to call Witness at trial who will testify about issues incriminating the defendant (Prospective Client A). The lawyer possesses certain information about this Witness she obtained during her representation of Client B in an unrelated business negotiation adverse to Party C. In particular, the lawyer learned from Party C that Client B and Witness were playing poker at a casino in Las Vegas on the precise date/time of the alleged crime of Prospective Client A. This information is completely extraneous to the business negotiation between Client B and Party C, but the lawyer learned it during the course of that representation. Client B would consider the public disclosure of this information embarrassing because Client B has a self-professed gambling problem. While Client B did not provide the information to lawyer, she learned it from Party C and concludes the information constitutes a client secret. She determines that she cannot undertake the representation of the Prospective Client A, the criminal defendant, because of Rule 1.7(b)(4). However, other lawyers at the firm could represent Prospective Client A provided that they do not possess, or have access to, the client secret the lawyer learned during the representation of Client B in the business negotiation.[24]

First, on its face, Rule 1.10 does not automatically impute to other lawyers in the firm knowledge of Rule 1.6 confidential or secret information known to another lawyer at the firm who are not or were not involved in the client's matter, providing instead a functional analysis. Comment [9] to Rule 1.10 (which deals with lawyers moving between firms) explains that a conclusive presumption that all partners in a law firm have access to all client confidences might properly apply if the client is extensively represented but may be unrealistic if the client is represented only for limited purposes. Rule 1.10 imputes only actual conflicts under Rule 1.7(a), (b)(1) through (b)(3), and Rule 1.9, but expressly carves out conflicts arising under Rule 1.7(b)(4). This analysis is reinforced by Rule 1.10(c), which provides that when a lawyer leaves a firm, the firm is not thereafter prevented from taking on matters adverse to a client formerly represented by the departed lawyer unless (1) the prospective matter is the same as or substantially related to the prior matter, and (2) another lawyer at the firm has information protected by Rule 1.6 that is material to the matter.

Second, given the importance of attorney-client confidentiality established by Rule 1.6, the Committee concludes that Rule 1.3 (Diligence and Zeal)—does not require a law firm to canvass confidential or secret Rule 1.6 information of all of its clients to fulfill the professional responsibility of one of its lawyers in his or her attorney-client relationship with any particular client. To the contrary, Rule 1.6 establishes an ethical mandate not to use or disclose the confidences and secrets of clients or former clients. When Rule 1.3(a) requires zealous and diligent representation within the bounds of the law, harvesting one client's confidences for another client's benefit is not required because it is outside those bounds. Similarly, Rule 1.3(b) forbids a lawyer's failure "to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules." Consequently, in the Committee's view, there is no duty on one lawyer in a law firm representing Client A to obtain and use or disclose another lawyer's confidential or secret information of Client B about which the first lawyer is unaware.

Example. A lawyer represented a client-landlord in an eviction case. Years later, the same lawyer represents a plaintiff adverse to the landlord in an automobile accident personal injury case. The matters are not factually related, and there is no "risk that confidential information as would normally have been obtained in the prior [eviction] representation would materially advance the client's position in the subsequent matter." Comment [3] to Rule 1.9. But the lawyer remembers that the landlord commented during a meeting about the eviction that he carried no automobile insurance because it just encouraged people to sue, and he preferred to take his chances against greedy plaintiffs.

While details on automobile insurance are not the type of confidential information typically obtained in an eviction matter, they nevertheless constitute a protected "secret" under Rule 1.6. The lawyer learned of the landlord's automobile insurance practice in the course of representing the landlord and the lawyer's revelation of that information is embarrassing, or likely detrimental to the landlord. The lawyer could not report the information to the later plaintiff-client as they assess strategy for the accident case, nor should the lawyer use the information during strategy development. The lawyer cannot fulfill her duty to communicate with the plaintiff or zealously use her own memory to develop a competent strategy. Thus, the lawyer has a Rule 1.7(b)(4) conflict.[25] At the same time, however, the information and the subject matters of the two cases do not create a Rule 1.9 conflict, and another lawyer in the same law firm—not burdened by the memory of the first lawyer and screened from information about the eviction rep-

(3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."

Rule 1.6(g) explains: "The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment."

[24] Altering the facts of this example highlight the importance of distinguishing conflicts arising under Rules 1.7(b)(2) or (b)(3) —and subject to imputation under Rule 1.10(a)—from those arising under Rule 1.7(b)(4) and not subject to imputation. Under certain circumstances, the fact that Witness and Client B were playing poker at a casino in Las Vegas on a particular date/time might be material to the lawyer's representation of Client B in the business negotiation with Party C. For example, if the financial transaction that is the subject of the negotiation required Client B to make certain representations and warranties that implicate gambling issues, the lawyer's representation of Prospective Client A would give rise to a conflict under Rule 1.7(b)(2) or 1.7(b)(3). Under these circumstances, the lawyer's conflict is imputed to the entire firm and would preclude the firm's representation of Prospective Client A.

[25] If this had been a Rule 1.7(b)(2) or (b)(3) conflict (if the landlord/eviction matter is a current matter), the conflict would be imputed to other lawyers at the firm under Rule 1.10(a).

resentation—can develop and communicate strategy competently, diligently, and zealously without ethical constraint.

The Committee therefore concludes that Rule 1.10 imputed disqualification applies, as the Rule states, to Rule 1.7(a), (b)(1) through (b)(3) and Rule 1.9 conflicts, but does not extend to Rule 1.6 duties and information without more. This conclusion is consistent with Legal Ethics Opinion 237, which concluded:

> An attorney may represent a defendant in a criminal case, even though another attorney in his or her office formerly represented an individual who is now a witness in that case if (1) the agency's representation of the person who is the witness was in an unrelated case; (2) the attorney involved in the current case does not actually possess any confidences or secrets of the former client; and (3) the agency takes adequate steps to screen that attorney from any such confidences and secrets."

The Committee also referenced then Comment [11] (now Comment [12]) to Rule 1.10, which discusses lawyers' access to information about law firm clients:

> Access to information . . . is essentially a question of fact in particular circumstances, 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 discussion 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.

Comment [12] to Rule 1.10. In between these two examples are endless other examples. In the Committee's view, in any given example, inferences may or may not be reasonable. More importantly, the focus of Opinion 237 should remain the principal inquiry: whether the particular attorney "actually possesses any confidences or secrets of the former client" that were material to the former client's representation.

### F. Suggestions Regarding Conflict-of-Interest Issues Related to Witnesses

The Committee suggests the following considerations to help identify, prevent, and resolve conflict-of-interest issues related to witnesses.

- To facilitate early identification of potential conflicts of interest involving witnesses, a lawyer could consider including the names of potential witnesses (including experts) and other sources of facts in conflict checks[26] and then supplementing checks as additional names arise.[27] Depending on the size of a law firm, it might circulate conflict checks to lawyers in addition to database checking, and it could encourage lawyers to review checks regularly.[28]
- To facilitate resolution of potential con flicts of interest related to witnesses, a lawyer, in advance of issuing a subpoena, might attempt to discuss it with the client-witness, assuming such discussion would not violate the Rule 1.6 interests of the client-party. The discussion could include the suggestion that the client-witness consult with independent counsel.
- More generally, advance waivers of conflicts of interest relating to discovery or other witness-related issues could be discussed with prospective-clients at the beginning of attorney-client relationships. As explained in Comment [31] to Rule 1.7, advance waivers are permissible only if the prerequisites of the rule – namely "full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation" – are satisfied.[29]
- Regarding potential client-parties, a lawyer could discuss the use of scope limitations and/or engagement of conflicts counsel to take discovery from, or to cross-examine, other clients of the lawyer to avoid conflicts of interest.[30]
- Joint representations sometimes develop witness conflicts, which might be addressed by advance agreements and consents. For example, joint clients could agree to maintain confidentiality of jointly shared facts and advice. They also might agree in advance to procedures for addressing downstream conflicts, including whether an unwaived conflict would require the lawyer's withdrawal from the representation of all or only some of the joint clients. Advance agreements also sometimes address how client information would be handled after withdrawal.
- In any organizational setting *Upjohn* warnings should be given to employees to avoid inadvertent creation of attorney-client relationships that could create conflicts.[31]

* * * *

Obtaining information from current- or former-client witnesses often gives rise to a variety of considerations. These issues might involve conflicts of interest pursuant to Rules 1.7 and 1.9, as well as considerations under Rule 1.6 and Rule 1.10. The opinion offers mechanisms for identifying, preventing, and resolving such conflicts while safeguarding confidentiality and remaining mindful of rules on imputation.

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[26] *See, e.g.*, New York Rule of Professional Conduct 1.10(e).

[27] At the beginning of litigation, it is often impossible to identify all potential adverse witnesses. D.C. Rule 1.7(d) regarding "thrust upon" conflicts applies a "reasonably foreseeable" standard to all conflict issues, including those involving witnesses. If an adverse witness were not identified and were not "reasonably foreseeable" at the beginning of a litigation engagement, then even if the witness were a current client of the trial lawyer, an adverse cross-examination of the witness might be permitted under the D.C. Rule. We also note, however, the ABA Model Rules do not include a Rule similar to D.C. Rule 1.7(d). "Conflicts counsel," as defined in note 11 above, are often utilized to address thrust upon conflicts that arise at trial.

[28] *See* Comment [19] to Rule 1.7 (explaining that the "test to be applied here [to determine potential conflicts] is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place").

[29] *See also* Comment [32] to Rule 1.7 ("Rule 1.7(a) provides that a conflict arising from the lawyer's advancing adverse positions in the same matter cannot be waived in advance or otherwise."); D.C. Legal Ethics Opinion 309 (explaining that advance waivers of conflicts of interest must comply with the overarching requirement of informed consent). *Accord* N.Y. City Bar Opinion 2005-5.

[30] *See, e.g.*, N.Y. City Bar Opinions 608 (2011) and 2017-6; ABA Formal Opinion 92-367.

[31] *Upjohn v. United States*, 449 U.S. 383 (1981). *See also* Rule 1.13(c) ("In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests may be adverse to those of the constituents with whom the lawyer is dealing.") and Comments [9] and [10] to Rule 1.13.

*Opinion 381*

**Responding to Third-Party Subpoena**

*Introduction*

A lawyer's representation of a prospective client in responding to a third-party subpoena that seeks documents, tangible things, property, or testimony[1] ("Information") about a lawyer's existing client does not create a conflict of interest unless the lawyer's representation of either the prospective client or the client will be, or likely will be, adversely affected.[2] A lawyer's representation of a prospective client in responding to a third-party subpoena that seeks Information about a lawyer's former client does not create a conflict of interest unless the subpoena matter is the same or substantially related to the lawyer's former representation and the interests of the prospective client and former client are adverse.

**Applicable Rules**

- Rule 1.0 (Terminology)
- Rule 1.1 (Competence)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest: General Rule)
- Rule 1.9 (Conflict of Interest: Former Client)
- Rule 1.10 (Imputed Disqualification: General Rule)

*Discussion*

In this opinion, the Committee considers whether a lawyer's representation of a client in responding to a third-party subpoena for Information that identifies specific parties by name (the "Prospective Client") creates a conflict of interest if the lawyer also represents or represented one of the named persons (the "Other Client") in unrelated matters.[3]

*1. Current Client Conflict of Interest*

Typically, a lawyer may represent a Prospective Client, even if the Information sought relates to another client of the lawyer, without triggering a conflict under Rule 1.7(b).

Pursuant to D.C. Rule 1.7(b), a lawyer shall not represent a client in a matter if:

(1) That matter involves a specific party or parties and a position to be taken by that client is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation; [or]

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.[4]

A. Assessing Conflicts at the Outset of the Representation

A lawyer is required to assess conflicts on each proposed engagement at the outset of the representation.[5] Such assessment includes undertaking reasonable diligence concerning the subpoena. In assessing possible conflicts before undertaking the representation of the Prospective Client, a lawyer should consider the particulars of the proceeding out of which the subpoena issued and the information contained in the subpoena itself, including the time period, the scope of information sought, and the names of persons identified and their connection to the information sought. Whether additional diligence would be required is a question of fact and varies by the circumstances. For example, under certain circumstances, it might be necessary for the lawyer to review publicly available information or consult with the Other Client as part of the additional diligence effort.

Ordinarily, direct adversity will not exist between the interests of the Prospective Client and the Other Client because the issuer of the subpoena, not the subject of the subpoena, is adverse to the Prospective Client and a testimonial or documentary response by the Prospective Client does not constitute taking any "position" with respect to any of the subjects of the subpoena. Rather, the focus of the Prospective Client – and therefore the scope of the lawyer's representation – is the legality and propriety of the subpoena and the respondent's posting of proper objections to requests for production by the issuer of the subpoena.

The lawyer's representation of the Prospective Client may, however, create a conflict of interest if the representation of that client would likely adversely affect, or be adversely affected by, the representation of another client or personal interests of the lawyer. However, Rules 1.7(b)(2)-(4) do not obligate lawyers to assess the possibility of conflicts based upon rank conjecture and speculation but, rather, only to determine, based upon a reasonable objective belief, that certain facts will develop that would create a substantial risk that the lawyer's representation of a client will adversely affect or be adversely affected by ethical obligations to another client, former client, or herself.[6]

A few hypothetical examples may help to illustrate the applicable conflicts standard. Suppose a lawyer is asked to represent a hospital in producing medical records of a patient in response to a third-party subpoena issued by an insurance company in a vehicular personal injury matter. The parties to the litigation are the at-fault driver's insurance company and the injured party, who is a client of the lawyer in a custody matter.[7] In representing the hospital, the lawyer would be advising it on the scope of the subpoena, any deficiencies, and any objections, including, for example, the relevance and responsiveness of any documents of the injured party (Other Client) in the hospital's possession.

[1] The reference to documents, physical things, property, or testimony in this Opinion is intended to incorporate the same terms and definitions as contained in Federal Rule of Civil Procedure 34.

[2] This Opinion does not address instances where the lawyer is the recipient of a third-party subpoena for his or her own records or for the records of the lawyer's firm. *See* D.C. Legal Ethics Opinion 288 (1999).

[3] A lawyer reviewing a subpoena that does not specify names, but only a certain time period, will ordinarily be unable to identify a conflict at the outset of the representation, but might become aware of one after commencement of the representation. *See* section 1.B. *infra*.

[4] D.C. Rule 1.0(h) defines "matter" broadly to mean "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule." Rule 1.0 (h).

[5] Rule 1.7 and Comments [7], [19], and [29].

[6] *See* Rule 1.7 Comments [7], [9], and [19]. *See also* D.C. Legal Ethics Opinion 356 (2010) ("a conflict must be clear, specific and not based on mere speculation."); Rule 1.7(d) (the standard is "reasonably foreseeable" when assessing whether a conflict could have been anticipated at the outset of the representation).

[7] The Committee does not see any meaningful distinction in the conflicts analysis if the request for production of medical records is in the form of a pre-complaint letter request rather than a subpoena issued out of litigation.

At the outset of the representation, the lawyer does not know the contents of the medical records, and the lawyer's review of the complaint does not provide any more information about what the medical records of the hospital might reveal. Typically, the lawyer may therefore undertake the hospital representation without it creating a Rule 1.7 conflict of interest. The mere possibility that responsive medical records of the hospital that might undermine the injured party's claim exist and are produced does not give rise to a conflict of interest. There may be circumstances, however, where the lawyer's knowledge about the facts surrounding the subpoena request and its implications might necessitate the lawyer's consultation with the Other Client (subject of the subpoena) to properly assess conflicts of interest before undertaking the engagement by the Prospective Client.[8]

Suppose that the lawyer knows through and in the course of representing the Other Client in the custody case that the Other Client has been unable to honor the temporary custody schedule because of injuries sustained from athletic activities. As a result of the custody matter, the lawyer has in her possession medical records from the hospital during the relevant subpoena time period reflecting those injuries. Given the lawyer's knowledge about the cause of the injuries documented in the medical records, undertaking the prospective representation might well create a conflict of interest under Rule 1.7(b)(2) or (b)(3) or under Rule 1.7(b)(4) with the personal interest of the lawyer herself.

The Committee concludes that to determine whether a conflict of interest exists in undertaking the prospective engagement, the lawyer must assess whether the lawyer knows,[9] after performing reasonable diligence in evaluating the subpoena request as described above, that the Prospective Client possesses responsive information that, if produced, is or likely will be adverse[10] to the subject of the subpoena (the Other Client).[11] If so, then the lawyer must assess whether that knowledge will likely adversely affect the lawyer's representation of either client. If it likely will, a Rule 1.7(b)(2) or (3) conflict exists.

If neither representation is likely to be adversely affected or the lawyer does not know in the first instance that the Prospective Client possesses responsive information that is likely to be adverse to the Other Client, the lawyer must nonetheless consider whether the lawyer has a personal conflict under Rule 1.7(b)(4). That is, the lawyer must determine in undertaking the prospective matter whether the lawyer's professional judgment will or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own interests.[12]

A lawyer who concludes at the outset of the representation that undertaking the new engagement would create a Rule 1.7(b) conflict with the Other Client could still represent the Prospective Client if the lawyer satisfies Rule 1.7(c)'s requirements that the lawyer obtain the informed consent from each affected client and reasonably believes that she can provide competent and diligent representation to each client.[13] A crucial initial consideration in this regard is whether the disclosure of the requisite information necessary to secure the informed consent of either the Prospective Client or the Other Client would violate the lawyer's Rule 1.6 duty to protect the confidences and secrets of each.[14] If so, then the lawyer could neither seek nor obtain informed consent and, as such, the lawyer would have to decline the prospective representation because the lawyer could not satisfy the Rule 1.7(c)(1) requirement.

If informed consent could be sought and were obtained, under Rule 1.7(c)(2), the lawyer must also undertake both a subjective self–assessment and an objective analysis to determine whether, notwithstanding the clients' informed consent, the lawyer will be able to "provide competent and diligent representation" to each client. That assessment would include consideration of whether the lawyer might pull punches during the new representation either out of concern over the impact on the lawyer's representation of the Other Client,[15] or because of the lawyer's own personal, financial or other interests.[16]

By way of further illustration, suppose a lawyer is asked to represent a bank that has received a Department of Justice subpoena for records of a party it is investigating for bribing a government official. News reports indicate that the subject of the investigation is a close personal friend of the government official and also a business person whose business seeks zoning approval and a building permit within the jurisdiction of the government official. The business is a long-standing client of the lawyer, which has generated substantial fees for the lawyer over time. The lawyer currently represents the business in litigation alleging breach of a commercial contract. The lawyer does

[8] *See, e.g.*, Comment [19] to Rule 1.7.

[9] Rule 1.0(f) defines "knowledge" or "knows" as "actual knowledge of the fact in question," which "may be inferred from the circumstances."

[10] Whether or not information known to the lawyer is "adverse" or "harmful" is left to the reasonable judgment of the lawyer.

[11] While Rule 1.3(b)(2) provides that "[a] lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship," the act of producing responsive information on behalf of another client that might be harmful to a lawyer's client does not run afoul of Rule 1.3(b)(2) because it is not in the matter in which the lawyer represents the client and "Rule 1.3 is not meant to govern conflicts of interest, which are addressed by Rules 1.7, 1.8, and 1.9."

[12] *See* Rule 1.7(b)(4) *infra* as quoted in the body of the Opinion.

[13] Rule 1.0(e) defines informed consent as "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 alternatives to the proposed course of conduct." Such required "information and explanation" varies by circumstances and is subject to a variety of factors, including the sophistication, *vel non*, of the person granting the informed consent.

Rule 1.7(c) provides that a lawyer may represent a client notwithstanding a conflict if "(1) each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client under the circumstances."

[14] Moreover, pursuant to Rule 1.18(b), "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as permitted by Rule 1.6." Thus, the duty of confidentiality owed to a prospective client is coextensive with the duty owed to an actual client. In some instances, the mere fact of the representation or prospective representation may constitute a Rule 1.6 secret, further potentially complicating the ability of the lawyer to obtain the requisite informed consent.

[15] As explained in D.C. Legal Ethics Opinion 380 (2021), "'Punch pulling' is a boxing term that refers to a fighter purposefully hitting his adversary with less than full force – as if the fighter pulled back a punch before making contact. In the professional responsibility context, a punch pulling conflict refers to circumstances where a lawyer is less zealous in advocating for, or advising, a client out of concern over the impact on the lawyer's representation of another client."

[16] *See* Rules 1.1, 1.3, and 1.7(c)(2) and *see, e.g.*, comment [7] ("The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client….").

not know at the outset of the prospective representation whether the bank possesses records reflecting payments from the business person to the government official, but the bank suspects that there might be some payments because of the frequency with which both transact at the bank and the time period involved.

While the lawyer does not have actual knowledge that the bank possesses any responsive documents damaging to the business person, nor does the lawyer represent the business person personally in a matter, the lawyer's long-standing and substantial professional relationship with the business might prevent the lawyer from providing competent and diligent representation to the bank. For example, the lawyer might be overzealous in raising objections to production of the potentially damaging documents because they might adversely affect the principal of a long-standing and lucrative client, when the bank does not have any concerns about the production other than its own cost. Under these circumstances, the bank representation could create a personal conflict of interest for the lawyer. Barring a problem with the lawyer's ability to provide competent and diligent representation to each client, without the lawyer's actual knowledge that certain information harmful to the interests of the subject of the subpoena exists and is responsive, the mere possibility that documents responsive to the subpoena exist that are, or might be, adverse to the interests of the business person or the lawyer's Other Client, the business, and might be produced, is purely speculative.

Even if it later develops that the lawyer's speculation about the potentially damaging nature of the information produced results in the evidence being used adversely against the business, the subsequent factual confirmation of the lawyer's speculation would not change the analysis.[17] The production of Information adverse to a particular client would be an "unwitting" side effect of the representation of the Prospective Client, and not the lawyer's attempt to seek a result for the Prospective Client "to which another client is opposed."[18] Nor would it be considered in hindsight to have been a Rule 1.7(b)(2) or (b)(3) conflict.

As discussed, although typically there is no ethical requirement that a lawyer disclose the prospective representation of a subpoenaed third-party to the Other Client (who is the subject of the subpoena), it might nonetheless be prudent for the lawyer to notify the Other Client of the prospective engagement – barring any Rule 1.6 (Confidentiality of Information) issues. The consultation could permit the Other Client an opportunity to voice concerns about the lawyer's representation of the Prospective Client under the circumstances.

B. Discovery or development of a conflict after commencement of the representation of the Prospective Client

If the lawyer undertakes the representation of the Prospective Client, a conflict under Rule 1.7(b)(2), (b)(3), or (b)(4) may nevertheless arise *after the representation commences* if the lawyer's discovery of potentially damaging information, prior to its production, might adversely affect the lawyer's ability to competently and diligently represent either the Prospective Client or the Other Client.[19]

Returning to the first example of the third-party subpoena to the hospital by an insurance company in a vehicular personal injury matter where the lawyer also represents Other Client in a custody matter but does not possess knowledge of the Other Client's medical issues: suppose after reviewing the medical records of the hospital for the Prospective Client for responsiveness and privilege, the lawyer discovers a note in the medical records that undermines, or would seem to undermine, the patient's injury claim. Suppose further that the note reflects that the patient disclosed that he had participated in sports activities around the time of the accident and that such sports activities could have produced the same injuries being attributed to the accident.

As the lawyer learns information during the course of the third-party subpoena representation, through reviewing documents, discussions with the client, or otherwise, the lawyer might learn information prior to production that is harmful to the Other Client and might also conclude that such information is responsive to the subpoena. Under such circumstances, continuing to represent the Prospective Client might adversely affect, or be adversely affected by, representation of the Other Client.[20] Or, the lawyer might conclude that there is a personal conflict pursuant to Rule 1.7(b)(4) because the lawyer's professional judgment on behalf of the subpoenaed client will be or reasonably may be adversely affected by her responsibilities to a third party or by her own interests. Whether continuing the Prospective Client representation is a conflict of interest under Rules 1.7(b)(2) – (b)(4) is a matter of degree and a question of fact, which turns on whether a reasonable lawyer would conclude that there would be a diminution in the quality of the representation of either the Prospective Client or the Other Client.

Should the lawyer conclude in the affirmative, he or she must assess whether the conflict is consentable and if so, seek informed consent from each affected client.[21] Such informed consent could be sought in advance in the engagement terms or sought contemporaneously.[22] If the lawyer concludes that she may not seek informed consent, either because the lawyer reasonably concludes that she would be unable to provide competent and diligent representation to each affected client given the nature and degree of the conflict, or because confidentiality obligations prevent her from disclosing information sufficient to obtain informed consent, she may retain conflicts counsel to address that portion of the representation if the client agrees and the retention is otherwise consistent with the Rules.[23]

[17] *See* D.C. Legal Ethics Opinion 356 (2010).

[18] *See* Rule 1.7, Comment [19].

[19] Because of the nature of the third-party representation, a conflict of interest will not typically arise under Rule 1.7 (b)(1) because, as stated previously, raising objections to a subpoena or providing responsive documents is not adverse to the *subject* of the subpoena (the Other Client) but, rather, is adverse to the *issuer* of the subpoena. In the unusual circumstance that a Rule 1.7(b)(1) conflict arises in connection with responding to a third-party subpoena, the conflict might be considered under the "thrust upon" scenario pursuant to Rule 1.7(d). D.C. Legal Ethics Opinion 356 might also be instructive in this regard. *But, see*, footnote 22 *infra*.

[20] *See* Rule 1.7(b)(2) or (b)(3).

[21] *See* Rule 1.7(c) and Rules 1.1 and 1.3.

[22] While advance waivers of conflicts of interest are permissible under certain circumstances, they are more susceptible to failing the informed consent standard than contemporaneous consents. *See* Rule 1.7, Comment [31]. *See also* D.C. Legal Ethics Opinion 309 (2001) ("The less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advanced waiver will be valid."). A client may also revoke valid consents. D.C. Legal Ethics Opinion 317 (2002).

[23] "Conflicts counsel" has the same definition as set forth in endnote 11 of D.C. Legal Ethics Opinion 380 (2021). ("'Conflicts counsel' is the designation generally applied to the retention of a lawyer from a different firm engaged solely to represent the client on the discrete, severable aspect of the matter that gave rise to the conflict.…").

Otherwise, the lawyer must withdraw from the representation.[24]

*2. Former Client Conflict of Interest*

A lawyer's representation of a Prospective Client to produce documents or give testimony that might include information adverse to the interests of a former client might constitute a conflict of interest if the prospective engagement is "the same or a substantially related matter in which [the Prospective Client's] interests are materially adverse to the interests of the former client unless the former client gives informed consent."[25] The purpose of Rule 1.9, the former client conflicts rule, is twofold: first, to prevent "side-switching" and, second, to protect confidential factual information gained through or in the course of the prior representation from being used to the former client's detriment in the current representation.[26]

Side-switching occurs when parties are materially adverse to each other in a subsequent substantially related matter and the former client's lawyer begins representing a client in a matter adverse to the former client's interests.[27] In connection with a subpoena request, when a lawyer represents the Prospective Client either in a matter that is not adverse to the former client (subject of the subpoena) or in a matter that is not the same as nor substantially related to the matter in which the lawyer formerly represented the Other Client, the prohibition on side-switching is not implicated.

With respect to client confidences, the rule focuses on the risk that the former client's confidential information may be used to benefit another client in a subsequent representation to the former client's detriment. The rule assures the former client that information confided to the lawyer will not be used by the lawyer against the former client in a subsequent matter without the former client's consent. The rule does not concern the possibility that some other party may later have information detrimental to the former client.[28] In that circumstance, the lawyer is able to represent the Prospective Client to respond to a third-party subpoena involving the former client without running afoul of Rule 1.9.

**Conclusion**

A lawyer's representation of a Prospective Client does not create a conflict of interest unless: (1) the lawyer knows, after performing reasonable diligence in evaluating the subpoena request, that the Prospective Client possesses responsive information that, if produced, is or likely will be adverse to the Other Client, and such knowledge likely will adversely affect the lawyer's representation of either client; or (2) the lawyer's professional judgment will or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or other interests as a result of the prospective engagement. Reasonable diligence prior to undertaking the new engagement includes considering the particulars of the proceeding out of which the subpoena issued and the information contained in the subpoena itself, including the time period, the scope of information sought, and the names of persons identified and their connection to the information sought. It might also include review of publicly available information or consultation with the Other Client depending on the knowledge of the lawyer concerning the circumstances surrounding the subpoena request and its implications. Whether additional diligence would be required is a question of fact and varies by the circumstances.

A lawyer who undertakes a representation of a Prospective Client having concluded that there was not a conflict at the outset of the representation and who, despite reasonable diligence, does not discover a conflict throughout the engagement, has not violated Rule 1.7 if responsive Information produced is subsequently used by another party in a manner that is damaging to the Other Client.

However, if a lawyer discovers Information potentially damaging to the Other Client during the course of the Prospective Client engagement and prior to production, the lawyer must assess from both an objective and subjective perspective whether the lawyer's ability to competently and diligently represent either the Prospective Client or the Other Client might be comprised. If such Information readily appears to be, or reasonably will be, damaging to the lawyer's Other Client (not speculatively), then it is a conflict that develops after commencement of the engagement, for which informed consent from each affected client would be required. If informed consent is not obtained, then conflicts counsel would have to be retained, if permissible, or the lawyer must withdraw.

Finally, a lawyer's representation of a prospective client in responding to a third-party subpoena that seeks Information about a lawyer's former client does not create a conflict of interest unless the subpoena matter is the same as or substantially related to the lawyer's former representation and the interests of the prospective client and former client are adverse.

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*Opinion 382*

## Lawyer-Directors Representing Entity-Clients

*Introduction*

The Legal Ethics Committee has received several inquiries regarding whether a lawyer who represents an entity-client may also serve as a member of the client's board of directors.[1] The Committee is aware that acting in such

[24] Rule 1.7(d) will typically not be available to a lawyer who concludes that a conflict has arisen during a representation in this context because a conflict arising under Rule 1.7(b)(2)-(4) is not consentable under Rule 1.7(d). As to withdrawal, *see* Rule 1.16 (Declining or Terminating Representation).

[25] Rule 1.9 states: "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."

[26] *See* Rule 1.9, Comments [2] and [3]; D.C. Legal Ethics Opinion 272 (1997) ("purpose of the rule is to assure the preservation of attorney-client confidences gained in the prior representation and to preserve the reasonable expectations of the former client that the attorney will not seek to benefit from the prior representation at the expense of the former client"); and *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37 (D.C. 1984) (en banc).

[27] *Cf*, Rule 1.9, Comment [2]: "[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."

[28] *See* Rule 1.9, Comment [3]: "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."

[1] This Opinion does not apply to lawyers who serve on the boards of entities for whom they do not also serve as counsel. *See*, *e.g.*, Harris, Micalyn S., and Karen L. Valihura. *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service* (Business Lawyer, vol. 53, no. 2, Feb. 1998, pp. 479-506.)

dual capacities is a common practice that often accrues to the benefit of both lawyer and client and is not generally prohibited[2] but, as former Supreme Court Justice Potter Stewart warned, there are significant ethical issues implicated by such dual service's intertwining "the function of the lawyer in giving professional counsel" and "the function of corporate management . . . in the profit-making interests of its stockholders."[3]

At its core, the essential ethical issues relating to a lawyer representing a client-entity also serving as a director on the entity's board are conflicts of interest that may arise between two or more of: (1) the lawyer's duties to the entity as its counsel; (2) the lawyer's fiduciary duties to the entity as a director; and (3) the lawyer's personal self-interest inherent in simultaneously serving in both roles.[4]

For example, a personal conflict might arise for the lawyer-director when:[5]

- the lawyer-director is asked for legal advice regarding her own acts or omissions that she took in her directorial capacity;
- the lawyer-director is asked for legal advice regarding different potential courses of action, and she prefers one option as a board member;
- the lawyer-director is asked to represent a client whose interests are directly adverse to the entity;
- the lawyer-director is, or may be, called as a witness by those bringing lawsuits against the entity-client;[6]
- the lawyer-director is employed by a law firm and serves as outside counsel to the entity, and the board must deliberate with respect to the relationship between the firm and the entity, including deciding whether to retain the firm, the fees to be paid to the firm, when and whether to retain the firm's services, etc.;
- a lawsuit is brought against the corporation and its directors, and the interests of the board are adverse to those of the corporation or adverse to the interests of the lawyer-director.[7]

The purpose of this Opinion is to create a roadmap for practitioners to navigate the ethical and practical issues of such dual service.

The Committee concludes that while there is no *per se* proscription against a lawyer representing an entity while simultaneously serving as a director of that entity, the lawyer must first carefully determine whether the additional fiduciary or other responsibilities related to serving on the entity's board creates a material risk of compromising the lawyer's independence of professional judgment on behalf of the client or otherwise creates a personal or other conflict of interest. This determination must include full and frank discussions with the client of all material risks inherent in the lawyer serving in such a dual role and obtaining the entity-client's informed consent thereto.[8]

The Committee notes that it may be more practical for the lawyer-director to recuse herself from representing the entity-client or from giving it legal advice while serving on its board as an effective way to avoid most, but not all,[9] of the types of conflicts discussed herein. Where consistent with the rules, the lawyer-director may suggest that the client agree to a different lawyer from her firm representing it while she serves as a director, which would minimize, but not eliminate, the ethics issues discussed herein.

**Applicable Rules**

- Rule 1.0 (Terminology)
- Rule 1.1 (Competence)
- Rule 1.2 (Scope of Representation)
- Rule 1.4 (Communication)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflict of Interest)
- Rule 1.8 (Conflict of Interest: Specific Rules)
- Rule 1.10 (Imputed Disqualification: General Rule)
- Rule 1.13 (Organization as Client)
- Rule 5.7 (Responsibilities Regarding Law-Related Service)

*General Discussion*

Unlike accountants, who are prohibited by the Code of Professional Ethics for Certified Public Accountants from serving on boards of directors of their entity-clients,[10] neither the ABA Model Rules of Professional Conduct nor the D.C. Rules bar lawyers from serving in

[2] *See, e.g.*, Restatement (Third) of the Law Governing Lawyers, § 135, comment d (2000).

[3] Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 Bus. Law. 463, 464 (1975); *see The Lawyer as Director of a Client*, 57 Bus. Law. 387, 395-96 (2001).

Lawyer-directors of nonprofit entities may also encounter potential issues, some of which are unique to nonprofits. For instance, some state statutes limit liability for uncompensated directors and officers of nonprofit organizations when they are acting in their capacity as directors and officers.

[4] Lawyers provide advice on law and legal strategy to an entity client but do not make commercial or other business decisions on the ultimate objectives of the client. Such decisions are made by the entity, usually acting through its directors. *See* Rule 1.2. A lawyer who serves in both roles runs the risk of confusing and blurring these important distinctions.

[5] A lawyer-director may have a conflict of interest in undertaking to provide legal advice to an entity-client regarding a challenge to the legality of actions in which he or she participated as a director. *See* generally Rule 1.7, comment [4]: "[I]f 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 client detached advice." However, under certain circumstances where the lawyer concludes that the conflict is consentable, the lawyer-director may provide such legal advice after notifying the entity-client of the conflict and obtaining its informed consent. Rule 1.7(c).

[6] Because of the broad scope of insider knowledge and industry information presumably known by a lawyer-director, she may be targeted and called a witness by those bringing lawsuits against the corporate client, creating a potential personal conflict. Moreover, Rule 3.7 (Lawyer as Witness) may preclude the lawyer-director from serving as trial counsel. As per Comment [1], "combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and client."

[7] In this regard, plaintiffs sometimes may aim at strategically disqualifying the lawyer-director and the lawyer-director's firm from representing the corporation.

[8] *See* Rule 1.8(g)(1) and Comment [13] thereto.

Although the D.C. Rules of Professional Conduct do not require a lawyer to carry professional liability insurance, having such protection is a sound and highly recommended practice. However, under some malpractice insurance policies that exclude non-law-related liabilities, lawyer-directors are entitled to less coverage – or even possibly no coverage at all – for work they perform in that dual role, even if a significant portion of the work performed was legal. *See, e.g., Continental Cas. Co. v. Smith*, 243 F. Supp. 2d 576, 582 (E.D. La. 2003). As such, lawyer-directors should always check with their insurers to determine if such limitations apply to their coverage.

[9] A lawyer-director may not solve all conflict problems by refraining from providing legal advice to the client-entity. For example, she may have a conflict imputable to other members of her firm pursuant to Rule 1.10, or she and/or other firm lawyers may have a personal conflict, as discussed *infra*.

To be clear, however, it is not the position of the Committee that a Rule 1.7 conflict necessarily arises where the lawyer-director limits herself to serving as director and a different firm lawyer serves as counsel to the entity. Even in the absence of a conflict, lawyers should be aware that some courts have disqualified lawyers in such circumstances.

[10] Code of Professional Ethics for Certified Public Accountants, Rule 101.

such a dual capacity, but they warn lawyers to decline such representations in circumstances where there exists a material risk that the lawyer's independent judgment will be compromised or where there is a disqualifying conflict.[11]

The duties of a corporate director to shareholders do not overlap cleanly with the duties that a lawyer owes a client under the D.C. Rules of Professional Conduct. As such, the lawyer must provide information to the entity-client sufficient for it to be aware of the potential risks inherent in an attorney serving such dual roles and make clear to the client at all times "which hat she is wearing."

An attorney-client relationship may unintentionally arise when the entity reasonably believes that the lawyer-director is acting as its counsel in providing legal advice. As such, it is important for a lawyer to take every reasonable step to avoid such misconceptions and to clarify his role at every stage. When acting pursuant to his duties as a board member, the attorney must make clear that he is not acting as a lawyer or giving legal advice. On the other hand, when the lawyer is acting as counsel to the entity-client, he must take every reasonable step to ensure that it understands that he represents only the entity and that he does not represent any of its board members, officers, employees, or anyone else.[12] Best practices include specifying this important point to the client both through specific and unambiguous language in the retainer agreement consistent with Rule 1.5 and thereafter when required by Rules 1.4 and 1.13.

There are several additional ethical issues that arise in the context of a lawyer serving a dual role on behalf of the entity-client, particularly the risk that her professional judgment could be compromised. As a stark – but not at all uncommon – example, a lawyer-director might be required to determine the legality of the board's decisions in which she directly participated; in such situations, her ethical obligation to provide competent, diligent, objective, and independent legal advice could be at odds with her personal and managerial interests.[13] Moreover, while it is not uncommon for an entity to agree prospectively to limit the liability of its directors, a lawyer who decides to also serve as a director could not make any agreement that prospectively limits the lawyer's liability to a client for malpractice.[14]

As such, a lawyer considering assuming a dual role on behalf of an entity must first assess whether assuming such a dual role is ethically permissible and, if so, discuss these issues with the client-entity and, together with it, determine, based upon a risk-benefit or other appropriate analysis, if assuming a dual role is appropriate under the circumstances.[15]

*Discussion*

*Rule 1.2 (Scope of Representation)*

Pursuant to Rule 1.2(a):

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

Thus, the Rule carefully distinguishes between the *objectives* of the representation, such as whether to accept a settlement or request a jury trial or plea, which vest generally in the client, and the *means* of obtaining those objectives, which vest generally in the lawyer: As Comment [1] to the Rule elaborates:

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

This distinction creates an issue for the lawyer-director, who at all times must be conscious of this important "objectives vs. means" distinction. As counsel to the entity, he must abide by the decisions of his client regarding the objectives of the representation[16] even if, as a director, he powerfully disagrees with the client's decision in that regard. Moreover, as counsel, he may exercise his best legal judgment and decline to follow the entity's instructions with respect to the *means* of the representation, even if the client urges such action. However, so long as the decision of the entity acting through its duly authorized constituent(s)[17] is both legal and ethical, the lawyer, in his capacity as a director, must follow the client's directions regarding even the

[11] *See* ABA Model Rule 1.7, Comment [35]. *See also* ABA Formal Opinion 98-410, pursuant to which:

> The lawyer should reasonably assure at the outset of the dual relationship that management and the other board members understand the different responsibilities of legal counsel and director; understand that in some circumstances matters discussed at board meetings with the lawyer in her role as director will not receive the protection of the attorney-client privilege; and understand that conflicts of interest could arise requiring the lawyer to recuse herself as a director or to decline representation of the corporation in a matter. During the dual relationship, the lawyer should exercise reasonable care to protect the corporation's confidential information and to confront and resolve conflicts of interest that arise.

[12] *See* Rule 1.13(a) (Organization as Client). There are circumstances when a lawyer may undertake to represent simultaneously and jointly both the entity and one of its constituents in the same matter, but that issue is beyond the scope of this Opinion. *See*, *e.g.*, D.C. Legal Ethics Opinion 327 (2005) (Joint Representation: Confidentiality of Information Revisited).

[13] *See*, *e.g.*, *The Lawyer as Director of a Client* (The Business Lawyer, Nov. 2001, Vol. 57, No. 1, at 388); ABA Model Rule 1.7.

[14] Rule 1.8(g). *See also* Comment [13]: "Agreements prospectively limiting a lawyer's liability for malpractice are prohibited because they are likely to undermine competent and diligent representation."

[15] See, *e.g.*, ABA Formal Opinion 98-410.

[16] A basic feature of the lawyer-client relationship, sometimes frustrating to lawyers, is that the client has the right to make foolish decisions. For example, a client might reject an attractive settlement offer that the lawyer believes is greater than a probable judgment were the case to be tried and the client to prevail spectacularly. *See, e.g.,* Rule 1.13, comment [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 the ones entailing serious risk, are not as such in the lawyer's province."

Of course, a lawyer has the ethical duty to counsel and advise the client against such foolish decisions but, at the end of the day, the client has the unfettered right to reject the lawyer's advice regarding the objectives of the representation.

[17] *See* discussion on Rule 1.13, *infra*.

means of the representation, even if he strongly believes that such action is not in the client's best interests.

As discussed more fully below, this dichotomy on the objectives-means continuum between a lawyer-director's prerogatives and duties as a lawyer and as a director creates potential personal conflicts of interest for lawyers wearing both hats.

*Rule 1.1 (Competence)*

Pursuant to Rule 1.1, lawyers must provide competent representation to their clients and must possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Some courts have ruled that a director for an entity who is also a lawyer is held to a higher standard of care than a non-lawyer director and, as such, must be careful to recognize "red flags" for potential legal issues in a company's operations which may not be apparent to a non-lawyer director.[18]

Moreover, unlike lawyers who advise a company but do not also serve as directors, lawyer-directors might know the intimate details of the entity-client's internal operations.[19] This heightened standard of care means that the lawyer-director faces a greater potential risk of violating Rule 1.1 when the lawyer is also representing the entity.

Finally, although it is generally outside the scope of the authority of the Legal Ethics Committee to comment on matters of substantive law, it is important to remind practitioners that they are bound by the substantive law,[20] and that their duty of competence under Rule 1.1 includes the duty to be familiar with all applicable laws and regulations. Again, in this regard, lawyer-directors should be aware that courts have often held them to substantially higher standards of care and due diligence under various SEC Rules than other directors.[21]

*Rule 1.13 (Organization as Client) and Rule 1.4 (Communication)*

Rule 1.13 establishes that a lawyer for an organization represents only the entity itself, "acting through its duly authorized constituents," who could be any person or persons designated by the entity-client to act in that capacity. As such, the duly authorized constituent is merely an agent for the entity with respect to the representation, and the full scope of the lawyer's ethical duties run directly to the entity itself, and not to any of its directors, officers, owners, employees, shareholders, or to any other persons or constituents.

There may be situations where one or more fellow directors is engaged in an action, intends to act, or refuses to act in a matter related to the lawyer-director's representation that is a violation of law which reasonably might be imputed to the organization and is likely to result in substantial injury to the organization. Under such circumstances, Rule 1.13(b) mandates that the lawyer proceed "as is reasonably necessary in the best interests of the organization," including referring 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."[22]

When a lawyer is also a director, it may be particularly uncomfortable and difficult for her to "report up" on her fellow directors – perhaps even as to the acts or omissions of the duly authorized constituent – with whom she has established a working relationship and perhaps friendships. Nevertheless, when the interests of management or the board or any of its directors diverge from that of the entity, the lawyer-director is bound by Rule 1.13 to prioritize the interests of the entity and to act only in its best interests.

Moreover, above and beyond Rule 1.13, a lawyer-director has the same duty as any other lawyer to ensure that all client decisions be made "only after the client has been informed of all relevant considerations."[23] Thus, if a lawyer who represents an entity-client is also considering serving on the client's board, he must provide all information that the entity will need to make an informed decision as to whether to invite the lawyer to serve as a director for the entity as well. Such information that must be discussed with the entity-client includes, at the very least, the fact that certain communications with the board by a lawyer who is also a director may not be protected by the attorney-client privilege.[24]

By virtue of the close working relationship with her fellow directors, the lawyer-director may actually obtain more information to communicate to the client and to draw on when advising the client. However, some confusion may result when a lawyer also serving as a director learns information that a non-director lawyer would not have known; again, Rule 1.4 would also require that the lawyer-director relay this information to the client to the possible detriment of the board.

*Rule 1.6 (Confidentiality of Information) and Rule 5.7 (Responsibilities regarding Law-Related Services)*

The duty of a lawyer to protect client confidences and secrets under the D.C. Rules is a fundamentally important obligation which, subject to very few exceptions, generally takes priority over other ethical imperatives. That particularly broad duty extends not only to confidential attorney-client communications but also to "secrets," which Rule 1.6(b) defines as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would likely to be detrimental, to the client." However, the client holds the privilege and the entity-client and/or its directors may waive the attorney-client privilege and consent to the disclosure of the entity's confidences and secrets.

[18] *See*, *e.g.*, *Escott v. BarCharis Constr. Corp.*, 283 F. Sup. 647 (S.D.N.Y. 1968).

[19] *See*, *e.g.*, *Feit v. Leasco Data processing Equipment Corp.*, 332 F. Supp. 54, 578 (E.D. NY 1971):

> Inside directors with intimate knowledge of corporate affairs and of the particular transactions will be expected to make a more complete investigation and have more extensive knowledge of facts supporting or contradicting inclusions in the registration statements than outside directors . . . such stringent requirements of knowledge of corporate affairs [apply to] inside directors that one is led to the conclusion that liability will lie in practically all cases of misrepresentation.

[20] When the substantive law is proscriptive and the D.C. Rules are permissive or silent on the matter, then the substantive law will control. On the other hand, when the D.C. Rules are proscriptive and the substantive law is permissive or silent, the Rules will control.

[21] *See Blakely v. Lisac*, 357 F. Supp. 255, 266 (D. Ore. 1972) (holding a lawyer-director "liable both as a lawyer and as a director" for drafting a fraudulent prospectus under SEC Rule 10b-5, while not holding other directors similarly liable).

[22] In the District of Columbia, this is colloquially referred to as the "report up, but not out" rule; that is, a lawyer for an entity has the duty to report such information up to the highest decision maker within the entity, but may generally not report "out" to regulators or others because of the duty to maintain client confidences and secrets. *See* discussion on the implications of Rule 1.6 (Confidentiality of Information) on a lawyer-director, *infra*. *But see* D.C. Rule 1.6 (d) (narrow exception to permit lawyers to "report out" – but only "to the extent reasonably necessary" – when the lawyer's services were or are being used to perpetrate an economic crime-fraud.)

[23] Rule 1.4, Comment [2].

[24] *See* discussion on Rule 1.6 implications, *infra*.

There are any number of communications by a lawyer that are legally protected from disclosure by applicable substantive law of attorney-client privilege but which are not afforded similar protection for communications from a director to his entity. As such, confusion may arise regarding which hat the lawyer–director is wearing; under which circumstances, in his role as lawyer, he is obligated to protect certain private information; and when, in his role as director, he is required to make disclosures.

The general rule is that *legal* advice is protected by the attorney-client privilege and Rule 1.6, but *business-related* advice is not always protected and is potentially discoverable in litigation.[25] The repercussions of this distinction may be dire; for example, given the different scopes of the fiduciary and attorney-client privileges with regard to confidential information, the lawyer-director may be forced to turn over information during discovery or potentially testify as to information that would have been covered by attorney-client privilege had the lawyer not also been a director.[26]

Distinguishing between these roles can be complex because the discussion may oscillate between legal advice and business discussions and also because a bright line between "legal" and "business-related" may not always exist, making legal advice provided by a lawyer-director more vulnerable to involuntary disclosure or subject to mandatory disclosure than that of a lawyer who is not also a director.[27] As such, when the lawyer-director must discuss legal matters which he would like to make subject to the attorney-client privilege, it may be insufficient to declare that "I am speaking now in my capacity as legal counsel." Rather, he must take affirmative and substantive steps to make plain the strictly legal nature of the discussion.

Although often impractical and difficult to achieve, the lawyer-director could consider having entirely separate sessions with his entity-client where only legal issues are discussed and where other firm lawyers and inside general counsel are purposely included in such meetings. Though the subject of attorney-client privilege substantive law is beyond the scope of this opinion, the lawyer-director might consider the crafting of meeting minutes so as to avoid revealing client confidential information in privileged discussions with entity counsel.

Moreover, Rule 5.7, which imposes additional duties upon a lawyer who provides "law related services," applies particularly to lawyer-directors. Rule 5.7(b) defines law-related services as "services that might reasonably be performed in connection 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." As Comment [9] explains:

> 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.

When a lawyer provides general legal services to the entity, but also provides only business advice to the entity in a particular case, Rule 5.7 will apply:

> (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 if the lawyer fails to take reasonable measures 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.

Thus, Rule 5.7 creates an additional mandate under the D.C. Rules that a lawyer-director be careful at all times to remember which "hat" he is wearing – lawyer or director – and to be meticulous in communicating with the entity-client to make clear which role he is playing at a particular time.[28] This is particularly important, and the risk of confusion is particularly severe, where the recipient of services lacks sophistication.[29]

*Rule 1.7(b)(4) (Conflicts of Interest: General Rule)*

Many lawyers think of "conflicts" as those that arise between two or more current clients or between a current and former client.[30] It goes without saying that, in undertaking any representation of an entity-client – whether as only in his capacity as lawyer or as a lawyer-director – the lawyer must always conduct a competent and thorough conflicts check against current and previous representations as he would ordinarily do in every representation. However, for a lawyer-director, disqualifying conflicts may not involve conflicts between two or more clients but, rather, conflicts that are personal to him.

The analysis of such conflicts begins with Rule 1.7(b)(4):

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if: . . .
>
> (4) The lawyer's professional judgment on behalf of the client will be *or reasonably may be* adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.

(Emphasis added).

This rule has very broad applicability; a lawyer has a Rule 1.7(b)(4) conflict not only where there exists an *actual* personal conflict, but even in cases where the lawyer's professional

[25] *See*, *e.g.*, ABA Formal Ethics Opinion 98 – 410, *Lawyer Serving as Director of Client Corporation* (1998).

[26] Some courts have even gone so far as to hold that the attorney-client privilege for communications between a lawyer and the lawyer's corporate client *dissolves entirely* when the lawyer becomes a director for the entity. *See*, *e.g.*, *Federal Savings & Loan Ins. Corp. v. Fielding*, 343 F.Supp. 537 at 546 (D. Nev. 1972) (When a lawyer "gets into bed together" with the entity by serving also as a director, the lawyer converts the relationship into strictly a business relationship, rendering all communications between the lawyer-director and the entity as "business communications" unprotected by the attorney-client privilege.)

[27] There is hardly a courtroom in the land where litigants do not regularly seek to pierce assertions of attorney-client privilege by arguing that the lawyer provided business advice, which is discoverable, and not legal advice, which is not. The courts have employed a wide variety of tests to determine whether a lawyer-director's communications are privileged, and some have ruled that "when the lawyer becomes a director the privilege essentially evaporates" and that even lawyer-director's communications which consist only of legal advice may not be privileged. Other courts have held that even non-legal advice is privileged so long as the parties sought purely legal advice from the lawyer-director. *See* ABA Formal Ethics Opinion 980-410, citing *Corp, v. Fielding*, 343 F. Supp. 537, 546.

[28] For a comprehensive discussion of Rule 5.7, *see* Singer, Saul Jay, *May A D.C. Lawyer Build A Deck* (Washington Lawyer, *Speaking of Ethics*, March 2016).

[29] Rule 5.7, Comment [8].

[30] *See generally* Rule 1.7 (Conflicts of Interest: General) and Rule 1.9 (Conflict of Interest: Former Client), respectively.

judgment on behalf of a client "*may be* adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interest." (Emphasis added). Such personal conflicts undermine the lawyer-director's capacity to render objective, detached advice because he will be – or even may be – personally affected by the legal advice he renders.[31]

However, even when a lawyer-director has a personal conflict, it may still be ethically permissible for him to represent the entity-client if he can meet *both* requirements of Rule 1.7(c):

> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
>
> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

As Comment [7] explains:

> The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client . . . Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on the issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interest.[32]

Thus, after a good faith effort to determine which conflicts of interest may exist, the lawyer must obtain the client's informed consent[33] before taking on a dual role.[34] However, in the context of resolving personal conflicts, it is very important for the lawyer-director seeking to represent the entity-client to carefully consider the implications of Rule 1.6, the duty to maintain and protect client confidences and secrets, in seeking such informed consent. If, for the consent by the entity-client to be "informed," the lawyer would be required to disclose Rule 1.6-protected information from another client (current or past), the lawyer would be ethically prohibited from doing so. The result would be that the lawyer could not obtain the requisite *informed* consent; she could not satisfy Rule 1.7(c)(1); she therefore could not remove the taint of her Rule 1.7(b)(4) personal conflict; and she would be precluded from representing the entity-client in that matter.

Moreover, some lawyers erroneously conclude that obtaining the client's informed consent effectively resolves a personal interest conflict. In fact, pursuant to Rule 1.7(c)(2), the lawyer must also undertake *both* a subjective self-assessment and an objective analysis[35] to determine whether – notwithstanding the client's informed consent – he will be able to provide competent, diligent, and zealous representation to the client notwithstanding his own interests. In the language of Legal Ethics Opinion 365:

> the lawyer must [subjectively] hold such a belief *and* that belief must be reasonable under an objective standard . . . the prohibition of Rule 1.7(b)(4) is one which is highly dependent on the circumstances of the representation and the lawyer's own circumstances . . . we can do no more than identify the conflict of interest considerations, and leave it to the inquirer to determine whether the particular circumstance of his representation of his client are such that his judgment "will be or reasonably may be affected . . ."

The analysis is not complete, however, because even when the lawyer-director has a personal conflict such that she cannot satisfy either the objective or subjective test of Rule 1.7(c)(2), she may nonetheless continue to serve as counsel to the entity-client if she can limit the scope of her representation so as to "carve out" the personal conflict.

Pursuant to Rule 1.2, a lawyer may eliminate the taint of a personal conflict by limiting the scope of the representation when such limitation is "reasonable under the circumstances" and the "client gives informed consent." As such, a lawyer-director may limit the scope of her representation when her directorial role undermines, or has the capacity to undermine, her judgment on behalf of the client-entity. In some circumstances, she may step out of one of her roles on behalf of the entity, or she may either withdraw from serving as counsel for the entity and advising it on the problematic issue (and recommend substitute counsel to advise the entity for that limited purpose) or abstain from her role as a board director when the board addresses and acts on the problematic issue.

In instances involving specific discrete matters, such as determining the lawyer's compensation and whether to retain the lawyer's firm to represent the entity in certain matters, such a limitation is both feasible and reasonable. In other cases, however, where the taint of the personal conflict will permeate virtually everything the lawyer does in representing the entity – such as, for example, when she is asked to represent the corporation in a lawsuit in which both she and the board are defendants – such a limitation will generally not remove the taint of the personal conflict, even if the entity-client gives informed consent to the representation.

Finally, pursuant to Rule 1.10(a)(1),[36] a lawyer's personal conflicts are not ordinarily imputed to her firm. Therefore,

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[31] A lawyer who has a personal stake in the outcome of her legal advice may, for instance, be tempted to provide more cautious advice. Even a lawyer-director whose self-interest is wholly congruent with the interests of the entity may nevertheless have a personal conflict if her concern for her own personal interest in any way interferes with her concern for the client's interest.

[32] *See also* Comment [11]: "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."

[33] 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." Rule 1.0(e) (Terminology).

[34] This would apply to both a director who subsequently seeks to represent the entity as counsel, and counsel for the entity who wants to serve on its board.

[35] A lawyer-director might undertake the requisite self-evaluation in good faith and subjectively conclude that she will be able to devote herself entirely to the client's interests and disregard any interest that might pose a personal conflict of interest. However, whether a reasonable person in the lawyer's position could objectively come to that conclusion under the circumstances is an important question that must always be addressed in personal conflict situations.

[36] Rule 1.10(a)(1) provides that:

> (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 Rule 1.9, unless:
>
> (1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm . . .

when the lawyer-director has a personal conflict with respect to a particular matter, another lawyer at the firm may be able to represent the entity-client with respect to that matter – unless the personal interest of the conflicted lawyer "presents a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm."

As such, any firm lawyer seeking to replace a lawyer-director from his firm who has been disqualified from representing the entity because of a personal conflict must undertake his own Rule 1.7(b)(4) analysis as discussed above to determine if he, too, has a conflict. As an obvious example, there is no lawyer at the firm who would not have an irreconcilable conflict representing the client-entity with respect to determining the appropriate compensation for the firm. On the other hand, for example, "a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm."[37]

If a lawyer for an entity has a personal conflict or is otherwise uncomfortable assuming a position on the board, then he must "just say no." However, where an entity is pressuring its lawyer to accept a position on its board, she may be able to mollify the client by agreeing to serve as a director and recommending that a different firm lawyer represent the entity-client going forward.

*Conclusion*

A lawyer may simultaneously serve as counsel and as a director for an entity as long as, while a lawyer-director, she takes every reasonable step to ensure that the client-entity appreciates the distinction between her duties as counsel and her duties as corporate director and declines any representation of the entity, or recuses herself from further representation of the entity, if a conflict is reasonably foreseeable or arises between two or more of: (1) the lawyer's duties to the entity as its counsel; (2) the lawyer's fiduciary duties to the entity as a director; and (3) the lawyer's personal self-interest inherent in simultaneously serving in both roles. The lawyer-director must engage in full and frank discussions with the entity-client of all material risks inherent in the lawyer serving in such a dual role and must obtain informed consent thereto.

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[37] Rule 1.10, comment [7].

*Opinion No. 383*

## Disclosure of Client Confidences or Secrets in Compliance With the Outside Counsel Guidelines of Another Client; Advance Agreement to Withdraw from Representation in the Event of a "Midstream" Conflict

Absent informed consent, a lawyer generally may not disclose to a client or prospective client information about another client or prospective client that is protected by Rule 1.6 or Rule 1.18. Such information includes all confidences and secrets, as defined in Rule 1.6, which typically include the identity of another client or prospective client and the nature of the other client or prospective client's matter. Even requesting or agreeing to a commitment to make such disclosures, whether pursuant to Outside Counsel Guidelines or otherwise, may constitute a prohibited inducement to another to violate, or an attempt to violate, the Rules of Professional Conduct.

Rule 1.7(d), and not an advance agreement between one client and its outside lawyer, governs whether the lawyer must withdraw from a representation if a "midstream" conflict arises.

Also, a lawyer may not permit a client to have access to the lawyer's records if such access might disclose confidences or secrets of other clients.

**Applicable Rules**

- Rule 1.6 (Confidentiality of Information)
- Rule 1.7(d) (Conflict of Interest: Generally)
- Rule 1.16 (Declining or Terminating Representation)
- Rule 1.18(b) (Duties to Prospective Client)
- Rule 8.4 (Misconduct)

*Inquiry*

In recent years, numerous issues have arisen regarding the relationship between outside counsel and their clients or prospective clients. These issues frequently arise in the context of engagement letters, outside counsel guidelines, or similar undertakings (collectively, "OCGs") generated by large institutional clients. Such OCGs sometimes require outside counsel, as a matter of contract, to engage or refrain from engaging in specified conduct or practices.

OCGs may raise issues regarding information that is protected under the D.C. Rules of Professional Conduct ("D.C. Rules" or "Rules"). By way of example, lawyers or law firms may be asked to agree as a matter of contract to advise a client, or obtain the client's consent, before the lawyer or law firm agrees to represent a competitor of the client in an unrelated matter not involving the client. Sometimes such requests extend to situations where the *issue* involved might be of interest to the client, even if the prospective client is not a competitor of the requesting client and the requesting client is not involved in the prospective matter. These types of issues may arise even before a lawyer and a prospective client reach the point of establishing an attorney-client relationship—for example, when a prospective client is interviewing lawyers for possible retention. Importantly, these are representations that would not constitute conflicts of interest under the D.C. Rules.[1]

Whether lawyers may request, or agree to, such commitments is beyond the scope of this opinion. The Legal Ethics Committee is issuing this opinion principally to remind lawyers that in the absence of informed consent,[2] (1) the D.C. Rules prohibit disclosure of a client's protected information in connection with such a request or commitment, and (2) agreeing to make such a disclosure or intentionally requesting such information may constitute a violation of the Rules even if no disclosure ultimately is made.

The Committee also has examined the propriety of two additional requirements found in some OCGs, namely that (1) the outside lawyer must withdraw from representing another current client if a so-called midstream conflict arises and (2) the client be permitted to audit the lawyer's records.

[1] *See* D.C. R. Prof. Conduct 1.7 (general conflicts rules). Although the current D.C. Rules permit a lawyer and her client to expand—arguably without limit—Rule 1.7's definition of what constitutes a conflict of interest, the D.C. Bar has recommended that the D.C. Court of Appeals eliminate this open-ended provision and limit the definition of conflicts of interest to those set out expressly in the Rules. D.C. Bar, Rules of Prof. Conduct Review Comm., Report to the Board of Governors Proposing Changes to the D.C. Rules of Professional Conduct Relating to Client-Generated Engagement Letters and Outside Counsel Guidelines (Jan. 2022) at 4-12, 23-26 (https://www.dcbar.org/getmedia/a2fed463-f33e-4155-82e4-3622e1e37afb/Report-of-OCGs-2022-Final-Transmittal-to-DCCA ).

[2] *See* D.C. R. Prof. Conduct 1.6(e)(1). "'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." D.C. R. Prof. Conduct 1.0(e).

*Discussion*

The D.C. Rules strike a balance between allowing clients and lawyers latitude to contract with one another as they see fit, on the one hand, and protecting essential elements of the practice of law, on the other. These essential elements include confidentiality of specified client information.

With certain exceptions, Rule 1.6 prohibits a lawyer from revealing a "confidence" or "secret" of a client[3] as well as from using such information "for the advantage of the lawyer or of a third person."[4] Rule 1.18(b) provides similar protection for confidences and secrets of a prospective client. "Confidences" are information protected by the attorney-client privilege.[5] "Secrets" are defined broadly as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."[6]

Information that is neither a confidence nor a secret—for example, information that is "harmless or unexceptionable"[7] and information about a former client that is "generally known"[8]—is not protected by Rules 1.6 and 1.18. Note, however, that "the lawyer must err on the side of protecting information where any doubt exists" whether it qualifies as a confidence or secret.[9]

***Information relating to representation of other clients***

A client's identity comes within the protection of Rule 1.6, at least where disclosure might be detrimental to that client.[10] The same is true with respect to a prospective client.[11] The nature of the representation or prospective representation also is a protected secret[12] and in some circumstances may be a confidence as well.

Absent the informed consent of the affected client or prospective client, disclosure of that person's identity or the issues on which the lawyer is representing that person would violate Rule 1.6, Rule 1.18, or both where the client or prospective client has requested that the information be held inviolate or where its disclosure would be embarrassing or likely detrimental to the client or prospective client.

Thus, an outside lawyer for Client *A* ordinarily may not reveal to *A* the identity of that lawyer's client or prospective client *B*, or the nature of *B*'s legal issue, unless permitted by an exception to Rule 1.6. Typically, the only potentially applicable exception will be "with the informed consent of [*B*]." Such consent presumably will not be forthcoming where *A* and *B* are competitors or where *B* does not want its engagement of the lawyer to be disclosed. Moreover, waivers of confidentiality "may not be implied from waivers of conflicts of interest" and are subject to "particular scrutiny" if challenged.[13]

A lawyer who agrees to disclose such information risks violating D.C. Rule 8.4(a) even if she never actually discloses protected information, as that rule prohibits not only violations of the Rules but also *attempts* to violate them.[14]

Moreover, an in-house lawyer who secures outside counsel's agreement to an OCG that requires outside counsel to violate the Rules may herself become subject to discipline: "It is professional misconduct for a lawyer to . . . knowingly . . . induce another to [violate the Rules]."[15] Indeed, even *seeking* such an agreement might constitute a prohibited attempt to violate the Rules or to induce another to do so.[16] Further, an in-house lawyer cannot avoid the restrictions discussed in this opinion by having a nonlawyer request such an agreement, as violating the Rules "through the act of another" is prohibited as well.[17]

That said, an in-house lawyer does not induce or attempt a violation if her request for information about other clients is conditioned upon such disclosure being consistent with the Rules' restrictions regarding client confidences and secrets. (If a conflict of interest is present, the outside lawyer would have to decline the proposed representation if she would have to disclose another client's confidences or secrets in order to seek informed consent.[18]) Moreover, a lawyer making an inquiry of another lawyer does not induce or attempt a violation if she reasonably believes that her inquiry will not elicit information protected by Rule 1.6 or Rule 1.18.

***"Midstream" conflicts of interest***

Another type of OCG that has come to the Committee's attention requires the lawyer to withdraw from representing another current client if a so-called midstream conflict arises. A midstream conflict is one that arises after a representation has commenced and that was "not reasonably foreseeable at the outset of the representation."[19] In such an instance, "a lawyer need not withdraw from any representation unless the conflict [would adversely affect one of the representations in question]."[20] Absent such an adverse effect, a lawyer may not withdraw under such circumstances if withdrawal would have a "material adverse effect on the interests of the client" from whose representation the lawyer proposes to withdraw unless one of the specialized circumstances set out in Rule

[3] D.C. R. Prof. Conduct 1.6(a)(1).

[4] D.C. R. Prof. Conduct 1.6(a)(3).

[5] D.C. R. Prof. Conduct 1.6(b).

[6] *Id.*

[7] D.C. Bar Legal Ethics Op. 312 (2002).

[8] D.C. R. Prof. Conduct 1.6, cmt. [10]. The ABA's Standing Committee on Ethics and Professional Responsibility has explained that "generally known" means "widely recognized by members of the public in the relevant geographic area or . . . widely recognized in the former client's industry, profession, or trade" and not merely, say, mentioned in open court, a public record, or a document available in a public library. ABA Formal Ethics Op. 479 (2017); *see* N.Y. State Bar Ass'n Op. 1088 ¶ 8 (2016) (discussing examples of generally known information). The fact that information appears in a public filing somewhere does not ipso facto remove such data from the "secrets" category. D.C. Bar Legal Ethics Op. 246 (1994).

[9] D.C. Bar Legal Ethics Op. 312 (2002).

[10] *In re Hager*, 812 A.2d 904, 920 (D.C. 2002); *accord* ABA Formal Op. 480 at 2 (2018); ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 112-13 (9th ed. 2019) ("ANNOTATED MODEL RULES").

[11] D.C. R. Prof. Conduct 1.18(b); *accord* D.C. R. Prof. Conduct 1.6, cmt. [9]; ANNOTATED MODEL RULES 312-13.

[12] *See* N.Y. State Bar Ass'n Op.720 (1999) (interpreting N.Y. version of Rule 1.6).

[13] D.C. Bar Legal Ethics Op. 309 n. 10 (2001).

[14] *See In re Fink*, 22 A.3d 461 (Vt. 2011) (disciplining lawyer who contracted for unreasonable fee, even though lawyer did not attempt to collect it).

[15] D.C. R. Prof. Conduct 8.4(a); *see In re Asher*, 772 A.2d 1161 (D.C. 2001) (inducing another lawyer to lie to court); *In re Isaacson*, 860 N.W.2d 490 (Wisc. 2015) (directing other lawyer to file court documents containing false and offensive statements).

[16] *See Fink*, 22 A.3d 461.

[17] D.C. R. Prof. Conduct 8.4(a)

[18] D.C. R. Prof. Conduct 1.7, cmt. [27]; D.C. Bar Legal Ethics Op. 312 n. 9 (2002).

[19] D.C. R. Prof. Conduct 1.7(d).

[20] D.C. R. Prof. Conduct 1.7(d).

1.16(b)(1) through (5) is present.[21] Thus, an advance agreement to make such a withdrawal may contravene Rule 1.7(d).

***Client access to law firm records***

OCGs requiring that the client be permitted to audit a lawyer's records also may implicate the rules protecting client confidences and secrets. This depends not only upon the breadth of the OCG but also the nature of the lawyer's record keeping systems.

One provision of which the Committee is aware states: "[CLIENT] shall have full access to all electronic and paper records the firm maintains and the right to examine any such materials during this period upon reasonable notice."

A client is entitled to its entire file, with a narrow exception for lawyer work product in some instances where full payment of fees has not been made.[22] That is a far cry, however, from "full access" to a lawyer's records, which is not permitted where such access might reveal confidences or secrets of other clients (e.g., if the lawyer's electronic records are stored on an information system with relatively open architecture).

*Conclusions*

Absent informed consent, a lawyer generally may not disclose to a client or prospective client information about another client or prospective client that is a protected secret or confidence under Rule 1.6 or Rule 1.18. Such information often includes (1) the identity of another client or prospective client, and (2) the nature of the other person's matter. Even requesting or agreeing to a commitment to make such disclosures, whether pursuant to an Outside Counsel Guideline or otherwise, may constitute a prohibited attempt or inducement to another to violate the Rules.

Rules 1.7(d) and 1.16, and not an advance agreement between one client and its outside counsel, govern whether a lawyer must—or may—withdraw from her representation of another client if a "midstream" conflict arises.

Finally, a lawyer may not permit a client to have access to the lawyer's records if such access might disclose confidences or secrets of other clients.

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[21] *See* D.C. R. Prof. Conduct 1.16(b).

[22] D.C. R. Prof. Conduct 1.8(i), 1.16(d); D.C. Legal Ethics Op. 333 (2005); D.C. Legal Ethics Op. 250 (1994); D.C. Legal Ethics Op. 230 (1992).

*Legal Ethics Opinion 384*

**Restrictions on Accepting a Legal Fee For Benefit of Certain Incarcerated Persons Before Notifying Prior Counsel of Record**

This Opinion addresses the limits, under Rule 7.1(f) of the D.C. Rules of Professional Conduct ("D.C. Rules" or "Rules"), on a successor counsel's ability to accept a legal fee from (or on behalf of) certain criminal defendants and detained youth who are incarcerated in District of Columbia correctional or juvenile detention facilities.

Rule 7.1(f) was added to the D.C. Rules in 2007 at the behest of the Public Defender Service and U.S. Attorney's Office, to protect already-represented incarcerated persons from lawyers who solicit fee-paying engagements based on unrealistic promises of success.[1] Rule 7.1(f) imposes specific notification obligations on a successor counsel before the successor may *accept* a legal fee from (or on behalf of) the incarcerated client. Rule 7.1(f) provides:

> Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.,* in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

Nowhere does Rule 7.1(f) define what "accepting any fee" or "timely and adequate notice" means. Other D.C. Rules inform us (i) that a lawyer's fees must be reasonable (Rule 1.5(a)); (ii) special disclosures and consents are required when a family member or other third-party seeks to pay the client's legal bill (Rule 1.8(e)[2]); and (iii) prepaid flat fees are never earned on receipt (Rule 1.15(e)[3]).

This Committee is mindful that criminal defense attorneys often require payment in full of prepaid flat fees (or a substantial deposit towards total expected hourly fees) before the defense attorney will commit to entering an appearance. Rule 7.1(f) could be read as requiring a successor counsel to defer *receipt* of fees until entering an appearance. Such a reading, however, would make it difficult for incarcerated persons to exercise their absolute right to change counsel. We therefore conclude that nothing in Rule 7.1(f) prohibits successor counsel from *receiving* payment of a fee into the lawyer's trust account pending "timely" service and filing of a notice of an appearance or motion to substitute.

As to what constitutes "timely and adequate notice," we note that Rule 112 of the D.C. Superior Court's Rules of Criminal Procedure currently requires a notice of appearance "within 3 days of appointment or retention." Criminal Procedure Rule 49 further requires that such notice be served upon the party's attorney. Although violation of a court procedure does not always constitute an ethics violation, we conclude that service and filing of an entry of appearance that conforms to Criminal Procedure Rules 49 and 112 is consistent with a lawyer's duties under Rule 7.1(f) to (i) protect client interests and (ii) avoid wasting resources of prior counsel and the court.

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[1] The legislative history to Rule 7.1(f) appears at page 179 of the Rules of Professional Conduct Review Committee's *Proposed Amendments to the District of Columbia Rules of Professional Conduct Final Report and Recommendations* (June 21, 2005) found at https://www.dcbar.org/about/who-we-are/reports/rules-of-professional-conduct-review-committee/rules-of-professional-conduct-review-committee.

[2] Rule 1.8 (e) states: "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent after consultation; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by [the confidentiality restrictions of] Rule 1.6."

[3] Under Rule 1.15(e), a client's prepaid fees, including prepaid flat fees, belong to the client and must remain in trust until the lawyer completes the associated work *unless* the client has given informed consent to a different arrangement. *In re Mance,* 980 A.2d 1196 (D.C. 2009). Informed consent generally cannot be obtained without first informing the client of the risks associated with waiving use of a trust account and that termination of the lawyer-client relationship, prior to completing all work, will entitle the client to a refund of prepaid fees associated with the portion of work not performed. *Mance*. at 1206-7. *See also* D.C. Bar LEC Op. 355. Although Rule 1.15(e) provides limited circumstances in which the client may provide informed consent to waive use of a trust account for the client's prepayments, we conclude that such a waiver normally would be inoperable before the lawyer has provided the notice of appearance to prior counsel as required by Criminal Procedure Rules 49 and 112.

*Ethics Opinion 385*

## Advising Clients About Communications with Represented Opponents

*Introduction*

Parties to a legal matter generally have a right to communicate directly with each other. This Opinion provides guidance for lawyers about when and how they may counsel their clients regarding communications with represented opposing parties. It does not address the question of how a litigant (plaintiff or defendant) may communicate directly with a witness or third party represented by counsel.

A lawyer may advise a client about communications with represented opponents (herein, "opponent-party") in which the client legally is entitled to engage without running afoul of D.C. Rules of Professional Conduct 4.2 and 8.4(a) ("D.C. Rules" or "Rules"). In doing so, a lawyer may provide assistance to the client, including recommending that the client undertake direct communications with the opposing party, identifying general topic areas and specific issues for discussion, discussing the goal or goals of such communications, and preparing or revising talking points representing the client's viewpoints, questions, and proposals. A lawyer may not, however, advise a client about legally-permissible communications solely for the purpose of evading the prohibitions of Rule 4.2. Even if the lawyer does not intend to evade Rule 4.2, the lawyer's assistance should not result in the client acting as a surrogate for the lawyer.

Although a lawyer may provide a client with assistance in communicating directly with an opponent-party, the lawyer may not attend or otherwise participate in party-to-party communications with an opponent-party, unless opposing counsel provides consent. This bar on attendance and participation includes a bar on monitoring party-to-party communications or consulting with the client in real time while such communications are going on.

Furthermore, a lawyer who advises a client about communications with a represented opponent-party should advise her client that the opponent-party may want an opportunity to consult with opposing counsel before entering into any agreements, making admissions, or disclosing confidential information. Under certain circumstances, such consultation should be encouraged by the party initiating the direct party-to-party communications.

**Applicable Rules**

- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.13 (Organization as Client)
- Rule 1.14 (Client with Diminished Capacity)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

*Inquiry*

1. May a lawyer encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation? If yes, to what extent may a lawyer assist her client in preparing for such communications?
2. May a lawyer attend or observe party-to-party communications and assist his client during them?

*Discussion*

Rule 4.2 prohibits a lawyer, during the course of representing a client, from "communicat[ing] or caus[ing] another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so."[1] This prohibition extends to non-lawyer assistants who are employed or retained by or associated with the lawyer.[2] Indeed, "[i]t is professional misconduct for a lawyer to . . . [v]iolate 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."[3]

Rule 4.2 applies to communications related to a matter with *persons*–and not just *parties*–represented by counsel. Persons include opponents, third parties brought into the litigation by formal process, and witnesses. Here, the Committee addresses only how the rule applies to opponent-parties.

The commentary to Rule 4.2 states:

> 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, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.

Rule 4.2 cmt [2].[4] Thus, although a lawyer and her non-lawyer agents may be prohibited from communicating with a represented opponent-party, the same prohibition does not extend to the lawyer's client or an agent of the lawyer's client, and the lawyer may advise the client or client's agent accordingly.

What "accordingly" means, however, is a question that many state bars, the ABA, and ethics counsel have struggled to answer. Numerous authorities concur with the dictate of Comment [2], that a lawyer may not advise a client about legally permissible communications solely for the purpose of evading the prohibitions of Rule 4.2. But this boundary is so extreme, practically requiring an attorney to admit (at least to himself) bad faith, that it is not particularly useful. This Opinion, therefore, provides some

[1] Rule 4.2(a).

[2] Rule 5.3(b) ("With respect to a nonlawyer employed or retained by or associated with a lawyer . . . [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."); see also D.C. Legal Eth. Op. 295 (2000) (concluding that a guardian ad litem representing a minor is prohibited by Rules 4.2 and 8.4(a) from using a social worker or any other third party to communicate with the represented parent of the guardian ad litem's client "as a go-between to circumvent Rule 4.2"); cf. D.C. Legal Eth. Op. 321 (2003) (concluding that, under Rules 5.3 and 8.4, respondent's counsel in a domestic violence matter must "make reasonable efforts to ensure that the non-lawyer assistants, including investigators, conduct themselves in a manner consistent with the D.C. Rules" when communicating with an unrepresented petitioner).

[3] Rule 8.4(a); see also Rule 5.3(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 requests or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer has direct supervisory authority over the person, or is a partner or a lawyer who individually or together with other lawyers possess comparable managerial authority in the law firm or government agency in which the person is employed, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.").

[4] The Committee has previously noted that Comment [2] to Rule 4.2 does not create an exception to Rule 4.2. D.C. Legal Eth. Op. 258 (1995). It "merely reflects the American jurisprudential tradition that parties generally are free to communicate directly with each other. This tradition is based on the belief that parties have a right to settle their disputes without the involvement or consent of their lawyers." D.C. Legal Eth. Op. 258 (discussing comment formerly numbered as Comment [1]).

considerations that will allow practitioners to gauge whether their contemplated involvement in party-to-party communications may be considered permissible under the D.C. Rules of Professional Conduct.

**The Duty of Zealous and Diligent Representation Is Bounded By Duties to The Legal System and Other Parties**

Among the first principles of legal representation are that a lawyer has a duty to zealously and diligently represent his client and to consult with the client about the means by which the client's objectives can be pursued.[5] Additionally, a lawyer is obligated to pursue the client's objectives through whatever reasonably available means are permitted by law and the disciplinary rules.[6] Throughout, a lawyer is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[7]

There often are circumstances under which party-to-party communications may succeed in bringing about a resolution. These circumstances may arise from the posture of the matter, the relationship between the parties, or the nature of the parties' dispute. Perhaps the most common dynamic where direct party-to-party communications may be helpful are settlement negotiations that have hit a stand-still and one party questions whether its settlement overtures have been conveyed promptly and accurately to the opposing party. Parties to contract or commercial disputes that have an ongoing business relationship (including conflicts between principals of a small business) will sometimes benefit from informal, direct communications. And, the areas of family law (divorce, custody), will contests, and intra-family torts are frequently referenced as matters in which the principals may be better positioned, at times, to resolve their disputes than their counsel are – or, at least, may have a better chance of reaching agreements that will preserve future family relations. These are but some examples, sufficient for the Committee to find that a reasonable practitioner may believe that party-to-party communications might advance her client's interests and that a diligent and zealous practitioner may wish to recommend that her client engage in such direct communication with his opponent-party.[8]

**Rule 4.2 Is Intended to Protect Fundamental Aspects of the Legal System: The Adversarial Process, Professional Advocacy, and Attorney-Client Privilege**

As this Committee has previously observed:

> Among [the] main purposes [of Rule 4.2] is the protection of the adversary system. A client who receives a communication from opposing counsel without the participation of his own counsel may not be able to evaluate the correctness of statements of law made by opposing counsel. Without the participation of his lawyer, an unprotected client may be induced by opposing counsel into making admissions, waiving confidentiality, or taking positions detrimental to the client's interest without the client realizing it because the client's lawyer is not aware of, and not participating in, the communication.

D.C. Legal Ethics Opinion 274 (1997).

The Committee has specifically noted that lawyers generally have a substantial advantage over lay persons in discussing legal matters. This inequality, as well as the integrity of the attorney-client relationships that are intended to keep adverse parties on equal footing, are the core purposes of the Rule.

> Rule 4.2 has at its core the concern that lawyers generally are in a better position, by education and training, to overwhelm a lay party and exploit his lack of legal knowledge in the course of communicating directly with the lay party. Courts and this Committee have noted that the Rule is intended to protect against the lawyer who might coax a statement or settlement or otherwise take advantage of the unsuspecting and momentarily uncounseled lay person. Thus, courts have noted the "difficulty the uncounseled lay person has in marshalling the information and foresight required to conduct negotiations about complex legal issues with a lawyer representing [an adverse party]."
>
> Courts also have observed that Rule 4.2 helps prevent the inadvertent disclosure of privileged information and has "preserved the proper functioning of the legal system" by protecting the integrity of the lawyer-client relationship.

D.C. Legal Ethics Opinion 258 (1995).

With these considerations in mind, a lawyer is permitted to counsel his client on party-to-party communications without engaging in an overreach that would compromise any of the purposes underlying Rule 4.2.

**Striking the Proper Balance Between Zealous Representation and the Safeguards of Rule 4.2**

Comment [2] to Rule 4.2 permits a lawyer to respond to a client's proposal for party-to-party communications and to answer the client's questions regarding such communications. The Committee additionally believes that nothing in Rule 4.2 or the commentary prevents a lawyer from affirmatively suggesting that a client should communicate directly with his opponent-party when, in the lawyer's opinion, the client's objectives may be advanced by such outreach.

Beyond this threshold advice, counsel may assist a client in preparing for party-to-party communications. Counsel may not, however, participate in such communications, in any respect, unless opposing counsel has been advised in advance of such participation and consented to it.

***Preparing for Party-to-Party Communications***

Party-to-party communications may be carried out through written, telephone, digital (*e.g.*, video conference), or in-person communications. Regardless of the medium, a lawyer may assist his client in preparing for such communications.

Given that a lawyer cannot communicate directly with a represented opponent-party, and cannot use his client for the same purposes, the lawyer should be mindful of not dictating or directing the communications and not coaching the client to seek confidential information, admissions, or binding agreements. The lawyer may, however, do the following:

- Solicit and clarify the client's objectives for the communication or meeting;

[5] Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation [subject to certain limits] and shall consult with the client as to the means by which they are to be pursued."); Rule 1.3(a) ("A lawyer shall represent a client zealously and diligently within the bounds of the law.").

[6] Rule 1.3(a), Rule 1.3(b)(1).

[7] Rule 1.4(b).

[8] Conversely, there are relationships and disputes that are facially ill-suited for direct communications between the parties. These include relationships in which the relative bargaining power and sophistication of the parties are significantly disparate. As discussed below, direct communications should not be encouraged where they are likely to be overbearing or harassing.

- Remind the client of previously stated objectives in the litigation and propose objectives for the communication or meeting;
- Assist the client in drafting talking points or questions to present during the meeting;
- Advise the client on how the client should respond to information or questions that the opponent-party may present during the meeting.

The lawyer may not, however, attempt to script the communication or coach the client to handle the communications as the lawyer would. The point of encouraging the parties to speak directly to one another is to use the dynamics between them, and their own voices, to find common ground.[9] When the lawyer's level of assistance in preparing for these communications turns the client into the lawyer's surrogate, it has gone too far.

A lawyer can help his client draft a letter or e-mail to the opponent-party and may even draft such correspondence for his client to send to the opponent-party. But the lawyer may not prepare binding legal documents – *i.e.*, formal statements, admissions, contracts, or settlement agreements –for the client to present to the opponent-party.[10]

Should the parties, in the course of a direct communication, reach an agreement to settle their dispute, counsel may help his client reduce that agreement to writing for subsequent presentation to the opponent-party by his client.

In addition to helping a client prepare for a party-to-party communications, the lawyer should advise his client that the right of the parties to communicate directly with one another is not absolute. Coercive or harassing communications are not permissible.[11]

Furthermore, a lawyer who advises a client about communications with a represented opponent-party should advise her client that the opponent-party may want an opportunity to consult with opposing counsel before entering into any agreements, making admissions, or disclosing confidential information. Under certain circumstances, such consultation should be encouraged by the party initiating the direct party-to-party communications.

The Committee notes that the ABA has published an opinion allowing lawyers to play a greater role in preparing their clients for party-to-party communications, including drafting a settlement agreement for presentation by the client to the opponent-party with the goal of having the opponent-party sign it during the party-to-party meeting. ABA Op. 11-461. The Committee notes that the ABA opinion is based upon ABA Model Rule 4.2, which is structured and written differently than Rule 4.2, and is supported by different commentary. The ABA opinion created some controversy at the time of its publication and was inconsistent with legal ethics opinions issued by numerous state bar associations.[12] The ABA advised members in 2012 that the opinion might be revised,[13] but in the intervening years it has not been revised or superseded. At least one state has rejected it outright and others have not adopted its conclusions.[14] It is also worth noting that the conduct approved in ABA Opinion 11-461 is conditioned upon the inclusion in any document prepared by counsel for the opponent-party's signature of a prominent notice advising the opponent-party to consult his counsel before signing.[15]

### *Participation in Party-to-Party Communications*

Participation in party-to-party communications is limited to the parties themselves unless counsel for one party has sought and received the opposing counsel's consent to attend. This means that it is not permissible for a lawyer to provide advice or commentary to his client while a communication is being conducted – even though technology would permit real-time monitoring and correspondence via email, text, chat, or any other means between the lawyer and the client. This bar on participation includes a bar on silent attendance or observation, in-person, telephonically, virtually, or remotely. Even if a lawyer plans to remain silent, and not communicate with either party, he should not attend a party-to-party communication.

It is possible that one party-to-party communication – an email, a phone call, or a meeting – could lead to a series of communications over time, during which one of the parties is intermittently consulting with his counsel. When this happens, the guidance provided above ("Preparing for Party-to-Party Communications") applies. Although the rules allow counsel to advise his client on a party-to-party communication, they do not allow counsel to negotiate with the opponent-party through his client without providing notice to and obtaining consent from opposing counsel.

Based on D.C. Legal Ethics Opinion 258, which generally prohibits an attorney acting *pro se* from communicating directly with his opponent-party with-

[9] If the lawyer believes the objective of the meeting is something other than finding common ground – on some aspect of the dispute or proceeding, if not on resolution of the matter entirely – she should question whether the proposed meeting is permissible. If, for example, the client wants to solicit information from the opponent-party outside of the rules of discovery, he is free to do so on his own, but he should not be doing so at the instruction of counsel.

[10] The lawyer may, however, share a copy of a binding document with the client and recommend that the client send or present it to his opponent-party if that document has already been provided to opposing counsel.

[11] "A party cannot achieve a settlement from another uncounseled party through 'duress, harassment, or overbearing conduct'." D.C. Legal Eth Op. 258 (1995) (citing Lewis v. S.S. Baune, 534 F.2d 1115, 1122 (3d Cir. 1976)).

[12] See, e.g., Cal. Eth. Op. 1993-131 (prohibiting party-to-party communications that originate with or are directed by attorney for one party; permitting such communications where counsel advises the client on communications originating with and directed by the client; explicitly prohibiting counsel from "drafting documents, correspondence, or other written materials . . . even if they are prepared at the request of the client"); Mass. Bar Ass'n Op. 11-03 (2011) (giving client general advice regarding party-to-party communication is permissible, but preparing and presenting a binding legal document directly to the opposing party is not permissible); State Bar of Mich. CI-1206 (1988) (reviewing and affirming earlier decision holding that lawyer may prepare and share a draft settlement document with client knowing that client will discuss it with – but not present it to obtain signature from – opponent-party; affirming that attorney cannot encourage client to "take action which might tend to interfere with the lawyer-client relationship of an adverse party"); Ass'n Bar of City of New York Eth. Op. 2002-3 ("where the client conceives the idea to communicate with a represented party, [our rules do] not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.") Or. Eth. Op. 2005-147 ("even if [a client] initiates communication with [an opponent-party], [counsel for the client] must not instruct [the client] to convey a particular message").

[13] James Podgers, On Second Thought, 98-JAN A.B.A. J. 21 (2012).

[14] Martin Cole, Scripting Contacts with Represented Persons, 68-NOV Bench & B. Minn. 12 (2011) (expressly rejecting ABA 11-461); Vir. Legal Eth. Op. 1890 (2021) (affirming earlier opinions prohibiting counsel from scripting a client's communications with opponent-party or directing client to make contact with opponent-party).

[15] The New York ethics rules permit a lawyer to draft papers for his client to present to an opponent-party, but expressly require advance notice to opposing counsel before any party-to-party communications take place. Compare N.Y. Rule of Prof. Conduct 4.2(b) and Comment [11].

out opposing counsel's permission, the Committee also concludes that in-house counsel cannot participate in party-to-party communications without opposing counsel's agreement.

**Circumstances Outside the Scope of This Opinion**

This Opinion does not address what role counsel may play in advising or preparing a client for party-to-party communications where the opposing party is a government agency. As recognized in Rule 4.2(d), Comments [9] and [10] to Rule 4.2, and related D.C. legal ethics opinions, government agencies have experience and expertise that distinguish them from many non-lawyer clients and are capable of representing their own interests in direct communications initiated by their opponent-parties.[16] Because of this institutional advantage, counsel for an opponent-party is permitted to meet with a governmental entity without the government's lawyer present. *See* D.C. Legal Ethics Opinion 280 (1998). The Committee believes the same reasoning should permit a lawyer greater leeway in preparing his client for a party-to-party communications with a government agency, including the preparation of binding documents for presentation by her client to a government representative in a party-to-party meeting.

Nothing in this Opinion is intended to disturb the provisions of Rule 1.2(c) governing limited scope representations. Should, for example, a lawyer agree to represent a client under Rule1.2(c) for the limited purpose of drafting a contract, the client would be free, subsequently, to present that contract to a potential business partner in a party-to-party meeting without opposing counsel's knowledge or participation because the lawyer is not representing the client in contract negotiations or advising the client on the broader commercial relationship contemplated in the contract. If, however, the limited scope agreement is broader – *e.g.*, to represent the client in securing business partners – the guidelines set forth above ("Preparing for Party-to-Party Communications and Participation in Party-to-Party Communications) would apply. Lawyers should not attempt to evade the general limits described in this Opinion by structuring representation of a client as a series of limited scope representations.

This Opinion has no application to the practice of assisting *pro se* litigants in preparing court papers, which is discussed in D.C. Legal Ethics Opinion 330 (2005). Such conduct is often controlled by court rules and court papers are served on opposing counsel. Thus, the concerns animating this Opinion are not present.

*Conclusion*

A lawyer may encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation. A lawyer may also assist her client in preparing for such communications in several ways, but should not direct the communications or coach the client to seek confidential information, admissions, or binding agreements.

A lawyer may not attend or observe party-to-party communications or assist his client during them. This is so, even though technology would easily allow a lawyer to do so undetected and would allow a client to seek real-time assistance during telephonic, virtual or remote meetings.

As stated above, the duty of zealous and diligent representation is bounded by duties to the legal system and other parties. Whether certain actions cross the fuzzy line between permissible and impermissible is a fact-bound issue. A lawyer should remember to balance these duties and consider his conduct from the perspectives of an objective person and opposing counsel.

**Published: March 2023**

*Ethics Opinion 386*

**Aggregate Settlements**

*Introduction*

Lawyers frequently represent multiple clients in civil litigation. As the matters proceed, the lawyers may seek to obtain an aggregate settlement for their clients. However, when lawyers attempt to settle matters on behalf of multiple clients, issues may arise that are not present in individual representations. This opinion provides guidance for lawyers on how to navigate the disciplinary rules and advise their clients when representing multiple clients in civil matters that could lead to aggregate settlements.[1]

D.C. Rule of Professional Conduct 1.8(f) states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims for 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 after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.[2]

The D.C. Rules of Professional Conduct (D.C. Rules or Rules) do not define the term "aggregate settlement," but ABA Formal Opinion 06-438 (2006) provides that an aggregate settlement "occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas."[3] The ALI Principles of the Law of Aggregate Litigation, Section 3.16, defines aggregate settlements as

> (a) . . . a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent; (b) The resolution of claims in a non-class aggregate settlement is interdependent if: (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number

[16] See, e.g., D.C. Legal Eth. Op. 280 (1998) (The concern regarding exploitation of a lay party "is not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive. Moreover, government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present.") In dealings with government officials, however, a lawyer does need to disclose the representation of the adverse client and matter.

[1] Rule 1.8(f) refers to aggregate settlements in civil and criminal matters. This Opinion, however, addresses aggregate settlements in civil matters only.

[2] Under Rule 1.0(b), "`consultation' denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." "Informed consent" under Rule 1.0(e) "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." Rule 1.0(o) defines writing as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, phot stating, photography, audio or video recording, and e-mail." Under the Rule, 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."

[3] The ABA Model Rule on aggregate settlements is 1.8(g), which is substantially similar to D.C. Rule 1.8(f).

or specified percentage of claimants; or (2) the value of each claim is not based solely on individual case-by-case facts and negotiations.

Although the precise definition of aggregate settlements remains unresolved under the Rules, the core of Rule 1.8(f) is that a lawyer who represents multiple clients in a matter or related matter must obtain all clients' informed consent in writing and provide adequate disclosures in connection with a settlement on their behalf.

As the text of Rule 1.8(f) indicates, lawyers may enter into aggregate settlements on behalf of their clients if the clients are fully informed about the settlement, including the financial or other consideration they and the lawyers' other clients are receiving. In addition, at the outset of a joint representation, pursuant to the conflict-of-interest rules, lawyers must ensure that they are appropriately advising their clients of the risks associated with the multiple representations, including settlement risks. They must also ensure that they provide their clients with accurate information about the nature and scope of the settlement prior to obtaining their clients' written consent to the settlement.

**Applicable Rules**

- 1.0 (Terminology)
- 1.2 (Scope of Representation)
- 1.4 (Communication)
- 1.6 (Confidentiality of Information)
- 1.7 (Conflict of Interest: General Rule)
- 1.9 (Conflict of Interest: Former Client)
- 1.8 (Conflict of Interest: Specific Rules)
- 1.16 (Declining or Terminating Representation)

*Inquiry*

1. What steps must a lawyer representing multiple clients take to ensure that the clients fully understand the nature and scope of any aggregate settlement into which they may enter?
2. What rules must lawyers follow when representing clients in matters involving aggregate settlements?

*Discussion*

**A. Engagement of Clients in a Joint Representation Involving a Potential Aggregate Settlement**

A lawyer who represents multiple clients must initially ensure that there is no conflict between or among the clients that may prohibit the joint representation.[4] If there are conflicts, the lawyer must determine whether the conflicts may be waived, fully disclose the nature of the conflicts to the clients, and obtain the clients' informed consent before proceeding with the joint representation.[5] The lawyer must be mindful that "[i]n a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client."[6] This means that, throughout the representation, the lawyer may not favor one client over another but rather must treat each equally.

Typically, aggregate settlements occur in the context of the representation of multiple clients in the same matter. Rule 1.8(f), however, is not restricted to the representation of clients in one matter. A lawyer may represent multiple clients, for example, in several matters against the same party for violations of a form agreement. If the lawyer resolves the matters through an aggregate settlement, the lawyer must abide by Rule 1.8(f) and any other applicable rules.

Under Rule 1.8(f), aggregate settlements are permissible, so long as each client provides informed consent in writing after full disclosure by the lawyer of the terms of the settlement.[7] However, a lawyer ordinarily may not rely upon an advance waiver from a client under which the client agrees not to object to the terms of a future aggregate settlement. We agree with the ABA's admonition that the disclosures required "must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such offer or demand." ABA Opinion 06-438. *See also In re Hoffman,* 883 So. 2d 425, 433 (La. 2004) (informed consent cannot be avoided by obtaining client consent in advance of a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement); *Tax Authority v. Jackson Hewitt,* 898 A.2d 512, 522 (N.J. 2006) (the rule "forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them.") Thus, informed consent cannot be obtained from a client until the terms of the settlement are known and have been fully disclosed to the client, which ordinarily is not possible until the proposed settlement is offered or demanded. Otherwise, a client's advance waiver could result in adverse consequences to the client who may ultimately receive an unfavorable settlement to which the client would not have agreed had the terms been fully explained at the time of the settlement.

The information concerning the potential aggregate settlement that the lawyer receives from and discloses to his clients is protected by Rule 1.6. While ordinarily a lawyer cannot disclose the privileged and confidential information of a client to others, in a multiple representation the lawyer is required to disclose relevant information among the joint clients as necessary to keep each client adequately informed; accordingly, at the outset of the joint representation, the lawyer should obtain the informed consent from all clients to share privileged and confidential information among the group.[8] The lawyer should also advise the clients that, should a dispute arise, the attorney-client privilege may no longer be available against other members of the commonly represented group on issues on which they have received advice from counsel. Comment 15 to Rule 1.7 states:

> 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.[9]

4 *See* Rule 1.7(b).

5 *See* Rule 1.7(c).

6 D.C. Legal Ethics Opinion 296 (2000).

7 Rule 1.8(f) specifically refers to aggregate settlements. Rule 1.4(c) generally requires that lawyers communicate all offers of settlement to their clients: "A lawyer who receives an offer of settlement in a civil case . . . shall inform the client promptly of the substance of the communication."

8 *See* Rule 1.6 cmt. 12; Rule 1.7 cmt. 16.

9 Comment 16 of Rule 1.7 addresses confidentiality in joint representations in further detail, and states:

> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty

If settlement of claims or defenses is at issue in a lawyer's representation of multiple clients, the lawyer should explain the risks involved:

> Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent.[10]

### B. Entering Into the Aggregate Settlement Agreement

The nature of an aggregate settlement agreement is such that two or more clients of a lawyer resolve the matter at once, through a negotiation. Unlike in a class action, however, the fairness of the settlement is not reviewed by a judge. Class action litigants have inherent protections under Rule 23 of the Federal and D.C. Superior Court Rules of Civil Procedure. Among other things, under Rule 23 in both federal court and the courts of the District of Columbia, notice must be provided to the litigants and the court must approve the settlement. Non-class aggregate settlements do not provide such protections as noted in *In Re Kennedy*: "The absence of those safeguards to protect collective action clients from the unfair or unethical settlement of their claims necessitates maintaining the protections of Rule 1.8(f) for collective actions such as the one in this case."[11] Although there is no explicit exception in Rule 1.8(f) for aggregate settlements in class actions, there is little doubt that non-class aggregate settlements present particular concerns due to a lack of court oversight of the resolution of the matter, which Rule 1.8(f) is designed to address.

The comments to Rule 1.8(f) set forth what disclosures a lawyer must make to the clients before an aggregate settlement is made or accepted on their behalf: "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."[12] For the settlement to be binding, each client must provide informed consent in writing.

ABA Opinion 06-438 sets forth a list of minimal disclosures a lawyer should make to the clients to whom a settlement offer is made, the pertinent portions of which are as follows:

- The total amount of the aggregate settlement or the result of the aggregate agreement.
- The existence and nature of all of the claims and defenses involved in the aggregate settlement.
- The details of every other client's participation in the aggregate settlement, whether it be their settlement contribution, their settlement receipts, or any other contribution or receipt of something of value as a result of the aggregate resolution.
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- The method by which the costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

The ABA opinion's list of minimum disclosures is consistent with Comment 12 to Rule 1.8. The specific information the lawyer should disclose to the clients, however, will ultimately depend upon the nature of the case and the information the clients will need to make intelligent and informed decisions on whether to approve the proposed resolution. As the *Kennedy* court suggested, in aggregate settlements conflicts between the lawyer and the clients, or between or among the clients, may occur. A lawyer may have an incentive to maximize the amount of money he or she may obtain through settlement. Or the lawyer may wish to streamline the settlement process so that the matter may be resolved more easily and with less administrative burden. This incentive may lead the lawyer to fail to disclose adequately to the clients the full terms of the settlement or to construct arrangements with the clients that run afoul of the rules.

In the *Kennedy* case, for example, Respondent retained 67% of the settlement funds for himself, and distributed the rest to his clients, without informing them of the terms of the settlement or the percentage he had taken. The court determined that the lawyer had violated Rule 1.8(f), among other rules. *Kennedy*, 281 A.3d at 42-43. *See also Florida Bar v. Kane*, 202 So.3d 11 (Fla. 2016) (upholding disbarment of three lawyers who entered into an aggregate settlement in which the lawyers had complete discretion over the disbursement of funds to their clients); *In re Gatti*, 333 P.3d 994, 1004 (Or. 2014) (lawyer violated rule on aggregate settlement by not obtaining clients' informed consent, in writing, to the formula he used to divide the defendants' lump-sum settlement offers).

An arrangement that some lawyers have employed in the past is obtaining the clients' advance consent to accept the majority's decision on whether to accept the terms of the aggregate settlement. Such an approach, however, is impermissible. The lawyer has a duty to all the clients. To the extent that one or more clients disagree with the terms of the aggregate settlement, the settlement cannot proceed. Under Rule 1.2(a), 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." *See also* D.C. Bar Legal Ethics Opinion 289 ("[Rule 1.2(a)] is designed to preserve the client's right to accept or reject a settlement offer, and it requires that a client be able to exercise his or her judgment at the time the offer is communicated . . . [A] client's right to accept or reject a settlement offer is absolute. . ").

Accordingly, it is ultimately each client's decision, not a decision for a majority of clients in a multiple representation, whether to accept or reject a settlement. Indeed, many courts have determined that "majority rule" arrangements violate Rule 1.8(f) or its equivalent. *See, e.g.*, *The Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A/2d 512. 522 (N.J. 2006); *Knisley v. City of Jacksonville,*

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> 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 . . . The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information relevant to the common representation will be shared, and explain the circumstances in which the lawyer may have to withdraw from any or all representations if one client later objects to continued common representation or sharing of such information.

Moreover, there may be situations in which the lawyer *must* disclose information received from one joint to other joint clients, even if the disclosing client asks that the information be kept in confidence. *See* D.C. LEO 327 (2005).

[10] Rule 1.8 cmt. 12.

[11] *In re Kennedy,* 281 A.3d 36, 42-43 (D.C. 2022).

[12] *See* Rule 1.8 cmt. 12.

147 Ill. App. 3d 116, 121 (1986) ("[T]he arrangement presented allowing the majority to govern the rights of the minority is violative of the basic tenets of the attorney-client relationship in that it delegates to the attorney powers which allow him to act not only contrary to the wishes of his client, but to act in a manner disloyal to his client and to his client's interests."); *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892, 894-95 (10th Cir. 1975).

Similarly, the Rules do not permit the construction of a committee or smaller group of jointly represented clients to decide for the entire group whether to accept an aggregate settlement, or other like arrangements. *See, e.g.*, *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046, 1050-51 (D. Colo. 1999). While an appointed committee may try to accept only an aggregate settlement that it deems fair to all litigants, each individual client is entitled to determine whether to accept or reject a settlement after being fully informed of its terms.

Issues about a lawyer's ability to continue to represent multiple clients typically arise when one or more clients approve, and others reject, a settlement proposal. The lawyer may or may not be able to continue to represent any of the clients. A lawyer confronted with such a scenario should carefully review Rules 1.6, 1.7, 1.8, 1.9, and 1.16 for guidance. In particular, the lawyer will need to determine, among other things, whether continuing representation of one or more clients will be adversely affected by representation of, or continuing duties to, the other clients. Further, depending on the particular facts, the lawyer may or may not need to obtain the informed consent from all clients to continue to represent all clients or a subset of clients in the matter.

### C. Other Issues

Non-class settlements that may involve hundreds or thousands of plaintiffs present special challenges. It may be difficult to obtain the approval of every plaintiff to such an aggregate settlement. The clients may be concerned about their privacy, not wanting every other jointly represented client to learn about the details of their respective case and the amount of funds they will receive. Individual clients may also be concerned about the settlement becoming public. Or they may simply have different views on the terms of a settlement.

The language of Rule 1.8(f) is helpful in resolving these issues. An attorney must disclose to each individual client "the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." The rule does not require that the client's name and the personal details of each client's claim be disclosed. Accordingly, with the clients' written consent, where privacy concerns are at issue, a lawyer may be able to reveal the nature of each individual's claim without disclosing the specific identity of each individual client.[13]

*Conclusion*

The representation of multiple clients creates unique issues concerning conflicts, confidentiality, and duties of loyalty, among others, of which lawyers need to be mindful. Representing multiple clients in settlement discussions touches upon all these issues and more. It is critical that lawyers fully inform their clients at the outset of the representation of the potential conflicts that can occur in the context of settlement discussions, and that they provide complete information to their clients about the nature of any settlement proposal, including the amounts they and other clients will receive and full details of the settlement, so that the clients can provide informed consent in writing, or interpose any objections they may have, to the terms of the settlement.

## Published: November 2023

*Ethics Opinion 387*

### Serving as Local Counsel for a Matter Being Litigated in a District of Columbia Court

The D.C. Bar Legal Ethics Helpline regularly receives calls from D.C. lawyers seeking clarification regarding their ethical obligations when they serve as local counsel for lawyers not admitted to practice in the District of Columbia. This Opinion addresses the ethical obligations of D.C. lawyers who are serving as local counsel in matters litigated in District of Columbia courts. It draws on an article by D.C. Bar legal ethics counsel that appeared in the July/August 2022 edition of *Washington Lawyer*.[1]

**Applicable Rules**

- 1.0 (Terminology)
- 1.1 (Competence)
- 1.2 (Scope of Representation)
- 1.3 (Diligence and Zeal)
- 1.4 (Communication)
- 1.5 (Fees)
- 1.6 (Confidentiality of Information)
- 1.7 (Conflict of Interest: General)
- 1.9 (Conflict of Interest: Former Client)
- 1.10 (Imputed Disqualification: General Rule)
- 3.1 (Meritorious Claims and Contentions)
- 3.3 (Candor to Tribunal)
- 4.1 (Truthfulness in Statements to Others)
- 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- 8.3 (Reporting Professional Misconduct)

*Discussion*

Although not defined in the D.C. Rules of Professional Conduct,[2] the term "local counsel" is commonly used in the District of Columbia to describe a D.C. lawyer who has been engaged by a client that wants to litigate a case before a D.C. tribunal using the client's out-of-state attorney as primary counsel.[3] Local counsel commonly helps the out-of-state attorney, or "lead counsel," to obtain pro hac vice admission to the local courts per D.C. Court of Appeals (DCCA) Rule 49(c)(7).[4] Local counsel does not represent lead counsel; rather, both local counsel and lead counsel represent the mutual client. Local counsel is not typically affiliated with the out-of-state attorney, but a D.C. attorney can serve as local counsel to other lawyers from the D.C.

[13] James Podgers, On Second Thought, 98-JAN A.B.A. J. 21 (2012).

[1] Erika Stillabower, *A Roadmap for Local Counsel*, WASHINGTON LAWYER, July/August 2022, at 54.

[2] The term "local counsel" also does not appear in the American Bar Association Model Rules of Professional Conduct or the Restatement of the Law Governing Lawyers.

[3] Local counsel are also engaged for non-litigation matters. For example, out-of-state real estate attorneys engage local counsel with specialized knowledge about land records systems to avoid title defects. They may also use local counsel to understand local transfer taxes and zoning matters. Although local counsel in non-litigation matters also have ethical obligations to the client, these types of local counsel scenarios are beyond the scope of this opinion.

[4] Federal courts have their own requirements and procedures for appearances by out-of-state attorneys. *See, e.g.*, D.D.C. LCvR 83.2(c), governing admission pro hac vice in the U.S. District Court for the District of Columbia.

attorney's firm who are seeking pro hac vice admission to D.C. courts.

DCCA Rule 49(c)(7) provides limited guidance regarding the duties of D.C. local counsel. The rule, which was amended in June 2022,[5] requires a pro hac vice applicant to "arrange[] to be supervised . . . by a D.C. Bar Member"[6] and defines "supervise" as "mak[ing] reasonable efforts to ensure that another person conforms to the applicable Rules of Professional Conduct."[7]

In its order adopting the Rule 49(c)(7) amendments, which were proposed by the D.C. Committee on Unauthorized Practice of Law (CUPL), the D.C. Court of Appeals explained:

> The requirements for "supervision" of a pro hac vice attorney by local counsel have been revised. D.C. App. R. 49(c)(7)(A)(ii). The current Rule refers to supervision by cross-referencing Super. Ct. Civ. R. 101. That Rule, however, was amended in 2020 to remove the supervision provisions. The prior version of R. 101 required local counsel to "at all times be prepared to go forward with the case, . . . sign all documents subsequently filed[,] and . . . attend all subsequent proceedings in the action unless this latter requirement is waived by the judge presiding at the proceedings in question." Super. Ct. Civ. R. 101(a)(3) (2019). The CUPL's original proposal was to move the requirements of R. 101(a)(3) in this court's rule. The CUPL has subsequently recommended that, instead of simply carrying forward the requirements of a Superior Court rule that is no longer in effect, the court should replace those requirements with the requirement that the local attorney agree to "supervise" the pro hac vice attorney, with "supervise" defined to mean "to make reasonable efforts to ensure that another person conforms to the applicable Rules of Professional Conduct." D.C. App. R. 49(b)(9). The court adopts the latter approach.[8]

Despite the paucity of guidance regarding the specific duties of local counsel beyond "mak[ing] reasonable efforts to ensure [lead counsel] conforms to the applicable Rules of Professional Conduct," a local counsel's obligations under the D.C. Rules of Professional Conduct remain inviolable notwithstanding her designation as "local" counsel.[9]

This opinion highlights some of a local counsel's duties to the client and to the court in the District of Columbia.

## A. SCOPE OF REPRESENTATION

Local counsel's role in a representation can range from narrowly limited to substantive and comparable to that of co-counsel or even lead counsel. In some cases, the out-of-state attorney may assist only behind-the-scenes without seeking pro hac vice admission, so long as her involvement does not amount to unauthorized practice of law under Rule 49(a).

Where the local counsel's role will be narrow, it is good practice for local counsel to explicitly limit the scope of his representation in writing. Rule 1.2(c) states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[10] While we do not here opine on whether local counsel arrangements are always subject to Rule 1.2(c), it is advisable for lawyers who anticipate a limited "local counsel" role to communicate that understanding to the client and to obtain informed consent.

Memorializing the local counsel's limited role in writing to the client is a preferable practice.[11] An engagement letter stating that the lawyer will be serving as "local counsel" to assist lead counsel and documenting that the client agreed to a narrow role for local counsel can protect local counsel from malpractice claims stemming from missteps made by lead counsel that are outside the scope of the local counsel's responsibility. Indeed, it is good practice for such an agreement to delineate the tasks (or the kinds of tasks) for which local counsel will be responsible, as well as those for which local counsel will not be responsible.

If local counsel is working with lead counsel pursuant to a court order appointing counsel, the court's order controls the scope of representation. In complex litigation, courts will often define the responsibilities of lead counsel and limit the participation of attorneys not appointed to leadership roles. A prudent practice would be to include any such limits, or incorporate them by reference, into the engagement letter.

## B. DUTY TO COMMUNICATE

Regardless of the scope of local counsel's participation in the representation, her ethical obligations to the client may not be delegated or contractually diminished.[12] For example, local counsel remains bound by Rule 1.4, which sets forth her duties of communication with the client:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> (c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

5 On June 22, 2022, the District of Columbia Court of Appeals adopted changes to certain provisions of DCCA Rule 49, including the provisions pertaining to pro hac vice admission, which became effective in August 2022.

6 DCCA Rule 49(c)(7)(A)(ii).

7 DCCA Rule 49(b)(9).

8 DCCA Order No. M-227-21, at 2 (June 22, 2022).

9 *See In re Bailey,* 283 A.3d 1199, 1203 & 1206 n.1 (D.C. 2022) (noting that lawyer's ethical obligations not altered by "local co counsel" designation). *See also In re Fay,* 111 A.3d 1025, 1030 (D.C. 2015) ("By asserting his bar membership to aid [lead counsel] in presenting [the client's] claim, respondent, like local counsel, assumed the ethical responsibilities and duties of the [lead counsel]."). Accord State Bar of N.M. Ethics Advisory Comm., Formal Op. 2020 01, at 1 (2020) ("A lawyer who enters an appearance in a matter as local counsel in association with another lawyer who is admitted pro hac vice has the same duties under the Rules as in every matter in which the attorney appears."); Utah State Bar, Ethics Op. 17 09, at 2-3 (2017) ("There is nothing in the Utah Rules of Professional Conduct . . . that limits the duties of an attorney admitted to the Utah State Bar who happens to be acting as local counsel for a pro hac vice attorney."); Ass'n of the Bar of the City of N.Y., Formal Op. 2015 4, at 1 (2015) ("Merely being designated as 'local counsel' does not necessarily limit the attorney's role, nor does it narrow her ethical obligations to the client").

10 General guidance on limited scope representations may be found in D.C. Legal Ethics Opinion 330 (2005).

11 *See* Rule 1.2 cmt. [6] ("In all matters involving limited scope representation, it is generally prudent for a lawyer to state in writing any limitation on representation, provide the client with a written summary of considerations discussed, and to receive a written informed consent from the client to the lawyer's limited representation"); see also Ass'n of the Bar of the City of N.Y., Formal Op. 2015 4, at 3 (2015) ("Even where a writing is not required, the better practice is to obtain the client's consent in writing.").

12 *See* Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2019-1, at 1 (2019) (noting that although "the scope of [local] counsel's professional services can be limited with client consent, . . . fiduciary duties such as loyalty and communication are not narrowed.").

Ideally, local counsel might regularly update the client jointly with lead counsel. That said, it may be reasonable under Rule 1.4 for lead counsel to assume responsibility for client communications.[13] Local and lead counsel should resolve at the outset of the representation their expectations about which lawyer should be in direct contact with the client and under what circumstances local counsel should contact the client directly. Although local counsel can generally rely on lead counsel's representations that lead counsel will communicate relevant information to the client, should local counsel learn that lead counsel's communication did not occur or is otherwise insufficient to satisfy the rule, local counsel must take steps to ensure the client is fully apprised consistent with Rule 1.4.[14] If the reason behind lead counsel's failure to communicate with the client—or comply with any other D.C. Rule of Professional Conduct or regulation—stems from unawareness of the relevant D.C. rules or practices, local counsel should recognize that she is likely regarded as the expert on D.C. rules and practices, and should act accordingly. Further, should local counsel become aware of any malfeasance or misfeasance by lead counsel that is seriously prejudicial to the client's interests (e.g., willful disregard of court orders), local counsel has a duty to inform the client.[15]

In addition to communicating with the client, local counsel should also keep open channels of communication with lead counsel as they have a duty to work together and communicate with one another with the common goal of representing a client's interests competently and diligently.[16]

## C. WRITTEN NOTICE OF FEES

Rule 1.5(b) requires a lawyer who has not regularly represented a client to provide written notice to the client before or a reasonable time after the representation commences of "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible."[17]

Although local counsel may enter into a fee arrangement with the client that is separate from lead counsel's, it is not uncommon for lead counsel to assume primary responsibility for billing the client.[18] In such instances Rule 1.5(e), which pertains to fees shared between lawyers who are not in the same firm, requires that:

> (1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
>
> (2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged;
>
> (3) The client gives informed consent to the arrangement; and
>
> (4) The total fee is reasonable.

As Comment [14] to Rule 1.5 notes, "[t]he Rule does not require disclosure to the client of the share that each lawyer is to receive but it does require the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm of the fee charged." Further, it is not enough for local counsel to speak with the client about the local counsel arrangement or division of responsibilities; local counsel must ensure that the client receives written notice of the arrangement as "written disclosure is the crux of the rule."[19] Although the purpose of Rule 1.5(e) is to minimize controversy and protect clients from billing practices that serve only to drive up costs, the exercise of clearly delineating responsibility for the matter is particularly helpful in the context of lead counsel-local counsel relationships, as expectations of each may vary significantly with each new engagement.

## D. CONFLICTS OF INTEREST

Lawyers approached to serve as local counsel must remember that the conflict of interest rules— D.C. Rules 1.7, 1.8, and 1.9— apply to them regardless of the division of responsibilities between local and lead counsel.[20]

Principles of imputed disqualification do not typically apply to a local counsel-lead counsel arrangement when local counsel is not associated with lead counsel or her law firm. Under Rule 1.10, a lawyer's conflicts are imputed to all lawyers within a firm when the lawyer is deemed "associated with" the firm. Although DCCA Rule 49(c)(7)(A)(ii) previously required lead counsel to make arrangements to be "associated with" local counsel, the 2022 amendments changed the term "associated with" to "supervised by."[21] Indeed, local counsel is more akin to a temporary contract attorney working on a single project who is physically segregated from the firm's office space and who has no access to the confidential information of the firm's other clients. In such an arrangement, the temporary contract lawyer would not be considered "associated with" the hiring firm and the temporary contract attorney's conflicts

[13] Indeed, the client may prefer or expect lead counsel to act as the intermediary between local counsel and the client. *See* Ass'n of the Bar of the City of N.Y., Formal Op. 2015-4, at 4 (noting "the long-standing, customary practice of lead counsel acting as intermediary between local counsel and the client").

[14] *Id.* at 5 ("if local counsel knows or has reason to know that lead counsel is not adequately updating the client concerning the case, she must take steps to remedy the omission, even if it means bypassing lead counsel and communicating directly with the client.").

[15] *See e.g.* Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 2019-1. *See also* ABA Standing Comm. Ethics & Prof'l Responsibility, Formal Op. 481 (2018) (discussing a lawyer's duty to inform client of material error).

[16] *See* Rules 1.1 and 1.3.

[17] Rule 1.5(b). *See also* Rule 1.2 cmt. [6] ("Rule 1.5(b) requires a lawyer to communicate in writing the scope of the lawyer's representation when the lawyer has not regularly represented a client.").

[18] *See* Rule 1.5 cmt. [9] ("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.").

[19] *In re Confidential (J.E.S.),* 670 A.2d 1343, 1344-45 (D.C. 1996) (informal admonition warranted where respondent failed to meet the requirements of Rule 1.5(e)(2). While respondent's retainer agreement stated generally that co-counsel would be obtained to assist with the case, it did not identify the name of co-counsel, omitted entirely the division of responsibilities between respondent and co-counsel, and excluded language regarding the effect of lawyers outside the firm on the fee to be charged, resulting in the client never gaining "an understand[ing] of [what] each lawyer would do.").

[20] *See also* Rules 1.11, 1.12, and 1.18 related to former government employment, third-party neutrals, and prospective clients.

[21] Notwithstanding the former language of the rule, the Committee does not believe that the prior version of Rule 49 obligated lawyers to impute conflicts between the firms of local counsel and lead counsel.

would not be imputed to that firm.[22] Similarly, local counsel working out of her own D.C. office on a single matter with no access to confidential information concerning lead counsel's other clients would not be "associated with" lead counsel or lead counsel's law firm (or vice versa) for imputation purposes. As a practical matter, this means that each lawyer's conflicts review would be limited to her own law firm's current and prior representations with respect to the matter at hand.

## E. DUTIES TO THE COURT

Similar to local counsel's duties to the client, local counsel's ethical obligations to the court apply notwithstanding a "local counsel" designation. As an example, local counsel has a nondelegable duty to comply with Rule 3.1:

> A lawyer shall not bring 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.[23]

Thus, regardless of whether local counsel participates substantively in a matter, she is obligated to refrain from filing frivolous claims, pleadings, motions, or other documents.[24]

In addition, to the extent that local counsel learns a fraud has been perpetrated in a court, local counsel must take reasonable remedial measures. Comment [8] to Rule 3.3 states: "If the lawyer's client is implicated in the fraud, the lawyer should ordinarily first call upon the client to rectify the fraud. If the client is unwilling to do so, the lawyer should consider other remedial measures. The lawyer may not, however, disclose information otherwise protected by Rule 1.6, unless the client has used the lawyer's services to further a crime or fraud and disclosure is permitted by Rule 1.6(d)."[25]

## F. DUTIES UPON WITHDRAWAL

A local counsel who has entered an appearance in a matter is obligated to abide by the tribunal's rules with respect to withdrawing from the representation.[26] Should a lawyer serving as local counsel conclude that she has a duty or right to seek to withdraw under Rule 1.16(a) or (b), the client and lead counsel must be timely informed.

## G. REPORTING PROFESSIONAL MISCONDUCT

Pursuant to D.C. Rule 5.1(b) and DCCA Rule 49(c)(7)(A)(ii), local counsel has a duty to supervise lead counsel by making reasonable efforts to ensure that lead counsel conforms to the D.C. Rules of Professional Conduct. To the extent lead counsel's conduct does not conform to the rules, local counsel should consider her obligations to the court, her client, and the opposing party.

As explained in Comment [1] to Rule 8.3, "[s]elf-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct." Accordingly, the rule imposes on all lawyers a mandatory duty to report substantial misconduct. Rule 8.3(a) states:

> 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 appropriate professional authority.

Rule 8.3(a) "does not require disclosure of information otherwise protected by Rule 1.6 or other law."[27] Information protected by Rule 1.6 includes confidences preserved by the attorney-client privilege and secrets "gained in the professional relationship that the client has requested be held inviolate" or that would be embarrassing or otherwise detrimental to the client if disclosed.[28] Generally, local counsel would have to obtain the informed consent of the client before reporting misconduct by lead counsel that occurred during the representation.

*Conclusion*

The D.C. Rules of Professional Conduct make no distinction between "local counsel" and "lead counsel." A lawyer serving as local counsel for litigation in a D.C. court remains subject to the D.C. Rules of Professional Conduct and must make reasonable efforts to ensure that non-D.C. lead counsel conforms to all applicable ethics and court rules.

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*Ethics Opinion 388*

### Attorneys' Use of Generative Artificial Intelligence in Client Matters

Advances in technology have greatly improved the ways in which lawyers provide legal services. What technology has not done is alter lawyers' fundamental ethical obligations, and specifically, the duties lawyers owe to their clients—and to the courts. We anticipate that both of these statements will hold true with respect to lawyers' use of generative artificial intelligence (GAI). Due to the rapid development of technology in this area, we recognize that some of the concerns raised in this opinion may be resolved or mooted for particular products in the future, perhaps even in the near future.[1]

The Rules of Professional Conduct require lawyers to be competent. Competence includes understanding enough about any technology the lawyer uses in legal practice to be reasonably confident that the technology will advance the

[22] *See* D.C. Bar Legal Ethics Opinion 352 (2010); see also D.C. Bar Legal Ethics Opinion 255 (1995) ("[T]he association of a lawyer with a firm on an ad hoc, case-by-case basis does not create that kind of continuing relationship, triggering imputation . . . of the individual lawyer's disqualifications to the firm—except with respect to the individual matters on which the lawyer is associated with the firm—so long as the firm does not create the impression among its clients or the public at large that such a continuing relationship exists.").

23 Local counsel must also comply with rules imposed by state and federal courts. *See, e.g.,* D.C. Sup. Ct. R. Civ. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper, including electronic filing—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that [she has met the requirements of the rule] to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances"); Fed. R. Civ. P. 11(b) (same).

[24] *See* Ass'n of the Bar of the City of N.Y., Formal Op. 2015-4, at 4 ("In our view, local counsel cannot reasonably limit the representation to exclude her ethical duty to avoid filing frivolous claims."). Note, however, that when a lawyer represents a defendant in a criminal proceeding, or a respondent in a proceeding that could result in involuntary institutionalization, Rule 3.1 requires that, "if the client elects to go to trial or to a contested fact-finding hearing, [a lawyer shall] nevertheless so defend the proceeding as to require that the government carry its burden of proof."

[25] *See also* Rule 4.1(b) (prohibiting knowing failure to disclose material facts to third persons when necessary to avoid assisting a criminal or fraudulent act by the client except when disclosure is prohibited by Rule 1.6).

[26] Rule 1.16(c).

[27] Rule 8.3(c).

[28] Rule 1.6(b).

[1] This opinion is based on information available to the Committee as of the second quarter of 2024.

client's interests in the representation. Separately, the lawyer should also be reasonably confident that use of and reliance on the technology will not be inconsistent with any of the lawyer's other obligations under the Rules of Professional Conduct.

Lawyers commonly adopt and use recently developed technology in their practices to achieve competitive advantage and gain efficiencies in providing legal services to their clients. Although technological innovation offers definite advantages, it comes with risks and the potential for adverse consequences. All of this holds true with respect to GAI. It can be a great boon to the practicing lawyer but—as recent events have shown—can sometimes be an untrustworthy and incompetent legal assistant.

Lawyers should understand that GAI products are not search engines that accurately report hits on existing data in a constantly updated database. The information available to a GAI product is confined to the dataset on which the GAI has been trained. That dataset may be incomplete as to the relevant topic, out of date, or biased in some way. More fundamentally, GAI is not programed to accurately report the content of existing information in its dataset. Instead, GAI is attempting to create ***new*** content. In the case of a request for something in writing, GAI uses a statistical process to predict what the next word in the sentence should be. That is what the "generative" in GAI means: the GAI generates something new that has the properties its dataset tells it the user is expecting to see.

GAI products sometimes "hallucinate," meaning they make up things that do not exist. As discussed below and as has been widely reported, a GAI product fabricated the names and citations of several "cases" that did not exist in response to a request for citations to support a particular legal position in a brief. Believing the GAI to be a "super search engine," a lawyer included the fake cites in the brief without checking them. That matter ended very badly for the lawyers who signed the brief. Current GAI for a general audience is not a reliable substitute for traditional fact- and cite-checking, and lawyers who blindly rely on outputs produced by GAI do so at considerable peril.[2]

Lawyers also should understand that many GAI products currently on the market are specifically designed to collect and use information received from users—which may include client confidences and secrets—for the GAI's own training and for transmission to future users of the technology. That raises potential issues under D.C. Rule 1.6, which requires lawyers not to reveal client confidences or secrets to third parties without the client's informed consent.

Regarding confidential client information, lawyers should determine whether the product will save information that the lawyers provide to the GAI, and whether the lawyers' interaction with the GAI product will affect the answers the GAI gives to future users of the product outside of the lawyer's law firm. Affirmative answers to either of those questions signal a need for caution. Depending on the circumstances, lawyers should either identify a different or more advanced GAI product that can be trusted with Client Confidential Information[3] (or negotiate with the product vendor for improved confidentiality terms to make the first product trustworthy), or input only data that is not Client Confidential Information.

For proceedings before a court or other tribunal—especially but not only those that have adopted rules or issued orders regulating the use of GAI—lawyers must be attentive to their duty of candor to the tribunal and their fairness obligations to opposing parties and counsel. Lawyers should also be attentive to their obligations as to the client file with respect to their use of the GAI. Additionally, lawyers whose fee agreements provide for fees based solely on time spent may only bill for the time the lawyers actually spend, even if the GAI reduces the time the lawyers devote to the matter. Absent a prior agreement, a lawyer cannot charge separately for the perceived value to a client of the work done by the GAI, though they may pass through any out-of-pocket expenses for GAI applications where the client has agreed to pay for out-of-pocket expenses. Finally, these issues implicate lawyers' duties of supervision. Under Rules 5.1 and 5.3, a lawyer should take reasonable measures to ensure that any supervised lawyer's or nonlawyer's use of GAI conforms to the Rules of Professional Conduct and the principles discussed in this opinion.

**Applicable Rules**

- 1.1 (Competence)
- 1.2 (Scope of Representation)
- 1.5 (Fees)
- 1.6 (Confidentiality of Information)
- 1.16 (Client File)
- 3.3 (Candor to Tribunal)
- 3.4 (Fairness to Opposing Party and Counsel
- 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
- 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- 8.4 (Misconduct)

*Discussion*

Most lawyers are not computer programmers or engineers and are not expected to have those specialized skills. As technology that can be used in legal practice evolves, however, lawyers who rely on the technology should have a reasonable and current understanding of how to use the technology with due regard for its potential dangers and limitations. So it is with generative AI technology. The widely reported events culminating with *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. 2023), provide an object lesson.

The *Mata* debacle began with a lawyer's fundamental misunderstanding of a technology that was new to him. The principal plaintiff's lawyer in that case regularly practiced in state courts in New York. The legal research database that he normally used was complete as to state court caselaw but had only limited access to federal caselaw, which became a problem when a case he had filed in state court was removed to federal court. He needed a new legal research tool.

As the lawyer testified at the sanctions hearing, "I had heard about this new site which I assumed – I falsely assumed was like a super search engine called ChatGPT, and that's what I used." 678 F. Supp. 3d at 456. With that incorrect understanding, he used ChatGPT to look for cases upon which he could rely in opposing a motion to dismiss his client's complaint.

Unbeknownst to the lawyer, the Chat-

[2] Although not the subject of this opinion, lawyers should also be aware that GAI has the potential to facilitate outright fraud by bad actors. For example, if prompted to do so, GAI can produce genuine loking videos or photographs of things that never happened, and "recordings" making it sound like a person said something that they never said.

[3] As discussed below, Rule 1.6 requires lawyers to maintain the confidentiality of certain information acquired during the professional relationship. This obligation extends to both "confidences" (defined by the rule as "information protected by the attorney-client privilege under applicable law") and "secrets" (defined as other information gained in the relationship "that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."). This opinion will refer to information protected by Rule 1.6 as "Client Confidential Information." Unless otherwise indicated, any citations to a "Rule" in this opinion will be to the D.C. Rules of Professional Conduct.

GPT tool that he consulted was not a legal research tool built to search a comprehensive library (a database) of previously published judicial opinions. The "free" version of ChatGPT that he chose had no such library. Indeed, ChatGPT explicitly disclaimed having a database in responding to an inquiry sent in October 2023 (after the events just described):

> I don't have a "database" in the traditional sense. I generate responses based on the text data I was trained on up until my last knowledge update in September 2021. My responses are generated by predicting what comes next in a given text prompt, drawing upon the patterns and information present in the text data I was trained on. I don't have access to the internet or real-time databases, and my knowledge is static, meaning I can't provide information on events or developments that have occurred after my last update.

The technical term for what ChatGPT and many other GAI programs use is a "data*set*" rather than a data*base*.[4] A dataset may be thought of as a limited pool of materials that illustrate a premise on which GAI learns the vocabulary necessary to generate a reasonable-sounding answer to a user's questions – without any regard for the truth of the answer. For GAI to generate case citations, for example, the dataset merely needs to include information indicating the proper format in which case citations normally appear, *e.g.*, *Party A v. Party B*, 100 F.3d 100 (D.C. Cir. 2020). For the GAI to produce citations for divorce cases, it might rely on information in the dataset establishing that the parties in divorce cases tend to have the same last name, and that such cases are published in a state reporting service rather than a federal reporter. Similarly, to generate criminal case citations, the GAI might rely on information that a government entity normally appears on the plaintiff side of the caption.

Had the lawyer in *Mata* understood that only a limited dataset was available to ChatGPT, he presumably would not have felt comfortable using the platform to research federal case law. As ChatGPT's disclaimer statement establishes, its initial training might or might not have included subject matter relevant to the *Mata* attorney's research; even if it had, that information would no longer have been current.

A more fundamental problem is that large language GAI tools like ChatGPT simply are not built to supply accurate answers even based on the limited datasets available to them, at least not yet. Instead, they respond to text prompts by creating "new" content that is statistically similar to what they have seen before:

> Generative AI refers to deep-learning models that can take raw data — say, all of Wikipedia or the collected works of Rembrandt — and "learn" to generate statistically probable outputs when prompted. At a high level, generative models encode a simplified representation of their training data and draw from it to create a new work that's similar, but not identical, to the original data.

Kim Martineau, *What is Generative AI?* | IBM Research Blog,[5] https://research.ibm.com/blog/what-is-generative-AI (Apr. 20, 2023). For example, a graphical GAI program might be prompted to generate a portrait of a horse that appears to have been painted by Rembrandt. But that output is new, different from what came before, and certainly not a genuine Rembrandt painting.

"Statistically probable outputs" are not what a lawyer searching for existing controlling authorities needs or wants. Generative AI offered to a broad audience is simply no substitute for the familiar legal research tools provided by trusted services like LexisNexis and Westlaw, which have databases of previously published laws, regulations, and cases that are constantly updated as laws change and new cases are decided.[6]

In the *Mata* case, ChatGPT appeared to provide the lawyer with exactly what he requested: six case citations for the propositions the lawyer needed to defeat a motion to dismiss. Unfortunately for the lawyer, however, those cases—reported by ChatGPT with case numbers, court names, citations, and authorship by real judges—did not exist.

Why did ChatGPT make up cases from whole cloth? As the IBM Research Blog explains:

> Many generative models, including those powering ChatGPT, can spout information that sounds authoritative but isn't true (sometimes called "hallucinations") or is objectionable and biased. Generative models can also inadvertently ingest information that's personal or copyrighted in their training data and output it later, creating unique challenges for privacy and intellectual property laws.

*Id.* Put differently, "The best way to think about this is you are chatting with an omniscient, eager-to-please intern who sometimes lies to you." Emma Bowman, *A New AI Chatbot Might Do Your Homework for You. But It's Still Not an A+ Student*, National Public Radio (Dec. 19, 2022) (quoting Ethan Mollick, a professor at the University of Pennsylvania's Wharton School of Business). Similarly:

> "There are still many cases where you ask it a question and it'll give you a very impressive-sounding answer that's just dead wrong," said Oren Etzioni, the founding CEO of the Allen Institute for AI, who ran the research nonprofit until recently. "And, of course, that's a problem if you don't carefully verify or corroborate its facts."

*Id*. For a visual demonstration of GAI hallucinations in action, *see* Gerrit De Vynck, Jhaan Elker and Tyler Remmel, *The Future of AI Video Is Here, Super Weird Flaws and All*, Washington Post (Feb. 28, 2024).

Again, had the *Mata* lawyer known of the risk of hallucinations at the outset, he presumably would have acted differently by, at a minimum, performing a traditional cite check on the cases ChatGPT claimed to have found.[7] He would not have done what he did next.

[4] Such GAI tools are initially trained on a finite dataset that, unlike a traditional database, may not be updated regularly. See generally https://atlan.com/dataset-vs-database/#:~:text=A%20dataset%20is%20like%20a,for%20ongoing%20data%20management%20tasks and https://databasetown.com/dataset-vs-database-key-differences/. The initial training might not include the subject matter relevant to whatever the lawyer wants to ask about and, even if it did initially, that information might not have been kept current.

[5] This link and the other links in this opinion were last visited in April of 2024. Over time, the content of information at links may change or the links themselves may stop working. The links in this opinion will not be checked or updated after publication of this opinion.

[6] We understand that both Westlaw and Lexis are now offering GAI-assisted cite checking products. See Westlaw Quick Check and Lexis + AI. While we are unable to vouch for either product, we understand that they seek to make their legal research databases as complete and up to date as technology allows.

[7] A check of ChatGPT's policies many months after the widely-reported Mata debacle yielded this disclaimer:

> A note about accuracy: Services like ChatGPT generate responses by reading a user's request and, in response, predicting the words most likely to appear next. In some cases, the words most likely to appear next may not be the most factually accurate. For this reason, you should not rely on the factual accuracy of output from our models.

https://openai.com/policies/privacy-policy (last visited April 2024 and reflecting a Privacy Policy

Upon receiving the brief with the fake citations, opposing counsel and the court raised questions about cited cases that they could not find. Still unaware of the "hallucinations" issue, the attorney doubled down with ChatGPT and asked the GAI whether the cases were real. ChatGPT "responded that it had supplied 'real' authorities that could be found through Westlaw, LexisNexis and the Federal Reporter." 678 F. Supp. 3d at 458. Again, that was not true. The cases were fabrications manufactured by the GAI's innate "desire" to give the lawyer what he was looking for.

At the conclusion of the sanctions hearing, the involved lawyers (the one who used ChatGPT and wrote the brief, and his local counsel supporting him in the federal court to which he was only admitted pro hac vice) were required to (1) pay a $5,000 fine; (2) notify their client in writing of the court's decision and of the background leading up to the sanction; and (3) "mail a letter individually addressed to each judge falsely identified as the author of the fake '*Varghese,*' '*Shaboon,*' '*Petersen,*' '*Martinez,*' '*Durden,*' and '*Miller*' opinions," providing a copy of the sanctions opinion, the transcript of the hearing, and the fake opinion wrongly attributed to each judge. *Id*. at 466.

In the wake of the wide publicity surrounding the *Mata* case, a number of judges around the country issued orders addressing potential use of GAI by attorneys practicing before them. Judge Brantley Starr of the U.S. District Court for the Northern District of Texas was one of the first:

> All attorneys appearing before the Court must file on the docket a certificate attesting either that no portion of the filing was drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence was checked for accuracy, using print reporters or traditional legal databases, by a human being. These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from an attorney who fails to file a certificate on the docket attesting that the attorney has read the Court's judge-specific requirements and understands that he or she will be held responsible under Rule 11 [of the Federal Rules of Civil Procedure] for the contents of any filing that he or she signs and submits to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

Chief Justice John Roberts specifically referenced GAI issues in his 2023 Year-End Report on the Federal Judiciary. As he described it, "AI combines algorithms and enormous data sets to solve problems." *Id*. at 5. While "AI apparently can earn Bs on law school assignments and even pass the bar exam… any use of AI requires caution and humility." *Id*.

> One of AI's prominent applications made headlines this year for a shortcoming known as "hallucination," which caused the lawyers using the application to submit briefs with citations to non-existent cases. (Always a bad idea.) Some legal scholars have raised concerns about whether entering confidential information into an AI tool might compromise later attempts to invoke legal privileges.

*Id*. at 5-6.

Closing out an eventful year for GAI, disbarred former lawyer Michael Cohen admitted to (unknowingly) supplying his lawyer in his criminal case with fake citations generated by GAI. Ella Lee, *Michael Cohen Gave Lawyer Fraudulent Case Citations Generated by AI*, The Hill (Dec. 29, 2023). This time the GAI in question was Google Bard, which Cohen believed to be "a supercharged search engine." *Id*. Cohen wrote that he had "not kept up with 'emerging trends (and related risks)' in legal technology and was not aware" that generative text services "could create citations and descriptions that 'looked real but actually were not.'" *Id*. Falling back on his current non-lawyer status, Cohen wrote that he trusted his lawyer to vet his suggestions before "drop[ping] the cases into his submission wholesale without even confirming that they existed," which is what his counsel did. *Id*.

Unmentioned thus far is what ChatGPT likely did with the fake cases it created in response to the *Mata* lawyer's inquiry. As mentioned above, ChatGPT was initially trained on a limited dataset. As time goes on, however, many GAI programs supplement their datasets based on interactions with users. To ChatGPT, the interaction with the *Mata* lawyer was successful and the fake case names may have been added to the dataset to be reported to future users with similar questions. Until the hallucination issue is resolved, systems prone to this problem are therefore self-corrupting, which is yet another reason their outputs need to be checked carefully.

In early 2024, researchers at Stanford University announced the preliminary results of a study finding that "[l]arge language models hallucinate at least 75% of the time when answering questions about a court's core ruling." Isabel Gottlieb & Isaiah Poritz, *Legal Errors by Top AI Models "Alarmingly Prevalent," Study Says*, Bloomberg Law (Jan. 12, 2024). Their testing involved "more than 200,000 legal questions on OpenAI's Chat GPT 3.5, Google's PaLM 2, and Meta's Llama 2—all general-purpose models not built for specific legal use." *Id*. One of the researchers said:

> We should not take these very general purpose foundation models and naively deploy them and put them into all sorts of deployment settings, as a number of lawyers seem to have done…. Proceed with much more caution—where you really need lawyers, and people with some legal knowledge, to be able to assess the veracity of what an engine like this is giving to you.

*Id.*

updated on Nov. 14, 2023 and effective on Jan. 31, 2024). The version of the policy in effect when *Mata* attorney relied on ChatGPT did not have this disclaimer. The motion to dismiss in *Mata* was filed on January 13, 2023, and the brief opposing it was filed on March 1, 2023. 2023 WL 4114965, at *2. The WayBack Machine has links to the relevant ChatGPT policy as far back as February 27, 2023. The policy then in force (and dated Sept. 19, 2022) did not have the "note about accuracy" disclaimer. https://web.archive.org/web/20230227230602/https://openai.com/policies/privacy-policy (last visited April 2024). The essence of that disclaimer appears to have been added as of April 27, 2023. https://web.archive.org/web/20230601012741/https://openai.com/policies/privacy-policy (last visited April 2024).

More recently, a Washington Post reporter evaluated two GAI products for use in connection with some of her job functions. Danielle Abril, *I Used AI Work Tools to Do My Job. Here's How it Went* - The Washington Post (Feb. 26, 2024). She found that "[t]he AI seemed to do better when it was fed documents or data. But it still sometimes made things up, returned error messages or didn't understand context." *Id.* The article ended as follows:

> [A]ll results and content need careful inspection for accuracy, some tweaking or deep edits — and both tech companies advise users to verify everything generated by the AI."I don't want people to abdicate responsibility," said Kristina Behr, vice president of product management for collaboration apps at Google Workspace. "This helps you do your job. It doesn't do your job."
>
> And as is the case with AI, the more details and direction in the prompt, the better the output. So as you do each task, you may want to consider whether AI will save you time or actually create more work.
>
> "The work it takes to generate outcomes like text and videos has decreased," Rahman [a professor at Northwestern University's Kellogg School of Management] said. "But the work to verify has significantly increased."

*Id.*

Also quite recently, a law firm invoked ChatGPT in a court filing for new and different purpose. *J.G. v. New York City Dept. of Education*, 2024 WL 728626 (S.D.N.Y. Feb. 22, 2024). Given the now well documented issues with ChatGPT, the court was not receptive. The case involved a motion for attorneys' fees from the losing party by counsel for a prevailing plaintiff in a situation in which the law permits such fee shifting. Movants must establish the "reasonableness" of their fee request. After making what the court deemed to be "aggressive" arguments under case law with respect to the reasonableness issue, the plaintiff's attorneys submitted a report from ChatGPT "as a 'cross-check' supporting" what the court deemed to be "problematic sources." *Id.* at *7. The court found the law firm's "invocation of ChatGPT as support for its aggressive fee bid" to be "utterly and unusually unpersuasive." *Id*. "As the firm should have appreciated, treating ChatGPT's conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump." *Id.* The court discussed *Mata* and another case where lawyers submitted fake citations manufactured by ChatGPT. And then the court focused on the absence of any basis for believing that ChatGPT could be a reliable source of information in this context:

> In claiming here that ChatGPT supports the fee award it urges, the [law firm] does not identify the inputs on which ChatGPT relied. It does not reveal whether any of these were similarly imaginary. It does not reveal whether ChatGPT anywhere considered a very real and relevant data point: the uniform bloc of precedent, canvassed below, in which courts in this District and Circuit have rejected as excessive the billing rates the [law firm] urges for its timekeepers. The Court therefore rejects out of hand ChatGPT's conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool, the [law firm] is well advised to excise references to ChatGPT from future fee applications.

*Id.* at *7.[8]

Against that background, we address specific Rules of Professional Conduct implicated by attorneys' use of GAI in legal practice. We recognize that there are different kinds of GAI in existence now, and increasingly powerful ones in the pipeline. Use of certain AI or AI-like products for document review and discovery has become an accepted part of legal practice because experience has shown that, when used properly, some of these products yield accurate results and reduce the cost of document review and production. That is not yet the case for the current versions of certain GAI products when used for legal research. This opinion, which is confined to *generative* AI products, is intended to provide guidance to attorneys as the technology evolves to determine when and how those products can be ethically incorporated into their practice. Due to rapid development of technology in this area, we anticipate that many of the concerns raised in this opinion may be resolved or mooted for particular products in the future, perhaps even in the near future.

As discussed below, use of GAI in legal matters implicates lawyers' duties of competence, confidentiality, communication, candor to the court, and fairness to opposing parties and counsel; their obligation to supervise nonlawyer assistants and hold them to lawyer standards of conduct; their obligations as to the fees and expenses of a representation; and their obligation to maintain and make available a complete client file at the conclusion of a representation.

### A. Competence

Under Rule 1.1(a), "[a] lawyer shall provide competent representation to a client." "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, and engage in such continuing study and education as may be necessary to maintain competence." Rule 1.1 cmt. [6]. As we noted in D.C. Legal Ethics Opinion 371 regarding the use of social media in the practice of law:

> We agree with ABA Comment [8] to Model Rule 1.1 that to be competent "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Although the District's Comments to Rule 1.1 do not specifically reference technology, competent representation always requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to carry out the representation. Because of society's embrace of technology, a lawyer's ignorance or disregard of it, including social media, presents a risk of ethical misconduct.

We hold the same view as to the use of GAI in legal practice.[9] Indeed, there may

[8] The United States Patent and Trademark Office recently issued detailed guidance on the use of artificial intelligence tools by attorneys and others practicing before it. *Guidance on Use of Artificial Intelligence-Based Tools in Practice Before the United States Patent and Trademark Office*, 89 Fed. Reg. 25609 (Apr. 11, 2024) ("PTO AI Guidance"). It discusses some issues that are not addressed in this opinion, including patentability and the potential violation of export control and national security regulations. Attorneys who practice before the PTO or whose practices expose them to data that is subject to export controls or national security restrictions should study that guidance.

[9] At the time of this writing, the D.C. Court of Appeals is considering a proposal that would add a reference to technology to the comments to Rule 1.1. Under that proposal, Comment [5] to Rule 1.1 would be amended to add the underscored language:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods, procedures, and technology meeting the standards of competent practitioners. It also includes adequate preparation and continuing attention to the needs of the representation to assure that there is no neglect of such needs. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequences.

come a time when lawyers' use of GAI is standard practice.

Before using any particular form of GAI, attorneys should have a reasonable and current understanding of how it works and what it does, with due regard for (a) its potential dangers, including the risk of "hallucinations" or misuse or exposure of Client Confidential Information, (b) its limitations, including whether it uses a narrow dataset that could generate incomplete, out-of-date, or inaccurate results, and (c) its cost. Attorneys also should have a reasonable basis for trusting the GAI outputs, or must review and validate GAI outputs, before incorporating these outputs in their work product for clients or relying on them in support of a legal proceeding.

How might a lawyer do these things? Given what has befallen fellow lawyers in connection with GAI, we suggest the kind of diligence that any reasonable business owner would undertake before making a significant investment in technology for their legal practice. Depending on the context, this might include the following questions and answers:

- What is in the news about the GAI platform with respect to legal practice?
- Has the GAI been tested for your intended purpose by disinterested third parties?
- Have other legal professionals that you trust used the GAI? Have they encountered any issues?
- Ask the GAI to do something you or a respected colleague or adver sary has already done and compare its output with the human work product.[10]
- Verify the accuracy and completeness(including any date limitations) of the GAI's output in a test run, especially with respect to citations to laws, regulations and judicial decisions.

What is required or prudent in any specific situation depends on the circumstances. Significantly less diligence may be warranted for GAI products that rely on proven, current databases of the relevant information. At the other end of the spectrum, much more care should be taken with respect to GAI products that are offered to a general audience and lack a positive track record in connection with legal services.

[10]This assumes that the original work product is (1) competent and (2) not already in the GAI's database.

### B. Confidentiality

Under Rule 1.6(a)(1), "a lawyer shall not knowingly… reveal a confidence or secret of the lawyer's client." Under this rule "'[c]onfidence' refers to information protected by the attorney-client privilege under applicable law and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client." Rule 1.6(b). As we noted in DC Legal Ethics Opinion 364:

> This expansive confidentiality obligation "[t]ouch[es] the very soul of lawyering." *In re Gonzalez*, 773 A.2d 1026, 1030 (D.C. 2001) (quoting *Fred Weber, Inc. v. Shell Oil Co*., 566 F.2d 602, 607 (8th Cir. 1977)). "Disclosure of client confidences is 'contrary to the fundamental principle that an attorney owes a fiduciary duty to his client and must serve the client's interests with the utmost loyalty and devotion.'" *Herbin v. Hoeffel*, 806 A.2d 186, 197 (D.C. 2002) (quoting *In re Gonzalez*, 773 A.2d at 1031).

Comment [40] to Rule 1.6 notes that, "[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Separately, Rule 1.6(f) requires lawyers to "exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." A third party GAI provider who has access to the inputs to a GAI program is an "other" as to which this obligation extends.

To protect client confidences and secrets, lawyers should ask two questions:

(1) Will information I provide to the GAI be visible to the GAI pro vider or other strangers to the attorney-client relationship?

(2) Will my interactions with the GAI affect answers that later users of the GAI will get in a way that could reveal information I pro vided to the GAI?

From the perspective of confidentiality, an affirmative answer to the first is at least a red flag but, perhaps, one that can be resolved after a negotiation with the GAI provider (or an upgrade to a paid product with better terms) to improve the data security and prevent third party access.[11] An affirmative answer to the second might be more challenging to resolve. A lawyer should be reasonably satisfied that her interaction with the GAI will not reveal Client Confidential Information to future users of the GAI. If the lawyer is not so satisfied, she should not reveal Client Confidential Information to the GAI or should not use the GAI.

Many currently available GAI products invite a conversation with their users. Attorney users seek to have GAI generate legal theories to support their client's claims or defenses. They may also share their own legal or factual theories hoping the GAI can provide legal and factual support. The attorney then reacts to the response with follow up inquiries. Through these inputs, the lawyer effectively may be disclosing her mental impressions to the GAI in the hope of getting further support and refining her strategy. Meanwhile, some GAI programs may be saving both the attorney's inputs (or "prompts") and the GAI's own outputs to make that "content" available to future users.

The lawyer's mental impressions about a client matter are, of course, work product. Separate from the attorney/client privilege, work product is among the most protected categories of confidential information in our adversary legal system. Even when a court orders disclosure of some work product information after a required showing of "substantial need," the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B); D.C. Super. Ct. R. Civ. P. 26(b)(3)(B).

Lawyers who input Client Confidential Information, or their mental impressions about a client matter, into GAI products —especially "free" ones—risk violating fundamental rules about client confidentiality. Most technology companies that provide these services make no secret of what they will do with any information submitted to them in connection with their publicly usable services: from their

[11]ChatGPT's Privacy Policy (discussed below) states that it "does not apply to content that we process on behalf of customers of our business offerings, such as our API. Our use of that data is governed by our customer agreements covering access to and use of those offerings."

perspective, user inputs are theirs to use and share as they see fit.

For example, the Privacy Policy underlying ChatGPT's free offering makes clear that ChatGPT and its parent OpenAI:

- "[C]ollect Personal Information that is included in the input, file uploads, or feedback that you provide to our Services ("Content"); and
- "[M]ay use Personal Information… [t]o improve our Services and con duct research" and "[t]o develop new programs and services."

Indeed, the policy shows that they view the information as simply another "asset" of theirs to be exploited and sold to others:

> *Business Transfers*: If we are involved in strategic transactions, reorganization, bankruptcy, receivership, or transition of service to another provider (collectively, a "Transaction"), your Personal Information and other information may be disclosed in the diligence process with counterparties and others assisting with the Transaction and transferred to a successor or affiliate as part of that Transaction along with other assets.

Absent client consent, lawyers who share Client Confidential Information with third party providers who have privacy policies like this risk violating their confidentiality obligations under Rule 1.6. And clients are unlikely to give informed consent—and typically should not be asked to consent—to wide ranging disclosures that could waive attorney/client privilege or otherwise make their most confidential and secret information available for third parties to see and use.[12] This includes potential litigation adversaries and their counsel who also have access to the same GAI. Attorneys who would provide client confidences and secrets to a GAI product should ensure that product has implemented adequate security safeguards and controls to ensure confidentiality and protect against unauthorized access and use of client information.

Comment [5] to Rule 1.6 does say that "[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." This may tempt GAI users to try to protect client confidentiality by anonymizing information that they submit to the GAI. Again, we urge caution. The more information a lawyer provides to a growing GAI dataset, the greater the likelihood that the GAI or one of its other users will be able to connect the dots and link the information the lawyer provided to the client in question. GAI is, after all, artificial "intelligence."

This is especially true if the lawyer's representation of a client is available in publicly searchable information, such as docket sheets for litigation, news reports about litigation, or—to the extent the lawyer's website identifies specific client matters handled by the lawyer—the lawyer's own website. Similarly, if a lawyer using such a service inputs her client's name for billing purposes, anyone with access to the service's records may be able to connect a given research request with an identifiable client.

Even if the lawyer and the client cannot be linked by the GAI as the source of information provided to the GAI, there is still a potential for harm if the information itself is valuable to the client because of the secrecy surrounding it. Imagine, for example, the harm that would occur to the client if a lawyer shared the client's trade secret manufacturing process with a GAI, and the GAI later revealed that information to others looking for faster and cheaper ways of making the product in question.[13]

One option that some GAI products provide to resolve confidentiality concerns is a zero data retention policy in which the provider of the GAI retains neither the inputs nor the outputs of the GAI's interaction with a particular user. As noted above, business users who pay to use a GAI product may be able to negotiate better terms than are available to users of a "free" service that the provider makes available for the provider's own marketing and product development purposes.

### C. Responsibilities Regarding Lawyers in a Firm and Their Nonlawyer Assistants

Under Rules 5.1 and 5.3, a lawyer should take reasonable measures to ensure that any supervised lawyer's or nonlawyer's use of GAI conforms to the Rules of Professional Conduct and the principles discussed in this opinion.

Rule 5.1(a) requires managers of law firms and other lawyers with comparable managerial authority in a law firm or government agency to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm or agency conform to the Rules of Professional Conduct." Rule 5.1(b) requires lawyers with direct supervisory authority over another lawyer to "make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Rule 5.3 extends these obligations to nonlawyers working in or for the firm, lawyer, or government agency. Under Rule 5.3(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." Similarly, under Rule 5.3(a), partners or other lawyers in a firm or government agency "who individually or together with other lawyers possess[] comparable managerial authority in a law firm … shall make reasonable efforts to ensure that the firm or agency … has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." Thus, both the lawyers who retain nonlawyers and the managers of a firm or lawyers with comparable managerial authority in a law firm or government agency that retains nonlawyers must take steps to assure that the nonlawyers abide by the professional conduct rules for lawyers and confirm compliance with attorneys' ethical responsibilities.

Where it is foreseeable that lawyers or nonlawyers within or retained by a firm or government agency will be using GAI in connection with a client representation, the firm and the retaining lawyers should take appropriate steps to ensure that any use of GAI is consistent with the Rules of Professional Conduct.

[12] *See* D.C. Legal Ethics Opinion 309, n.10 (2001) (noting high bar for waiving confidentiality).

[13] As noted in the PTO AI Guidance referenced above:

> Use of AI in practice before the USPTO can result in the inadvertent disclosure of client sensitive or confidential information, including highly-sensitive technical information, to third parties. This can happen, for example, when aspects of an invention are input into AI systems to perform prior art searches or generate drafts of specification, claims, or responses to Office actions. AI systems may retain the information that is entered by users. This information can be used in a variety of ways by the owner of the AI system including using the data to further train its AI models or providing the data to third parties in breach of practitioners' confidentiality obligations to their clients…. If confidential information is used to train AI, that confidential information or some parts of it may filter into outputs from the AI system provided to others.

89 Fed. Reg. at 25627.

One step law firms, lawyers, and government agencies could consider is to require employees—lawyers and nonlawyers alike—to satisfy themselves that client confidentiality under Rule 1.6 will be protected before using a GAI product. For example, if a review of the GAI's privacy policy determines that the GAI will not keep client confidential or secret information from the GAI's owner and other third parties outside the law firm, law office, or government agency, Rules 5.1 and 5.3 likely prohibit the supervising lawyers from permitting supervised personnel to use the GAI in the client matter. In the absence of a clear privacy policy, supervising lawyers should consider directing the employees to make other inquiries to satisfy themselves that the client's confidentiality will be protected.

Another step could be to require lawyers and nonlawyers within or retained by a law firm, lawyer, or government agency to take steps to verify the accuracy of the output of any GAI they use. At some point, however, the time and costs associated with the verification may outweigh whatever perceived benefits led the lawyer to consider using the GAI in the first place. Once a firm has vetted a particular GAI for particular purposes, it could require its lawyers to use that GAI for those purposes rather than some competing GAI not yet approved within the firm.

### D. Candor to Tribunal and Fairness to Opposing Party and Counsel

For matters in litigation or arbitration, the use of GAI outputs that contain misrepresentations of facts or law, or that provide fake citations, also implicates the lawyer's duties to the tribunal and to the opposing party and counsel. This is especially true if the tribunal has adopted rules or procedures or issued orders requiring disclosure of the use of GAI and verification or other safeguards with respect to GAI outputs.

Under Rule 3.3(a), lawyers shall not knowingly:[14]

> (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, unless correction would require disclosure of information that is prohibited by Rule 1.6;
>
> * * *
>
> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly adverse to the position of the client; or
>
> (4) Offer evidence that the lawyer knows to be false, except as provided in paragraph (b) [*dealing with representation of the accused in a criminal case*]. 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.

These duties "continue to the conclusion of the proceeding." Rule 3.3(c). "A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d)." Rule 3.3(d).

The comments to this rule specifically address use of fake citations akin to those generated by the GAI in *Mata*. "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." Rule 3.3 cmt. [3].

Similarly, Rule 3.4 imposes certain duties of fairness to the opposing party and counsel. Among these duties, the lawyer shall not:

- "[f]alsify evidence" (Rule 3.4(b)); or
- "[k]nowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists" (Rule 3.4(c)).

Rule 3.4(c) comes into play when the tribunal has adopted rules or has issued orders restricting or otherwise governing use of GAI in connection with the proceeding, and the lawyer does not comply with those rules or orders.[15]

### E. Fees

Under Rule 1.5(a), "[a] lawyer's fee shall be reasonable." The rule provides a non-exclusive list of eight factors to be considered in assessing the fee's reasonableness. Separately, when "the lawyer has not regularly represented the client," the lawyer must send the client a writing stating "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible." Rule 1.5(b). That writing must be sent "before or within a reasonable time after commencing the representation." *Id*.

If the lawyer intends to bill the client for use of GAI for which there is an out-of-pocket cost to the lawyer, that expected cost is an expense that should be communicated to the client under this rule.

Separately:

> [i]t goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis (i.e., hourly), and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client.

D.C. Legal Ethics Opinion 267 (1996) (quoting ABA Formal Ethics Opinion 379 (1993)).

A familiar variation of this issue occurs when a lawyer expends considerable time and effort to prepare a detailed legal research memo for one client and, to that first client, considerable expense based on the lawyer's hourly rate. Shortly thereafter, a second client happens to ask the same legal question. It will take far less time to adapt the first memorandum for the second client's use than it took to create the memorandum in the first place. While the lawyer may believe it is not fair or reasonable to charge the second client only a fraction of what the first client paid for such a valuable piece of legal research, that is what is required if the lawyer's billing arrangement with the second client is based exclusively on an hourly rate.

The same is true when the use of GAI reduces billable time and the lawyer's

[14] As defined in the Rules of Professional Conduct, "'[k]nowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Rule 1.0(f); *In re Soto*, 298 A.3d 762, 767 (D.C. 2023) (quoting Rule 1.0(f)). This is a high threshold that would not normally be crossed by a lawyer's unintended misrepresentation due to the lawyer's ignorance of the limitations of the GAI or other technological application. To the extent that the misrepresentation could have been prevented through ordinary care like cite-checking, however, the lawyer could still face sanctions, claims or other consequences, as did the lawyers in *Mata*.

[15] As noted above, GAI technologies can create false photographs, audio recordings and videos that look or sound very real. These sorts of "deepfake" files have the potential to be used as false evidence squarely within the prohibitions of Rules 3.3 and 3.4.

fee agreement with the client is based exclusively on the time the lawyer spends working on the matter. No matter how good or valuable the GAI's output is, absent a different fee arrangement, the lawyer can only bill for the time the lawyer spent. As discussed above, the reasonable expense of the GAI itself may be billed as an expense item if the lawyer's agreement with the client permits the lawyer to bill for such expenses.

### F. Client File

When a representation is terminated, Rule 1.16(d) requires a lawyer to do several things, including "surrendering papers and property to which the client is entitled." As we discussed in D.C. Legal Ethics Opinion 333 (2005), this rule requires production of the "entire file," including "copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer." Although lawyers are not required to retain every piece of paper or electronic datum generated or received during a client representation, a lawyer should consider whether specific interactions with GAI in connection with a client matter should be retained as part of the client file.[16]

### Conclusion

We anticipate that GAI eventually will be a boon to the practice of law. Moreover, lawyers who use generative artificial intelligence do not need to be computer programmers who can write AI programs or critique AI code written by others. But they do need to understand enough about how GAI works, what it does, and its risks and limitations to become comfortable that the GAI will be helpful and accurate for the task at hand, and that it will not breach client confidentiality. Lawyers should also be mindful of the implications GAI creates for their duties of supervision; their duty of candor to the tribunal and their fairness obligations to opposing parties and counsel; the reasonableness of their fees; and their obligations with respect to the client file.

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[16] A lawyer may, at her own expense, retain a copy of the client file. *See* D.C. Legal Ethics Opinion 273 (1997); D.C. Legal Ethics Opinion 250 n. 2 (1994).

*Ethics Opinion 389*

## Flat Fees, Subscription Fees and Disbarment

Rule 1.15 contains the default rule requiring a lawyer to hold funds of clients or third parties in trust, separate from the lawyer's funds. Rule 1.15's application to prepaid flat fees (typically received by lawyers in connection with criminal cases, immigration matters, and subscription services) has been the subject of much confusion among the bar's membership.

The current text of Rule 1.15(e) of the District of Columbia Rules of Professional Conduct requires the following treatment of a client's advances (prepayments) of fees or costs:

> Advances of unearned fees and unincurred costs shall be treated as property of the client [in a qualifying lawyer trust account] until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, [a lawyer shall refund] to the client [ ] any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

A trilogy of cases from the D.C. Court of Appeals between 2009 and 2024 has defined "unearned" fees, "earned" fees, and client "informed consent" in ways that are not obvious on the face of the rule.[1]

Failure to follow the strict requirements of these three cases creates a risk of disciplinary prosecution for commingling (which is typically sanctioned by public censure), negligent misappropriation (which carries a presumptive minimum sanction of a six month suspension), or intentional or reckless misappropriation (which carries a presumptive sanction of disbarment under *In re Addams*, 579 A.2d 190, 191(D.C. 1990) (*en banc*)).[2]

[1] The Legal Ethics Committee understands that work is currently under way to prepare proposed revisions to Rule 1.15 (reflecting current case law) for submission to the D.C. Court of Appeals for its consideration.

[2] Disbarment is the presumptive sanction in the District and most other jurisdictions for intentional misappropriation. Reckless misappropriation under the District's precedents is the non-intentional use of client (or third-party) entrusted property without proper consent, resulting from something more than simple negligence. Recklessness may be found, for example, when a lawyer pays the same invoice from trust twice, yet fails to detect and correct the error for several months because the lawyer has no bookkeeping system designed to prevent or detect the duplicate payment. By contrast, a promptly detected and corrected duplicate payment may be treated in the District as the lower-sanctioned negligent misappropriation. The Court of Appeals has acknowledged that "[t]he decision in Addams has generated substantial controversy and criticism over the years." *In re Mensah,* 262 A.3d 1100, 1102-03 (D.C. 2021) (collecting and summarizing cases). For those of our members who are also licensed elsewhere, our multistate survey suggests that the District is the only jurisdiction that routinely disbars for what the District classifies as a first offense of reckless misappropriation. *See generally*, David Luty, I*n the Matter of Mitigation: The Necessity of a Less Discretionary Standard for Sanctioning Lawyers Found Guilty of Intentionally Misappropriating Client Property*, 32 Hofstra L. Rev. 999 (2004).

This opinion examines common misconceptions about the rules governing fee agreements that could expose District-licensed attorneys to professional discipline and offers practical ways to comply with the applicable Rules and case law.

### Applicable Rules[3]

- 1.0(e) (Terminology: Informed Consent
- 1.8(i) (Lawyer Liens and Their Enforcement
- 1.5 (Fees)
- 1.7 (Conflict of Interest: General Rule)
- 1.15 (SafeKeeping Property)
- 1.16 (Declining or Terminating Representation)

*Discussion*

### The Trilogy Adds Requirements Not Evident in Rule 1.15.

The first case in the trilogy, In re Mance, 980 A.2d 1196 (D.C. 2009), stands for the proposition that prepaid flat fees and prepaid costs are subject to the same entrustment requirements under Rule 1.15(a) as prepayments for hourly fee projects; absent a valid Rule 1.15(e) waiver of entrustment, prepaid fees and costs belong in trust, until earned by performance of the associated work.[4]

The second case, *In re Ponds*, 279 A.3d 357 (D.C. 2022), adds requirements for a lawyer to provide verbal and written

[3] Unless otherwise indicated, any citations to a "Rule" in this opinion are to the D.C. Rules of Professional Conduct.

[4] D.C. Rule 1.15(e) allows a client to waive the default rule that client prepayments must be held in trust until the lawyer completes the associated work. This waiver applies only to prepayments: clients cannot waive entrustment for traditional escrows (such as proceeds of real estate settlements or collection litigation). Note also that states following the ABA's Model Rule 1.15 do not allow waiver of entrustment under any circumstances.

disclosures to a client before the client can waive the entrustment requirements under Rule 1.15(a).

The third case in the trilogy, *In re Alexei*, 319 A.3d 404 (D.C. 2024), holds that a lawyer may not make interim draws from trust on a flat fee project unless the client has expressly agreed to treat portions of the flat fee as earned before completion of the entire flat fee project.

Rule 1.15(d) has traditionally allowed a lawyer to impound disputed trust funds, for reasons such as the lawyer's good faith assertion of a reasonable amount of fees earned; provided that the lawyer could not draw from trust over the client's objection (even if that objection is baseless), until the fee dispute was resolved via settlement, arbitration, or litigation. *See, e.g., In re Haar*, 667 A.2d 1350, 1353 (D.C. 1995) (*Haar I*); *In re Haar*, 698 A.2d 412, 421 (D.C. 1997) (*Haar II*). *Alexei* suggests Rule 1.15(d) will no longer apply to disputes over prepaid fees unless the lawyer's flat fee agreement has an explicit contractual mechanism to resolve a lawyer's claims to the portion of fees earned when the lawyer's services are terminated before completing the entire scope of work to which the flat fee applies.

**Engagement Agreement and Banking Formalities.**

Rule 1.5 contains specific requirements for disclosure of how fees and costs will be charged to a client. When "the lawyer has not regularly represented the client," the lawyer must provide the client with a writing stating "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible." Rule 1.5(b).[5] That writing must be transmitted "before or within a reasonable time after commencing the representation." *Id*.

As part of any investigation into alleged lawyer misconduct, Disciplinary Counsel likely will request a copy of the lawyer's engagement agreement with the client. Failure to have complied with Rule 1.5(b) can provide an additional basis for discipline even in cases that started with no allegations relating to the fee or its collection. If the engagement agreement provides for prepayment for future services, Disciplinary Counsel's investigation may expand into whether the lawyer has complied with the trilogy even if funds handling has nothing to do with the original complaint against the lawyer.

Under Rule 1.5(a), "[a] lawyer's fee shall be reasonable." The rule provides a non-exclusive list of eight factors to be considered in assessing the fee's reasonableness. Under case law, however, the overarching requirement of reasonableness imposes rights and obligations that are not readily apparent from the current text of Rules 1.0 (Terminology), 1.5 (Fees), or 1.15 (Safekeeping Property).

Under Rule 1.15(a), a lawyer in possession of property of clients or third parties must keep that property separate from the lawyer's own property. When the property is money, the money must be kept in a trust account. The current version of Rule 1.15(e) provides that:

> Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

Comment [9] to Rule 1.15 explains:

> Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

"'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." Rule 1.0(e). Clients who are "experienced in legal matters generally and in making decisions of the type involved" or are represented by independent legal counsel may require "less information and explanation than others." *Id.* at cmt. [2].

These rules are intended to protect clients. Client money in a lawyer trust account cannot be attached by the lawyer's creditors. That is not the case when client funds are located in a lawyer's operating account. The above language from the current version of Rule 1.15 authorizes clients to give "informed consent" to having their funds put in an operating account but does not detail exactly what must be done to get an enforceable informed consent. The trilogy now requires additional steps to obtain an effective consent, as discussed below.

Client protection also requires lawyers to withdraw money that belongs to the lawyers from the trust account promptly after the lawyer becomes entitled to the money. Failure to withdraw the lawyer's funds results in "commingling" of entrusted funds with lawyer funds and potentially exposes the trust account to claims from the lawyer's creditors. *In re Hessler*, 549 A.2d 700, 702 (D.C. 1988) ("By mingling client funds with the attorney's own, the client's funds become more difficult to trace and are subject to the risk that they may be taken by creditors of the attorney.").

Commingling is treated as a serious disciplinary offense because it is often a precursor to accidental misappropriation. Simple commingling, without other aggravating factors, typically results in a censure. *In re Osborne*, 713 A.2d 312, 313 (D.C. 1998). The presumptive sanction for negligent misappropriation of funds that are supposed to be in trust is a six-month suspension. *In re Anderson*, 778 A.2d 330, 342 (D.C. 2001). The presumptive sanction for reckless or intentional misappropriation is disbarment. *In re Addams*, 579 A.2d 190, 191(D.C. 1990) (*en banc*) ("[I]n virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence.").[6]

[5] This opinion refers to the writing that Rule 1.5 requires as an "engagement agreement." Rule 1.5 specifies when writings or written agreements are required. As is the case with Rule 1.7—a rule that does not require a writing or a client signature for a conflict waiver—"[i]t is ordinarily prudent for the lawyer to provide at least a written summary of the considerations disclosed and to request and receive a written informed consent, although the rule does not require that disclosure be in writing or in any other particular form in all cases. Lawyers should also recognize that the form of disclosure sufficient for more sophisticated business clients may not be sufficient to permit less sophisticated clients to provide informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof that informed consent was secured." Rule 1.7 cmt. [28].

[6] The Court of Appeals ultimately held in *In re Mensah*, 262 A.3d 1100,1105(D.C. 2021) that, in some negotiated discipline cases involving reckless but not intentional misappropriation, a three-year suspension with reinstatement conditioned on a showing of fitness to practice law may be an appropriate resolution. *Id*. at 1105. It should be noted that a "disbarment" in the District of Columbia is in effect a five-year suspension with a showing of fitness required for reinstatement. *Id.* at 1102.

**Contract Caveat: According to *Mance*: No Matter What the Engagement Agreement Says, Flat Fees for Future Services Are Not "Earned on Receipt." Likewise, Calling the Prepayment *a Retainer* Doesn't Make It Earned on Receipt.**

*In re Mance*, 980 A.2d 1196 (D.C. 2009), involved a murder case in which a father hired an attorney to defend the father's son. The attorney put most of the money in his trust account and the rest in his operating account. *Id.* at 1200. At the time, it was common for criminal defense attorneys to have flat-fee-earned-on-receipt engagement arrangements.

From the attorney's perspective, there was nothing to do until the son authorized him to start negotiating the terms under which the son would turn himself in to police. *Id.* at 1200. However, the father was upset by an apparent lack of action by the attorney. The father hired another attorney and asked the first attorney for a refund. When the attorney did not immediately refund the entire payment, the father filed a bar complaint.

The Court of Appeals ultimately held "that when an attorney receives payment of a flat fee at the outset of a representation, the payment is an 'advance[] of unearned fees' and 'shall be treated as property of the client … until earned unless the client consents to a different arrangement.'" *Id*. at 1202 (quoting Rule 1.15). Quoting Rule 1.5(a), the Court noted that "[t]he primary rule concerning the amount of fees is that '[a] lawyer's fee shall be reasonable.'" *Id*. Citing a Colorado opinion, *Mance* held that "an attorney earns fees only by conferring a benefit on or performing a legal service for the client." *Id*. (quoting *In re Sather*, 3 P.3d 403, 410 (Colo. 2000)). Thus, "a flat fee is an advance of unearned fees because it is money paid up-front for legal services that are yet to be performed." *Id.*

*Mance* "note[d] that an attorney may obtain informed consent from the client to deposit all of the money in the lawyer's operating account or to deposit some of the money in the lawyer's operating account as it is earned, per their agreement." *Id*. at 1206 (citing Rule 1.15). However, the court found no informed consent in that case because there had been no discussion with the client of the possibility of the money being put in a trust or escrow account, or what that meant. *Id.* at 1207.

*Mance* also described how treating flat fees as unearned fees protects a client's right to change counsel:

> Another important benefit to placing flat fees in a trust or escrow account is preservation of the client's right to choose his or her counsel, including the right to discharge an attorney. *See* D.C. Rule 1.7(b) cmt. 8 ("Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds."). Since a flat fee is not owned by an attorney until it has been earned through the performance of services to the client, "the client will not risk forfeiting fees for work to be performed in the future if the client chooses to discharge his attorney."

*Id.* at 1203 (quoting *In re Sather,* 3 P.3d at 410). *See also* Rule 1.16(d) ("In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as … *refunding any advance payment of fee or expense that has not been earned or incurred*.") (emphasis added).

*Mance* distinguished prepaid "flat fees" from what we will call "availability fees" to avoid using a variety of confusing and potentially conflicting applications of the word "retainer" that have been applied in the past. An availability fee "'is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required.'" *Id.* at 1202 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 34 cmt. e (Am. L. Inst. 2000)). Such a fee "is a 'fee[] paid solely for availability and therefore do[es] not involve an advance fee but a fee that is fully earned when paid.'" D.C. Legal Ethics Opinion 264 (1996) (citations omitted).[7] Such arrangements "'are quite rare,' and have 'largely disappeared from the modern practice of law.' However, attempts to cast what is actually an advance payment of fees for services to be performed later as [an availability fee] are very much present today." ABA Formal Opinion 505, at 3 (footnotes omitted).[8]

A true availability fee fairly can be viewed as the client's purchasing an option to retain the lawyer in the future. The price paid for the option is fully earned by the lawyer upon receipt but, to exercise the option, the client may need to engage the lawyer in the future and enter into a separate fee agreement with the lawyer to pay for the legal work to be done during that engagement.[9]

*Mance* also warned against efforts to evade its dictates by creative terminology or "front loading."

> Simply labeling a fee as something other than a flat fee or extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation will not excuse the lawyer from safekeeping the client's funds until it can reasonably be said that they have been earned in light of the scope of the representation.

*Mance* at 1204-05 (footnote omitted). A footnote to the quoted sentence stated that "[t]he questionable ethical viability of non-refundable fee advances has inspired some imaginative terminology designed to characterize the advance payments in a manner that eludes the issue: retainers, non-refundable retainers, fee advances, or advanced fees, prepaid fees, flat fees, and minimum fees." *Id.* at 1204 n.9 (quoting *Idaho Sup. Ct. Bd. Of Prof'l Ethics & Conduct v. Apland*, 577 N.W.2d 50, 55 (Iowa 1998) (quoting ABA/BNA *Lawyers' Manual on Professional Conduct* 45:109 (1993)).

In practice, a regulator or court can easily identify prepayments for legal

[7] Separate from its discussion of various forms of retainers, D.C. Legal Ethics Opinion 264 (1996) also stated that a fee advance belongs to the lawyer and must be put in the lawyer's operating account rather than being commingled with client funds in a trust account. That aspect of the 1996 opinion was superseded by changes to Rule 1.15 that took effect in 2000.

[8] In 2023, the American Bar Association provided guidance on these issues through the lens of the ABA Model Rules of Professional Conduct. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 505, *Fees Paid in Advance for Contemplated Services* (2023). As is typical, that opinion notes in its first footnote that the Model Rules are only models and that the "controlling" authorities are provided by the "laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions." The ABA opinion then went beyond the usual disclaimer, adding, "This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future." This opinion focuses on the D.C. rules and case law. Practitioners in other jurisdictions should study their own controlling local authorities carefully because there are significant variations around the country as to what is and is not permitted, and as to what the likely sanction for an error might be.

[9] The trilogy of cases discussed in this opinion do not address what should or must happen if an availability fee arrangement is terminated, or attempted to be terminated, by the lawyer or the client before the agreed availability period expires. We assume, without deciding, that refundability of a previously earned-on-receipt true availability fee may be impacted by circumstances under which contracts are determined to be void, voidable, or impossible to perform.

services by examining the circumstances surrounding the payment and asking what the client understood. The names that the parties applied to the payment at the outset will carry little or no weight.

Recognizing that its ruling was new and different from a "widely-used practice," *Mance* made its ruling prospective as to D.C. bar members other than the respondent in that case. 980 A.2d 1205-06. As to that respondent, the court wrote that its interpretation would have made him guilty of a long list of violations:

- "misappropriation of client funds in violation of Rule 1.15(a);"
- "commingling of lawyer funds with those of the client in violation of Rule 1.15(a);"
- "failure to maintain complete records of client funds in violation of Rule 1.15(a)…;"
- "failure to treat an advance as client funds in violation of Rule 1.15(d);"
- "failure to take timely steps to sur render client funds in violation of Rule 1.16(d);" and
- "failure to deposit client funds in a specially titled trust or escrow account, in violation of Rule 1.16(d)."

*Id.* at 1208. Given its decision to apply the ruling prospectively, however, *Mance* found that respondent could not be guilty of the "more serious violations" of the provisions in the list, especially misappropriation. *Id.* The takeaway from *Mance* is that clients cannot be bound to engagement agreements that purport to transform, through misleading contractual language, prepayments into something they are not.

### *Ponds*: Detailed Requirements for Any Client Consent to Unearned Funds Being Placed in an Operating Account.

The Court of Appeals revisited these issues in 2022 when it disbarred an attorney who entered into the following flat fee agreement with a client, put the entire flat fee in his operating account, and did not refund the money at the conclusion of the representation despite an Attorney-Client Arbitration Board ruling requiring him to do so:

> The fee agreement between [the lawyer] and [the client] described the flat fee as non-refundable. It further provided that [the lawyer] was not required to keep a record of the time he spent working on [the client's] case; that the flat fee was the exclusive property of [the lawyer]; that [the client] waived any claim of property interest in the flat fee; and that [the client] agreed that the flat fee would not be placed in an escrow account. The fee agreement did not advise [the client] that [the lawyer] could keep the flat fee only if [the lawyer] provided the agreed-upon services or that [the lawyer] was required to return the flat fee if it was unreasonable or unearned. The fee agreement also did not explain what an escrow account is or the benefits of keeping client funds in such an account.

*In re Ponds*, 279 A.3d 357, 359 (D.C. 2022). The case turned on whether this agreement was an enforceable "informed consent" from the client.

The court held that it was not because it fell short of the following guidelines:

> Informed consent [under Rule 1.15(e)] requires an attorney to discuss the "material risks of and reasonably available alternatives to the proposed course of conduct." *In re Mance,* **9**80 A.2d at 1206 (internal quotation marks omitted). To satisfy this requirement in connection with a flat-fee agreement, the attorney must "expressly communicate to the client verbally and in writing" that (1) "the attorney will treat the advance fee as the attorney's property upon receipt"; (2) "the attorney can keep the fee only by providing a benefit or providing a service for which the client has contracted"; (3) "the fee agreement must spell out the terms of the benefit to be conferred upon the client"; (4) "the client must be aware of the attorney's obligation to refund any amount of advance funds to the extent that they are unreasonable or unearned if the representation is terminated by the client"; and (5) "unless there is agreement otherwise, the attorney must ... hold the flat fee in escrow until it is earned by the lawyer's provision of legal services." *Id.* at 1206-07 (internal quotation marks omitted).

279 A.3d at 358-59. The most likely "benefit to the client" of an agreement like this is the described scope of services that the lawyer commits to provide if the client enters into the agreement.

As to the sanction, the respondent in *Ponds* argued that "his failure to comply with the requirements of *In re Mance* was simply a good faith but perhaps negligent mistake of law." *Id.* at 362. The Court of Appeals disagreed and disbarred him because "[d]isbarment is normally the appropriate sanction when an attorney has intentionally or recklessly misappropriated client funds." *Id.* (quoting *In re Smith*, 70 A.3d 1213, 1218 (D.C. 2013)).

### *Alexei*: Flat Fees Not Earned Until the Conclusion of the Matter Absent a Written Agreement to the Contrary.

The third case in the trilogy is *In re Alexei*, 319 A.3d 404 (D.C. 2024). The attorney in that case entered into a flat-fee-earned-on-receipt billing arrangement with an immigration client. The flat fees were for filing (1) a green card application, (2) a separate immigration-related request, and (3) an appeal from a prior immigration decision. *Id.* at 406. The amount in question was initially paid into the lawyer's trust account. However, the lawyer periodically transferred portions of the payment to his operating account based on time spent working on the matter at the lawyer's standard hourly rate. Hourly drawdowns from trust led the attorney to have paid himself all of the client trust funds before any of the filings referenced in the engagement agreement had been made. *Id.* As discussed below, the ultimate problem for the attorney was that "[t]he agreement neither mentioned [the lawyer's] hourly rate nor specified how [the lawyer] might earn the advanced funds." *Id*. at 406.

It is clear from the Hearing Committee Report and the Board on Professional Responsibility Report in *Alexei* that at least some of the documents that the lawyer had agreed to file were eventually filed, including the green card application. However, that application "was ultimately denied, and [the client] hired new counsel." *Alexei*, 319 A.3d at 406. Through new counsel, the client filed a *Lozada*-based[10] disciplinary complaint against the respondent while "sincerely" thanking him for his past service and asking him to "[p]lease understand this is not personal, it is just something that is necessary in order to re-open my [immigration] case." *Id.* at 407. The disciplinary complaint did not allege any

[10]When an immigrant seeks to reopen an immigration decision on grounds of ineffective assistance of counsel, he or she must file a disciplinary complaint against former counsel or explain why such a complaint was not filed. *In re Lozada*, 19 I&N Dec. 637 (BIA 1988). As a practical matter under *Lozada*'s progeny, the immigrant's challenge will not be considered unless and until a disciplinary complaint is filed. American Immigration Lawyers Association, Policy Brief: Ending the Reign of *Lozada* and Removing Barriers to Ineffective Assistance of Counsel Claims in Immigration Law (July 11, 2024). As noted in that article, an Attorney General of the United States during the second Bush administration acknowledged "that most bar complaints under *Lozada* are 'unfounded.'" Moreover, "[s]uch unfounded complaints impose costs on well-intentioned and competent attorneys, and make it harder for State bars to identify meritorious complaints in order to impose sanctions on lawyers whose performance is truly deficient."

misappropriation of funds but the issue emerged during Disciplinary Counsel's investigation. *Id.*

Before the case reached the Court of Appeals, both the Hearing Committee and the Board on Professional Responsibility concluded that the respondent "violated no rules of professional conduct because he had earned at least a portion of the advance payment as he worked on the case." *Id.* at 406. Disciplinary Counsel argued to the Board "that *In re Mance* held that advanced payments on a flat fee could be earned only after the attorney finished the legal services encompassed by the fee [agreement]." *Id.* at 407. "[T]he Board determined that that case did not 'articulate the bright-line rule that Disciplinary Counsel now advocates,'" and found that that Disciplinary Counsel had not carried its burden of proving a violation by clear and convincing evidence. *Id.*

Disciplinary Counsel appealed, arguing that, "unless the fee agreement says otherwise, the 'default rule' is that the entire flat fee for a specified service is earned only when the attorney actually provides the entirety of that service to the client." Disciplinary Counsel's Opening Brief, *In re Alexei,* No. 23-BG-591, at 11 (D.C. filed Oct. 5, 2023).

Finding this to be an "issue of first impression," the Court of Appeals endorsed Disciplinary Counsel's "default rule":

> [A]s a default rule, attorneys earn funds advanced on a flat-fee payment only when all the legal services pertaining to the flat fee are complete. We reach this conclusion for three reasons: (1) it best fits the nature of a flat fee, (2) it places the onus to contract differently on the party generally best positioned to do so, and (3) it facilitates clarity and better enforcement of the rules of professional conduct.

*In re Alexei*, 319 A.3d at 411.

*Alexei* acknowledged the respondent's "arguments in favor of a more flexible default rule" based on "fear that the default rule we adopt today could leave attorneys unpaid for significant work if their client terminates the representation before the attorney completes the job." *Id.* at 413. It found, however, that "[a] ttorneys are not without remedy against a client who declines to pay for partial services." *Id.*

> [A]ttorneys may recover for uncompensated work through a quantum meruit action. *See, e.g.*, *Ginberg v. Tauber*, 678 A.2d 543, 544 (D.C. 1996) (involving a quantum meruit action brought by an attorney against their former client for "the reasonable value of the services [the attorney] provided"); *Jonathan Woodner Co. v. Laufer*, 531 A.2d 280, 287 (D.C. 1987) (clarifying that appellant, an attorney, could recover under a quantum meruit theory if he "present[ed] proof of the reasonable value of the services rendered in advancing" the client's goal). Or, if the parties have agreed to arbitrate their fee disputes, the attorney may file a petition with the Attorney/Client Arbitration Board.

*Id.* at 413.

Under the text of *Alexei*, absent a contractual basis to impound in trust the portion of prepaid fees that a discharged lawyer in good faith believes to have been earned, the quantum meruit remedy is now safely available only after refunding to the client and hoping that the client will still have the means to pay at the conclusion of the quantum meruit action.[11]

*Alexei* recognized that the default rule it was adopting was not within the holding of *Mance*. *See* 319 A.3d at 409-10. Thus, the court determined to apply its "holding prospectively such that it does not apply to Mr. Alexei or any agreements already in force before the issuance of this opinion." *Id.* at 415.

**What *Alexei* Did Not Discuss: The Common Law Retention Lien and Rule 1.8(i).**

*Alexei* did not address the long history of retaining liens in the District of Columbia and its interplay with Rule 1.15(d) (on lawyer's right to impound in trust funds pending resolution of fee dispute). "The substantive law of the District of Columbia has long permitted lawyers to assert and enforce liens against the property of clients. *See, e.g., Redevelopment Land Agency v. Dowdey,* 618 A.2d 153, 159-60 (D.C. 1992), and cases cited therein." D.C. Rule 1.8 cmt. [16]. Under the common law, attorneys in the District of Columbia had:

> a so-called "retaining lien," which attaches to particular funds or papers, belonging to the client, that come into the attorney's possession. *See Wolf v. Sherman*, 682 A.2d 194, 197 (D.C.1996); *Lyman v. Campbell*, 87 U.S. App. D.C. 44, 45-46, 182 F.2d 700, 701-02 (1950); District of Columbia Bar Legal Ethics Op. No. 100 at 172, 173 n. 5 (1984) (providing that attorney may assert retaining lien on client assets in attorney's possession but may not ethically deduct fee from client funds held in escrow absent "a specific agreement between the attorney and client" permitting the withdrawal) (quoting ABA Committee on Ethics, Informal Op. No. 859, Aug. 4, 1965).

*In re Haar*, 698 A.2d 412, 416 n.4 (D.C. 1997) (*Haar II*). "The retaining lien attaches to property of the client in the possession of the attorney and entitles the attorney to retain possession of that property until the fee is paid." *Wolf*, 582 A.2d at 197.[12] The traditional subject of the retaining lien is what most attorneys today understand to be a "retainer," an advance payment from the client to assure that the attorney will be paid for work to be performed in the future and costs associated with that work.

Changes to Rule 1.8(i) severely limited an attorney's ability to assert and enforce a retaining lien as to "a client's files." Unlike its predecessor, the rule now provides:

> A lawyer may acquire and enforce a lien granted by law to secure the lawyer's fees or expenses, *but a lawyer shall not impose a lien upon any part of a client's files*, except upon the lawyer's own work product, and then only to the extent that the work product has not been paid for. This work product exception shall not apply when the client has become unable to pay, or when withholding the lawyer's work product would present a significant risk to the client of irreparable harm.

Rule 1.8(i) (emphasis added).

[11] Our members who are also licensed elsewhere should note that there appears to be no other jurisdiction that requires refunding, prior to instituting quantum meruit proceedings, what the lawyer reasonably believes to be the value of services rendered in a prematurely terminated flat fee case. Even Colorado, the source of the Sather case on which the trilogy so heavily relies, does not require refunding before initiating quantum meruit arbitration or suit against the client on flat fee issues. *In re Gilbert*, 346 P.3d 1018, 1026 (Colo. 2015) ("It would be a waste of resources in these circumstances to force attorneys to return money to which they are entitled and then bring suit against the client to recover it."); accord *Gilbert* dissenting opinion at 1030 (dissenting on other grounds, while acknowledging obvious right of lawyers to impound in trust a portion of prepaid flat fee in trust pending resolution of dispute through quantum meruit litigation). The holding of *Gilbert* was subsequently codified in Colorado Rules 1.5(h)(2) and 1.15(A)(c).

[12] For a detailed discussion of how the possessory lien works and is protected by Article 9 of the Uniform Commercial Code, even in the absence of an agreement explicitly granting a lien, see Cassandra Burke Robertson & Jesse Wynn, *Untangling Attorney Retainers from Creditor Claims*, 12 St. Mary's J. Legal Mal. & Ethics 142 (2021).

However, this rule does not affect a lawyer's continued ability to assert and enforce a retention lien as to client property in the lawyer's possession other than "a client's files." To the contrary, it affirmatively states the attorney's right to do so: "Rule 1.16(d) requires a lawyer to surrender papers and property to which the client is entitled when representation of the client terminates. Paragraph (i) of this rule states a narrow exception to 1.16(d): *a lawyer may retain anything the law permits – including property – except for files*." Rule 1.8, cmt. [17] (emphasis added).[13]

Under Rule 1.15(d):

> If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

A comment to this rule explains:

> The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should 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 should be promptly distributed.

Rule 1.15 cmt. [7].

The engagement agreement in the *Alexei* case contained no explicit terms to treat a portion of the client's prepayment as disputed funds under Rule 1.15(e) and thereby impound that portion in trust pending resolution of the fee dispute. *Alexei* is clear that refunding before pursuing a quantum meruit claim is not required to the extent the lawyer has a contractual claim of earned fees based an explicit and fair pricing method for partially-completed work. A fee agreement that contains a clearly written lien notice is another basis on which to defer refunding, what the lawyer reasonably believes can be proven as earned, before pursuing a quantum meruit claim.[14] For examples of such lien notices, see Cassandra Burke Robertson & Jesse Wynn, *Untangling Attorney Retainers from Creditor Claims*, 12 St. Mary's J. Legal Mal. & Ethics 142 (2021).

A separate provision of Rule 1.15 requires lawyers to "promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive." Rule 1.15(c). Thus, any amount in the lawyer's possession in excess of the lawyer's reasonable belief as to what can be proven in quantum meruit must be paid to the client promptly. What is "prompt" depends on the circumstances because "[t]he Rules of Professional Conduct [] are rules of reason." D.C. Rules: Scope cmt. [1]. If the lawyer is travelling and unable to make a transfer, for example, "prompt" requires doing it reasonably soon after returning. Holding on to other people's funds for over a year is not "prompt." *In re Nave,* 197 A.3d 511 (D.C. 2018); *In re Martin*, 67 A.3d 1032 (D.C. 2014).

**Possible Arrangements to "Earn" Fees Before the Conclusion of the Matter and Holding Disputed Fee Amounts in Trust Pending Resolution of Any Fee Dispute.**

As to possible arrangements that could entitle the lawyer to some amounts prior to the conclusion of a flat fee matter, *Alexei* left open a number of approaches so long as the chosen one is documented in the engagement agreement:

- "[T]he agreement might provide that the attorney earns the flat fee at an hourly rate set forth in the contract up to but not exceeding the total flat fee." To avoid improper front-loading, the hourly rate must be set at a level that will not prematurely exhaust client funds before completing substantially all work.
- "[T]he agreement might involve multiple discrete legal services … and attach a separate price for each service that sums to the total flat fee. Under such a contract, an attorney would earn the portion of the flat fee attributable to each separate legal service upon completing that project."[15]
- "[T]he agreement might provide that after the attorney submits, say, a first draft of a legal brief to the client for approval, [the lawyer] earns a [stated] percentage of the flat fee. These agreements, by deviating from the default rule, would allow attorneys to earn portions of the advanced flat fee as they worked on the client's behalf."
- "The rate at which the attorney earns the fees—whether hourly, by milestones, or by some other measurement—would still need to comport with the separate ethical requirement that the fees be reasonable."

319 A.3d at 414.

As we previously have written:

> The agreement can also contain language reflecting that the lawyer will earn the entire fee at the conclusion of a representation even if certain specified milestones have never been reached. For example, a lawyer who persuades a prosecutor to dismiss criminal charges in advance of trial could earn the entire fee, even if the lawyer and client had specified the trial as a milestone in their agreement. The milestones and approaches used can and should be tailored to the type of engagement. Those suitable for a criminal matter may not be appropriate to use for a real estate transaction or the drafting of a will.

D.C. Legal Ethics Opinion 355 (2010).[16]

Although not required by the trilogy, we recommend that the lawyer give notice to the client as each agreed milestone is reached, unless the circumstances are such that the client has other means of knowing that. In a criminal case, for example, with a milestone of "appearing at the arraignment, $500," separate notice should not be required because both the attorney and the client would have been physically present at the arraignment. If another threshold involved the "filing of a discovery motion, $500," however, the client might not know about it unless the

[13] D.C. Legal Ethics Opinion 379 (2020) speaks broadly about limits on "retention liens" but it was focused on file retention liens and did not address the distinction that Rule 1.8(i) and its comments make about retention liens as to files and retention liens against client funds and other non-file, client property in the lawyer's possession.

[14] Explicit lien language was not before the *Alexei* Court. The *Alexei* Court expressed no intention to overrule longstanding precedent on a lawyer's right to contract explicitly for a security interest in the client's funds. *See, e.g., Wolf v. Sherman,* 682 A.2d 194 (D.C. 1996) (describing differences between common law retaining liens and contract-based "express liens"). There is likewise no basis to conclude that Alexei requires refunding before briefly first attempting to compromise and settle the fee dispute with the client.

[15] We are mindful that it may be impossible, on all but the simplest projects, to craft flat fee milestones that address every possible future fork in the road. Lawyers may also consider having a contractual provision to measure the amount of fees that will accrue (or be impoundable in trust) if the representation ends after starting work on the first milestone (or any other milestone) but before completing that milestone.

[16] D.C. Legal Ethics Opinion 355 was withdrawn in 2022 because the advice in the ethics opinion about any writing requirement in then Rule 1.15 was inconsistent with *Ponds*.

lawyer gives notice or makes a practice of sending copies of all filings to the client. In arrangements based on hourly rates, lawyers can simply continue the usual practice of sending a monthly statement reflecting their tasks, the hours expended, and the charges to be taken against the agreed fee. Building a record in which the client receives regular notices (and perforce, opportunities to object) will strengthen the lawyer's position in the event of any later dispute or disciplinary investigation.

**Monthly Recurring Fees or Subscription Agreements.**

An agreement might also provide for the periodic payment of a fixed amount in exchange for certain services generally described, as is often the case in lobbying or outside counsel for small business agreements. It is the nature of such arrangements that more work may be done in some months than in others during the term of the contract. The flat fee per period allows the parties to share the risk and smooth out the expected payments. The client may prefer for its own budgeting purposes to know the full amount in advance and pay it in installments (which may be equal or unequal, periodic or intermittent, regular or irregular) during the term of the engagement. So long as the agreement is reviewed and adjusted from time to time to assure that it has not become "unreasonable," we do not believe that the client is entitled to a refund of the monthly (or periodic) fee for odd months (or periods) in which little or no actual work was done.

Under the *Mance/Ponds/Alexei* trilogy, however, the monthly fee in this situation will not be considered to have been "earned" until the month (or other agreed period) in question has passed. Billing ideally should be "in arrears" and the monthly amount should remain in the trust account until the month (or other period) ends. If the client terminates the representation mid-month, the lawyer should think very carefully before treating any portion of that month's fee as having been earned. Uncertainty on this issue can be avoided if the engagement agreement spells out a formula for calculating the fee for a mid-month termination, perhaps by applying a fraction in which the numerator is the number of days in the month when the lawyer was still retained and the denominator is the total number of days in that month.

Lawyers sometimes enter into subscription agreements with clients under which clients are entitled to specified legal services in exchange for payment of a monthly or other periodic fee. A simple example would entitle the client to up to a certain number of consultations per month for a fixed or reduced fee. After that threshold has been crossed, the rates are adjusted to a level defined in the subscription agreement. These agreements may go into considerable detail as to what services are and are not covered. To the extent that these plans require payment in advance for legal services to be provided in the future, however, they are subject to *Mance*, *Ponds* and *Alexei*. Lawyers offering such plans should conduct themselves accordingly, especially if and when the client terminates the agreement sooner than originally expected. Lawyers should be aware that, if an unsophisticated client uses no services for several months, Disciplinary Counsel may assert that the trilogy requires a return of some or all of the funds to the client.

**Conclusion**

Prepaid fees should normally be held in a trust account until earned by performing the associated work. Although it is possible to secure an enforceable informed consent from the client to put the prepayment in the law firm's operating account, the *Mance*, *Ponds* and *Alexei* trilogy now requires oral and written specific disclosures to the client as described above.

The lesson of the trilogy is that prepaid legal fees for future services cannot be "earned on receipt" regardless of what the engagement agreement says. When and how prepaid fees will be earned during the representation should be defined in a written engagement agreement with the client. Failing that, the fee will not be deemed earned for purposes of drawing from the trust account until the natural completion of the entire matter.

Even then, the lawyer may not be entitled to a full fee if the matter ends without achieving all the agreed milestones on which the "earning" of the fee was conditioned. Lawyers can and should anticipate that possibility and contract for a reasonable written solution in the engagement agreement at the start of the matter.

During the representation, we recommend that the lawyer inform the client as the agreed milestones are met, unless the circumstances are such that the client already knows about it.

When the representation ends before the matter ends, the lawyer may not pay herself from trust, over the client's objection, until that objection is resolved by agreement, arbitration, or litigation. While the lawyer will have the right to bring a quantum meruit claim against the client to collect a fee for the reasonable value of the lawyer's services, it is no longer safe to hold the disputed amount of the fee in trust pending a resolution of the dispute absent a client's prior written authorization to do so. Being safe means refunding before suing for quantum meruit *or* contracting from the outset to an impoundment in trust of what the lawyer in good faith believes to be the value of services rendered in the lawyer's trust account during the pendency of the dispute.

Because Disciplinary Counsel routinely requests the engagement agreement whenever someone files a disciplinary complaint against an attorney, every disciplinary complaint could potentially trigger a disciplinary investigation into a lawyer's billing and payment procedures even if the complaint itself has nothing to do with such matters and lacks any merit.

Lawyers will not be able to avoid rules established by the *Mance, Ponds* and *Alexei* decisions by calling what amounts to a prepayment for future services some form of earned on receipt "retainer" or similarly misleading characterization. Lawyers who do so, whether deliberately or because they honestly do not understand the difference, may put their law licenses in peril.

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*Ethics Opinion 390*

**Representation and Privilege Issues in Context of Prior Work**

A lawyer's prior work for a client occasionally becomes an issue in subsequent litigation or other representation on behalf of the same client.[1] When this situation arises, the lawyer must consider whether a conflict exists that prevents the lawyer from taking on or continuing the representation, or whether to seek the client's informed consent to a conflict. Among

[1] Rule 1.7(b)(4) enumerates several broad areas where a lawyer's professional judgment may be compromised, resulting in a potential conflict in the representation of a client. This opinion only addresses conflicts that may occur where the lawyer has represented a client and the lawyer's prior work for the client may be at issue in the same or different matter for the same client. Although the prior work of a lawyer may be at issue when the lawyer subsequently represents a different client, this opinion does not address that scenario.

other rules of professional conduct, D.C. Rules of Professional Conduct 1.7(b)(4), 1.7(c), and 3.7 may apply. Under Rule 1.7(b)(4), a lawyer cannot take on a representation or continue to represent a client in an ongoing matter if the lawyer's personal interests will adversely affect the lawyer's professional judgment on behalf of the client. Rule 1.7(c), however, may permit the lawyer to take on the representation or continue the representation in certain situations, notwithstanding the proscription of Rule 1.7(b)(4). Further, under Rule 3.7, absent limited circumstances, a lawyer cannot advocate for a client at a trial in which the lawyer is likely to be a necessary witness.[2]

Attorney-client privilege issues arising in litigation may implicate a lawyer's prior work for a client. By way of example, the client may be able to raise an advice of counsel defense or otherwise attempt to negate claims against the client based upon, in whole or in part, the prior work performed by the lawyer, where raising such a defense may require or counsel that the client waive attorney-client privilege in whole or in part over prior communications between the lawyer and client. As discussed below, this situation raises ethical issues for the lawyer.

**Applicable Rules**

- 1.0 (Terminology)
- 1.4 (Communication)
- 1.6 (Confidentiality of Information)
- 1.7 (Conflict of Interest: General Rule)
- 1.9 (Conflict of Interest: Former Client)
- 1.10 (Imputed Disqualification: General Rule)
- 3.7 (Lawyer as Witness)

*Inquiries*

1. Under Rule 1.7, when is a lawyer precluded from representing a client in a matter where the lawyer's prior work for the client may be at issue?

2. Under Rule 3.7, when is a lawyer precluded from advocating for a client at trial?

3. What are a lawyer's obligations when attorney-client privilege issues arise based upon the lawyer's prior work for a client?

[2]*See generally* Iowa Ethics Opinion 09-03 (August 25, 2009) (analyzing Iowa Rules 1.7 and 3.7 in discussing whether law firm involved in purchase of closely held corporation could represent client in later dispute between the buyer and seller where law firm's prior work could be the focus of litigation.)

*Discussion*

D.C. Rules of Professional Conduct 1.7(b)(4) and 1.7(c) state:

> (b) Except as permitted by paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:
>
> * * * * *
>
> (4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests.
>
> (c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if
>
> (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and
>
> (2) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

D.C. Rule of Professional Conduct 3.7 states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9. The provisions of this paragraph (b) do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency.

**A. Application of Rule 1.7 When a Lawyer's Prior Work for a Client Raises Issues as to Whether the Lawyer May Continue to Represent the Client**

A lawyer's prior work for a client may become an issue in a variety of circumstances. For example, a lawyer may provide tax advice that later becomes the subject of an audit or litigation with the Internal Revenue Service. Or a lawyer may negotiate a contract or draft an instrument on behalf of a client, and the meaning of the language negotiated or drafted by the lawyer later becomes the subject of actual or threatened litigation. *See* Iowa Ethics Opinion 09-03, *supra*. The lawyer and the lawyer's firm may nevertheless wish to represent the client in the subsequent matter, and the client may also desire the firm's representation in the subsequent matter. The lawyer and the firm, however, will need to consider their ethical obligations in determining whether they can take on the representation.

Rules 1.7(b)(4) and 1.7(c) provide the starting point in the analysis. As a threshold matter, Rule 1.7(b)(4) requires the lawyer to determine whether the lawyer can provide unvarnished advice to the client and vigorously represent the client given the lawyer's prior work or whether the lawyer's professional judgment will be or reasonably may be adversely affected by the lawyer's interest in her prior work. A concern is that the lawyer may avoid taking positions that could bring the quality of the lawyer's prior work into question. For example, the lawyer might choose a strategy that avoids exposing the shortcomings of the lawyer's prior work, even if that might not be the best strategy for the client. The lawyer must carefully analyze the rules and the circumstances of the potential representation and consider whether it would be permissible, or prudent, to represent the client. *See* Rule 1.7, cmt. 11 ("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.") *See, e.g., In Re Conduct of Kluge*, 335 Or. 326, 336-337 (2003) (lawyer violated Oregon's rules of professional conduct where the legality of the attorney's prior work was at issue, his interests reasonably might have affected his professional judgment, and he failed to make full disclosure of the potential conflict to his client and did not obtain his client's consent.)[3] If the lawyer concludes that she cannot provide competent and diligent representation to the client under the circumstances, then she may not

[3]The *Kluge* court opined that the lawyer "had a strong interest in defending the propriety of his conduct to protect his professional reputation…. and in avoiding any personal liability to [plaintiff] for his actions as [plaintiff's] supervisor." *Id*. In addition, the court found that the lawyer's interests might reasonably have compromised his ability to advise his client about litigation strategy in the case.

undertake or continue the representation under Rule 1.7(c).

Examples of situations where courts have found representation impermissible, under the particular circumstances of those cases, include *In Re Kieler*, 290 Kan. 397, 401 (2010) (violation of Rule 1.7 when lawyer continued to represent client after malpractice claim ripened, his interests were in conflict with the client's interests, and he failed to obtain informed consent from his client under Kansas Rule 1.7(b)); *In re Marriage of Wixom and Wixom*, 182 Wash. App. 881, 888-905 (lawyer violated Rule 1.7 when he refused to withdraw from case after contending that his client should pay all fees associated with a Rule 11 sanctions order; because actual conflict existed, the client could not waive the conflict.). In these and similar situations, the lawyer must carefully consider, among other things, whether she can provide "competent and diligent" representation to the client.

There are instances where the lawyer's professional judgment on behalf of the client reasonably may be adversely affected by the lawyer's personal interests, yet the client may nevertheless wish to retain the lawyer or continue with a current representation. In such circumstances, under Rule 1.7(c) the lawyer must: 1) reasonably believe that the lawyer can provide competent and diligent representation to the client; and 2) obtain informed consent from the client to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation. *See Ambush v. Engelberg*, 282 F. Supp. 3d. 58, 64 (D.D.C. 2017) (attorney could continue to represent clients where clients provided consent – after being advised by another attorney – as to attorney's continued representation, and attorney maintained that he reasonably believed he could provide competent and diligent representation of clients).

If the lawyer reasonably believes that the lawyer can provide competent and diligent representation to the client, the lawyer must communicate adequate information and an explanation about the material risks of and reasonable available alternatives to the proposed course of conduct.[4] In the context of prior work, the lawyer should at a minimum advise the client of the nature of the potential conflict, including the known risks of the representation, and the ability of the client to obtain new counsel. Although the lawyer's disclosures and the client's consent need not be in writing, it is prudent for the lawyer's disclosures and the client's consent to be in writing to avoid any subsequent misunderstandings.

A question arises as to whether the lawyer is in the best position to advise the client when there is a potential conflict of interest under Rule 1.7 due to the lawyer's prior work for the client. In such circumstances, the lawyer should consider advising the client to obtain independent legal advice on whether the client should retain the lawyer or the lawyer's firm in the matter.[5]

**B. The Impact of Rule 3.7**

In addition to assessing whether a lawyer can diligently handle a subsequent matter given the lawyer's prior work, the lawyer should assess whether the lawyer is likely to be a necessary witness at trial in the subsequent matter. Under Rule 3.7, if the lawyer is likely to be a necessary witness, the lawyer cannot act as an advocate at a trial in the matter unless the testimony relates to an uncontested issue, the testimony relates to the nature and value of legal services rendered in the case, or disqualification of the lawyer would work substantial hardship on the client.[6] Whether a lawyer is "likely" to be a "necessary" witness is dependent on the particular facts of the case. Others besides the lawyer may be able to testify on the matter on which the lawyer has knowledge, or the issue may not be important to the case or not be in dispute.[7]

Rule 3.7 generally applies only to advocacy at a trial and does not preclude an attorney from advocating for a client in pre-trial matters. The Committee has previously issued Legal Ethics Opinion 228, making it clear that Rule 3.7 applies only to representation as an advocate at trial, and that a lawyer may generally work on and appear in pre-trial matters for the client even if the lawyer is precluded from advocating for the client at trial under Rule 3.7. *See also* ABA Informal Op. 89-1529 (Oct. 20, 1989) (same).

Rule 3.7 attempts to balance the interests of the client in proceeding with the lawyer of its choice and the need to ensure that the opposing party is not prejudiced by the lawyer appearing both as an advocate and witness. As comments 1 and 2 to Rule 3.7 state:

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

The substantial hardship exception recognizes that "a balancing is required between the interests of the client and those of the opposing party."[8] Although the opposing party might suffer prejudice from the lawyer testifying, "[e]ven 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."[9] *Id.*

Even if the lawyer is disqualified from acting as an advocate due to the lawyer's likelihood of appearing as a witness at trial, other lawyers in the firm are not necessarily precluded from acting as advocates in the trial. "[T]here is no general rule of imputed disqualification applicable to Rule 3.7." Rule 3.7, cmt. 5; *see* Rule 1.10. Whether there is nevertheless an improper client conflict of interest is determined by Rule 1.7 or 1.9. The lawyer's testimony may conflict with the client's, or the lawyer may be vulnerable to impeachment due to an incentive to testify in support of the position of the lawyer's firm.[10] The lawyer and firm will need to analyze whether a conflict may be present and fully inform the client of the issues so that the client can make a

[4] *See* Rule 1.0(e).

[5] *See Ambush, supra*.

[6] *See* Rule 3.7(a).

[7] If the lawyer is a "necessary" witness from an objective standpoint, a strategy of refraining from calling the lawyer as a witness ordinarily will not avoid the restriction of Rule 3.7. *See, e.g., Premium Products, Inc. v. Pro Performance Sports, LLC*, 997 F. Supp. 2d 433 (E.D. Va. 2014); *Freeman v. Vicchiarelli*, 827 F. Supp. 300 (D.N.J. 1993); *MacArthur v. Bank of N.Y.*, 524 F. Supp. 1205 (S.D.N.Y. 1981). *But see Real Estate Training Int'l, LLC v. Nick Vertucci Cos.*, 124 F. Supp. 3d 1005 (C.D. Calif. 2015) (applying California rule).

[8] Rule 3.7, cmt. 4.

[9] For example, a client might face significant hardship if it must switch lawyers when the initial lawyer has substantial knowledge of the facts and nuances of the case, and the cost in time and money to switch counsel would be significant.

[10] *See* Rule 3.7, cmt. 6

meaningful choice whether to retain the firm or continue to have the firm represent it in the matter.

**C. Attorney-Client Privilege Issues**

A client's decision whether to waive an attorney-client privilege concerning the lawyer's prior work can implicate the rules and considerations discussed above. For example, a lawyer may advise a publicly-traded company that it need not reveal certain information in its public disclosure materials. If the client is later sued for failing to disclose that information, the client may need to consider an advice of counsel or similar defense. At least in some circumstances, advancing such a defense might mean waiving attorney-client privilege over some of the lawyer's communications, either because the client may affirmatively produce such communications or because opposing counsel may seek them.[11] If the same lawyer who gave the disclosure advice is representing the client in the subsequent litigation matter, a Rule 1.7 conflict may exist because the lawyer's own prior conduct is at issue. The potential waiver of privilege may be a significant aspect of the Rule 1.7 inquiry because the lawyer's own communications might be subject to disclosure and, depending on the circumstances, might cause embarrassment or create legal exposure for the lawyer. In these circumstances, the lawyer will need to fully inform the client about these circumstances and determine whether she can still provide competent and diligent representation to the client.[12] *See* Rule 1.7(c); Rule 1.6(e)(1) (unless an exception applies, a lawyer may only use or reveal client confidences or secrets with the informed consent of the client); *see also* Rule 1.4(b).

Rule 3.7 may also be implicated when a client advances a defense that might lead to an implied waiver of the attorney-client privilege. If the privilege is waived, the likelihood that the lawyer will be a necessary witness at trial increases, and consideration must be given to whether the lawyer can or should continue to represent the client.

Given the foregoing issues, the lawyer must determine whether she is in the best position to address with the client the possibility of advancing an advice of counsel or good faith defense. As with the representation issues discussed above, in providing advice to the client, the lawyer may intentionally or inadvertently seek to protect the lawyer's own interests rather than those of the client. In the case of privileged materials, the lawyer may not wish to have potentially embarrassing or ill-thought-out attorney-client communications disclosed to the other side, the court, or a jury, and may wish to avoid the possibility of having to testify at trial. And the lawyer may be concerned about a later malpractice claim by the client. Again, depending on the circumstances, an independent lawyer may be in a better position to advise the client on whether to advance the defense.

**D. Conclusion**

When a lawyer's prior work may be at issue in a subsequent matter for the same client, the lawyer must carefully consider whether the ethics rules permit the lawyer to represent the client in the subsequent matter. Rules 1.7 and 3.7, in particular, come into play. As an example, Rules 1.7 and 3.7 may be implicated when a client faces a decision whether to waive privilege, or whether to assert a position in litigation that could have the effect of waiving privilege, over the lawyer's prior communications with the client. When the lawyer's prior work is at issue, the lawyer must determine whether the lawyer's professional judgment will be or reasonably may be adversely affected by the lawyer's personal interests, and if so, whether the lawyer can continue to provide the client with diligent and competent representation. If the lawyer reasonably believes she can continue the representation notwithstanding the conflict, the lawyer must fully inform the client of the existence and nature of the conflict, as well as the possible adverse consequences of the representation, and obtain the client's informed consent before proceeding. It may be prudent for the lawyer to suggest that the client seek the advice of independent counsel. When a trial is possible, the lawyer or independent counsel must consider whether the lawyer is likely to be a necessary witness at the trial and, if so, whether Rule 1.7 or Rule 3.7 affects the lawyer's ability to represent or continue to represent the client.

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[11] *See, e.g. United States v. Bilzerian*, 926 F.2d 1285 (1991) (attorney-client privilege implicitly waived when defendant in criminal securities fraud case raised good faith defense)

[12] Of course, there are a myriad of other situations where a lawyer's prior work might be implicated in a potential waiver of attorney-client privilege. This opinion does not purport to address the issue of when a client will be deemed to have waived the privilege; rather, the opinion merely discusses the ethical issues that a lawyer should consider when confronted with a potential waiver of privilege over past communications.