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**DISTRICT OF COLUMBIA BAR  
RULES OF PROFESSIONAL  
CONDUCT REVIEW COMMITTEE**

**PROPOSED AMENDMENTS TO THE  
DISTRICT OF COLUMBIA RULES  
OF PROFESSIONAL CONDUCT:  
FINAL REPORT AND RECOMMENDATIONS**

**Members of the Committee**

Leah Wortham, Chair	Stephen J. Csontos
Anthony C. Epstein, Vice Chair	Scott S. Dahl
Loretta C. Argrett	Eric L. Hirschhorn
Leonard H. Becker	Thomas B. Mason
Bridget BaileyLipscomb	Daniel Schumack
Seth E. Bloom	Mary Lou Soller
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As approved by the D.C. Bar Board of Governors  
for submission to the District of Columbia Court of Appeals.

June 21, 2005; revised October 6, 2005

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## INTRODUCTION

This Report sets forth the final recommendations of the Rules of Professional Conduct Review Committee of the D.C. Bar (the “Rules Review Committee” or “Committee”) regarding amendments to the District of Columbia Rules of Professional Conduct (“D.C. Rules”). The Committee focused its review on the changes to the Model Rules of Professional Conduct of the American Bar Association (“ABA”) in 2002 and 2003. These changes were based on the recommendations of the ABA’s Commission on the Evaluation of the Rules of Professional Conduct (generally known as the “ABA Ethics 2000 Commission”) and the ABA Corporate Responsibility Task Force. The Committee also considered other issues that have arisen since the last amendments to the D.C. Rules became effective in 1996, including ABA amendments to the Model Rules prior to the Ethics 2000 review.

The ABA Ethics 2000 Commission recommended numerous changes – substantive, organizational, and stylistic – to the ABA Model Rules. In August 2001 and February 2002, the ABA House of Delegates approved most of the recommendations, with some significant exceptions. Additional changes to Rules 1.6 and 1.13 were adopted by the ABA House of Delegates in August 2003 in response to the report of the ABA Corporate Responsibility Task Force.

As the ABA Ethics 2000 Commission conducted its review, the Rules Review Committee made several submissions to that Commission starting in 1999 in response to the Commission’s request for public comments. The Committee briefed the D.C. Bar’s Delegates before the ABA House of Delegates voted on the Commission’s recommendations.

Concurrently with its review of the revised Model Rules, the Rules Review Committee received requests from the D.C. Bar’s Legal Ethics Committee to consider amendments to various D.C. Rules, and this Report addresses each of those requests. This Report also addresses a proposal by a group of lawyers to amend D.C. Rule 7.1 with respect to solicitation of prospective clients by so-called runners.

During its monthly meetings over the course of its deliberations, the Committee discussed each rule. To facilitate the Committee’s analysis, a Committee member prepared a written commentary on each rule, discussing differences between the D.C. version and the prior Model Rule counterpart, both before and after the recent changes to the Model Rules.<sup>1</sup>

On January 31, 2005, the Committee completed its initial report. Representatives of the Committee met with the Bar’s Board of Governors on February 18, March 14, April 12, April 26, May 12, June 15, and June 21 to explain the Committee’s proposals and to receive comments from Board members. These comments resulted in a number of changes to the Committee’s recommendations. Those changes are set forth a

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<sup>1</sup> These memoranda are available through the Committee’s liaison with the D.C. Bar staff, Lisa Y. Weatherspoon.

memorandum dated June 15, 2005, from the Committee to the Board. That memorandum was posted on the Bar's website on June 16 with an invitation for further public comment.

On February 8, 2005 the Bar solicited public comments on the proposals in the Committee's initial report. Sixteen public comments were received by the announced deadline of April 8, and the Committee received a few additional comments after the deadline, to which it was able to give only limited consideration. The Committee concluded that some of these comments merited changes to the Committee's recommendations. Those changes are summarized in the Committee's June 15, 2005, memorandum discussed above. Exhibit A to that memorandum lists the public comments. The public comments also raised some issues that the Committee believes are more appropriately addressed in a Legal Ethics Committee opinion than in the text of or comments to a rule, and the Committee will send a letter to the Legal Ethics Committee identifying these issues for its consideration.

This final report incorporates the changes that the Committee made to its initial recommendations in response to comments both from the Board and from the public. These comments were thoughtful and insightful, and they resulted in significant improvements in the Committee's recommendations.

The Committee generally arrived at consensus judgments. Some members do not agree with some of the recommendations. Each recommendation, however, represents the view of at least a majority of the Committee, and each member of the Committee joins in this report as a whole.

The first section of this Report contains an overview of the Committee's most significant recommendations, including both recommendations to make significant changes in substance or structure to the D.C. Rules, and recommendations not to adopt significant changes to the Model Rules. The Report then discusses each rule. The section on each rule contains an explanatory note about the Committee's recommendations, and a red-line version showing the changes proposed to the existing D.C. Rule.<sup>2</sup> The Committee has also prepared a version of the Rules that incorporates all of the Committee's recommendations, but without red-lining and without the explanatory notes.

This Report reflects the enormous commitment of all of the members of the Committee since 1999, when the Committee submitted its first recommendations to the ABA Ethics 2000 Commission. Special thanks go to former Chairs Leonard H. Becker and Kathryn M. Fenton, along with current Vice-Chair Anthony C. Epstein, for their

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<sup>2</sup> The existing D.C. Rules are available at <[http://www.dcbbar.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_conduct/index.cfm](http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/index.cfm)>, and the Model Rules are available at <[http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html)>. The report of the ABA Ethics 2000 Commission is available at <[http://www.abanet.org/cpr/e2k-report\\_home.html](http://www.abanet.org/cpr/e2k-report_home.html)>, and the report of the ABA Corporate Responsibility Task Force is available at <[http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf)>.

major roles in the organization and production of the final report. The members of the Committee during its consideration of the Ethics 2000 recommendations and its subsequent comprehensive review of the D.C. Rules included:

Loretta C. Argrett.....2002 – present  
 Bridget Bailey-Lipscomb.....2004 – present  
 Leonard H. Becker.....2000 – present

*Chair 2002-2003*

Seth E. Bloom.....1999 – present  
 Arthur D. Burger.....1998 – 2004

*Interim Chair 2001, Vice Chair 2000-01*

Kathleen A. Carey.....2001 – present  
 Karen Christensen.....1998 – 1999  
 Barry E. Cohen.....2000 – present  
 Stephen J. Csontos.....1994 – 2000, 2003-present

*Vice-Chair 1999-2000*

Scott S. Dahl.....2000 – present  
 Anthony C. Epstein.....1999 – present

*Vice-Chair 2004-present*

Kathryn M. Fenton.....1998 – 2004

*Chair 2003-2004*

Tara Fentress.....1999 – 2002  
 Eric L. Hirschhorn.....2004 – present  
 Daniel Joseph.....1994 – 2000

*Chair 1997 –1999*

Barbara Kammerman.....1996 – 2001  
 Gary J. Krump.....2001 – 2002  
 Margaret C. Love.....1997 – 2000  
 Thomas B. Mason.....2002 – present  
 Gerald P. Norton.....1995 – 2001  
 Robert E. O’Malley.....1999 – 2001

*Chair 2000-2001*

Daniel D. Polsby.....2001 – 2003  
 Leonard Rubenstein.....2000 – 2001  
 Daniel Schumack.....2004 – present  
 Mary Lou Soller.....2002 – present  
 Michael B. Trister.....1994 – 2000

*Chair 1999-2000*

Albert W. Turnbull.....2001 – present

Laura S. Wertheimer .....1999 – 2000  
Leah Wortham .....2000 – present  
*Chair 2004-present, Vice-Chair 2001-2004*

The liaisons with the D.C. Bar staff provided exemplary service to the Committee throughout its deliberations: Keith J. Soressi (1999 – 2000); Ernest T. Lindberg (2000 – 2002); and Lisa Y. Weatherspoon (2002 – present).

The Committee also was ably served by law clerks from the Bar: Michael Osborne (2000 – 2001); Erin E. Moore (2001 – 2002); Boisseau Woltz (2002 – 2003); Shweta Nagrath (2003 – 2004); and Stephanie Nguyen (2004 – 2005).

Finally, the Committee thanks the law firms of Jones Day and Steptoe & Johnson LLP for their assistance in compiling this report.

Leah Wortham  
Chair



## **ERRATA STATEMENT**

The District of Columbia Court of Appeals reviewed the June 21, 2005, Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations (REDLINED VERSION). Three typographical errors were found and corrected. On page 40 in Comment 13 the reference to (d) was changed to (e). On page 44 in Comment 22 the word “other” (in the second line) was deleted. On page 36 in Rule 1.6(d) the words “confidences and” were added after “client” and before “secrets.”

In light of those corrections, Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations (REDLINED VERSION) dated October 6, 2005, were issued to replace the June 21, 2005, Final Report.

## **OVERVIEW**

The D.C. Rules of Professional Conduct, which took effect in 1991, adopted the format and general structure of the ABA Model Rules. They differed, however, in several significant respects. Most importantly, they reflected a few significant policy differences. The D.C. Rules also often included guidance, frequently in Comments, on topics not addressed specifically in the Model Rules. In a number of places, for example, the D.C. Rules address the application of particular rules to government lawyers. In some instances, the wording of the D.C. Rules differs from that of the Model Rules, but the Jordan Commission and Board of Governors explained that no policy difference was intended. As a result of these factors, the D.C. Rules probably vary more from the Model Rules than those of any other jurisdiction that has adopted the Model Rules format.

The changes to the Model Rules that the ABA adopted in February 2002 in response to the recommendations of its Ethics 2000 Commission include a few significant policy changes, although some of the Commission's controversial recommendations were rejected by the ABA House of Delegates. In August 2003, the ABA made additional policy changes to Model Rules 1.6 and 1.13 in response to recommendations of the Corporate Responsibility Task Force, spurred in part by allegations of recent corporate misconduct and by the Sarbanes-Oxley Act. The large majority of recent changes to the Model Rules, however, did not make significant policy changes but rather provided clarification and additional guidance.

The Committee looked carefully at all of the changes to the Model Rules adopted by the ABA or recommended by its Ethics 2000 Commission and its Corporate Responsibility Task Force. The Committee considered not only controversial policy changes but also the many wording changes that represent drafting improvements.

Where the Court of Appeals made a decision to vary in policy or format from the Model Rules, the Committee's presumption was to maintain the D.C. approach. The Committee, however, reviewed each such difference and assessed whether subsequent developments warranted reconsideration. In a number of instances, the Court of Appeals adopted language in the original Model Rules or Comment, but that language had subsequently been amended by the ABA, either in response to the recommendations of the Ethics 2000 Commission or the Corporate Responsibility Task Force, or in one of approximately thirty previous amendments to the Model Rules since their original adoption. In considering these changes, the Committee weighed policy considerations, the value of uniformity with the Model Rules and with jurisdictions that have opted to follow the Model Rule approach, and the value of consistency with the existing D.C. Rules.

Like the February 2002 amendments to the ABA Model Rules, most of the Committee's proposals would improve drafting or provide additional guidance. When a new ABA provision does not conflict with a policy in the D.C. Rules, the Committee

often proposed adoption in the interest of uniformity. In other instances, the language in the D.C. Rules had stood the test of time, and the Committee left it intact.

The following summary highlights recommendations that represent policy changes from the existing D.C. Rules or that propose rejection of significant recent changes to the Model Rules. This overview also identifies Rules to be added and deleted, even though many of these changes are consistent with existing Comments to the current Rules or with D.C. ethics opinions. The many recommendations the Committee thought useful for clarification, additional guidance, or uniformity with the Model Rules are discussed in explanatory notes to each of the Rules, but not in this summary.

Rule 1.6 – Client Confidences. The Committee recommends adoption of a permissive disclosure option when a lawyer’s services have been used to further a crime or fraud and disclosure of client confidences or secrets is necessary to prevent, mitigate, or rectify reasonably certain substantial injury to the financial interest or property of a third party. The disclosure is limited to the extent reasonably necessary to accomplish the ends specified, and Comments to Rule 1.6 and related Comments to Rule 4.1 stress that less drastic options, *e.g.*, withdrawal or “noisy withdrawal,” remain sufficient in many circumstances. This limited disclosure option is consistent with the policy underlying the crime-fraud exception to the attorney-client privilege, which strips otherwise privileged information of protection when a client abuses a lawyer’s services by employing them to further a crime or fraud. A new cross-reference to Rule 1.6 in Rule 4.1 points out that, if a lawyer’s failure to disclose information regarding client crime or fraud that was furthered by use of the lawyer’s services would constitute the lawyer’s own assistance in the client’s crime or fraud, Rule 4.1 requires the lawyer to make disclosure reasonably necessary to prevent such assistance. The Committee also recommends adding an ABA provision that explicitly permits a lawyer to disclose confidential information to another lawyer from whom the first lawyer seeks advice on compliance with law or the ethical rules. Because of the additional proposed exceptions to Rule 1.6, the Committee proposes clarifying amendments to Comments to Rules 2.3, 3.3, 3.4, 4.1, 8.1, and 8.3.

Rule 1.7 – Conflicts of Interest. The Committee recommends retaining the fundamental structure of the D.C. version of Rule 1.7, which departs significantly in form but not substance from the Model Rule counterpart. The Committee proposes adding a new Rule 1.7(c)(2) to clarify that a lawyer should not seek consent to joint representation unless the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client. The Committee does not recommend the ABA’s requirement that all conflict waivers be in writing, but does recommend modifying a Comment to emphasize that it is ordinarily prudent for lawyers to obtain written informed consent.

Rule 1.8 – Transactions with Clients. The Committee decided not to recommend the ABA’s categorical prohibition of sexual relationships between lawyers and clients. Instead, it recommends new Comments to Rule 1.7, identifying the potential conflict of interest issues that can arise from sexual relations with clients.

Rule 1.10 – Imputed Disqualification. The Committee concluded that the basic structure of the D.C. Rule regulating imputed disqualification should remain unchanged, notwithstanding its significant differences in format from the counterpart Model Rule. Consistent with the Model Rule, the Committee recommends adoption of an exception from the general rule of imputed disqualification of other lawyers in a firm, namely when one lawyer is disqualified because of a personal interest that is unlikely to affect the other lawyers’ adherence to professional standards. Also consistent with the Model Rules, the Committee recommends the repeal of the D.C. provision that essentially forbids a law firm from representing a new client whose interests are adverse to those of a former firm client in the same or substantially related matter, even if the lawyers who have protected information about the former client have left the firm.

Rule 1.11 and 1.12 – Government Lawyers, Judges, and Law Clerks. Consistent with the ABA Rules, the Committee recommends addressing conflict of interest questions with regard to former judges, law clerks, and third-party neutrals in Rule 1.12 instead of in Rule 1.11.

Rule 1.13 – Organization as Client. The Committee recommends adoption of the recent amendment to the ABA Model Rules that requires lawyers for organizations to report certain violations to higher authorities in the organization than the lawyer’s normal contacts, unless the lawyer reasonably believes it is not in the best interest of the organization to do so. This would move guidance on the point from a D.C. Comment to the text of the Rule, and like the revised ABA Rule, would create a presumption that the lawyer should “report up” in certain circumstances. While conforming to the ABA on this “reporting up” amendment, the Committee declined to recommend the “reporting out” provisions of Rule 1.13 that the ABA adopted in August 2003. The Committee believes that its recommended permissive disclosure option in Rule 1.6, when a lawyer’s services have been used to further a crime or fraud, would provide a sufficient option to “report out” conduct that could injure third parties or the organization. Consistent with D.C.’s long-standing policy in favor of expansive protection of client confidences, the Committee declined to recommend a broader “reporting out” option applicable only to organizational clients, whose confidences should be protected to the same degree as those of individual clients.

Rule 1.14 – Client Under a Disability. The Committee recommends adopting ABA changes to the Model Rule, including a new title. These changes recognize that clients’ capacity to participate in decisions about their legal representation fall along a continuum of capacity, and that clients do not fall into only two groups – those able to have “normal” relationships and those “under a disability.” The Committee recommends a few modifications to the ABA text, particularly to caution lawyers that surrogate decision-making options other than formal guardianships or conservatorships may best serve clients with diminished capacity, and lawyers should advocate the least restrictive form of intervention in the client’s decision-making..

Rule 3.3 – Candor to Tribunal. The D.C. Rule gave more protection to client secrets and confidences than the corresponding Model Rule, even before the Ethics 2000 changes widened the gap by expanding lawyers’ duty to disclose client confidences and secrets in order to rectify a fraud on the tribunal. The Committee recommends retaining the basic D.C. approach, but proposes some changes. For example, consistent with the recommendations concerning Rule 1.6, the Committee would make an exception to the general rule prohibiting disclosure of information protected by Rule 1.6 when a client has used or is using the lawyer’s services to further a crime or fraud.

Rule 3.4 – Fairness to Opposing Parties. The Committee recommends adoption of a new subsection prohibiting all lawyers from making peremptory strikes of jurors for any reason prohibited by law. The current prohibition against discriminatory exercise of peremptory challenges in Rule 3.8 applies only to prosecutors.

Rule 4.4 – Respect for Rights of Third Parties. The Committee proposes to incorporate in Rule 4.4 the approach taken in D.C. Bar Legal Ethics Committee Opinion 256 to the frequently recurring problem of inadvertent production of privileged documents. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures. By contrast, the Committee’s proposal requires the receiving lawyer to return the documents to the sending party in this circumstance, and also prohibits the receiving lawyer from reading or using the material if the lawyer has not done so before realizing that it was transmitted in error.

Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs. Consistent with the recommendation of the D.C. Bar Pro Bono Committee, the Rules Review Committee recommends adoption of ABA Model Rule 6.5, which is a new addition to the Model Rules. This Rule facilitates the provision of pro bono legal services by limiting the imputation of unknown conflicts of interest in circumstances where it would be impractical to perform a normal conflicts check. This change makes it possible for attorneys to provide services they otherwise might believe to be precluded by the inability to perform a conflicts check within their firms or organizations.

Rule 7.1 – Communications Concerning Lawyer’s Services. The Committee recommends two sets of changes to Rule 7.1. First, the Committee recommends repeal of D.C.’s unique option that permits lawyers to pay third parties for referrals. The Committee was convinced that there had been significant harassment of accident victims by “runners” paid by lawyers to obtain new clients. The Committee also recommends a redefinition of abusive solicitation to include “coercion, duress, or harassment” rather than “undue influence,” the term in the current Rule. Second, in response to reports from the Public Defender Service, the U.S. Attorney’s Office, and the Office of Bar Counsel that some lawyers are taking advantage of inmates by promising quick release from the D.C. Jail or favorable resolution of their cases, the Committee recommends adding a requirement that a lawyer who solicits an inmate at the D.C. Jail already represented by another lawyer notify that lawyer before accepting funds from the inmate.

Rule 8.4 – Misconduct. The Committee recommends addition of a new Comment, adapted from an ABA Comment, stating that manifestations of bias based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status violate Rule 8.4(d) when their offensive, abusive, or harassing nature seriously interferes with the administration of justice.

Rule 8.5 – Disciplinary Authority; Choice of Law. The Committee recommends retention of the choice of law provision in current D.C. Rule 8.5(b). The current D.C. Rule is identical to the former version of the ABA Model Rule. Based on the Ethics 2000 review, the Model Rule now requires disciplinary authorities to apply the rules of the jurisdiction where conduct not connected with matters before tribunals occurred or, if different, the rules of the jurisdiction where the predominant effect of the conduct occurred, regardless of whether the lawyer was admitted to practice in that jurisdiction. In contrast, the D.C. Rule, like the former version of the Model Rule, requires application of the rules of a jurisdiction in which the lawyer is licensed to practice. The Committee concluded that the new Model Rule would subject lawyers to substantial and unreasonable burden and uncertainty in determining where the predominant effect of their conduct occurred and whether the applicable rules are different from the more familiar rules of the jurisdictions where they are admitted.

The Committee proposes five new Rules based on their counterparts in the Model Rules. These Rules are consonant with existing D.C. Rules and Comments; indeed, much of their content is already contained in current Rules and Comments, or in D.C. Bar Legal Ethics Committee Opinions. These five Rules are: Rule 1.17 concerning sale of a law practice; Rule 1.18 concerning duties to prospective clients; Rule 2.4 concerning lawyers serving as third-party neutrals; Rule 5.7 governing provision of law-related services like title insurance and accounting; and Rule 6.5 regarding nonprofit and court-annexed limited legal services programs. Consistent with the ABA’s February 2002 amendments, and the recommendation to address the topic in a new Comment to Rule 1.7, the Committee proposes deletion of Rule 2.2 concerning intermediaries.

The Committee proposes several conforming amendments to the ABA Model Rules in the terminology section of the D.C. Rules, including definitions of “informed consent” and “writing,” as well as corresponding changes in several Rules.

## **PROPOSED AMENDMENTS**

### **Scope Section**

#### **Explanation of Proposed Changes**

The amendment to Comment [4] reflects District of Columbia decisional law according both legal and evidentiary significance to the ethical rules in civil litigation between private parties. *See Griva v. Davison*, 637 A.2d 830 (D.C. 1994); *Avianca Inc. v. Correia*, 705 F. Supp. 666, 678 (D.D.C. 1989).

#### **Redline Showing Proposed Changes**

##### **Scope**

[1] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role. Many of the Comments use the term “should.” Comments do not add obligations to the Rules but provide guidance for 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.



## **Terminology Section**

### **Explanation of Proposed Changes**

The Committee considered the differences in the definitions in the D.C. Rules and the Model Rules.

In five instances, the Model Rule and D.C. Rule terms are identical and the Committee recommends no changes to the D.C. terms. These terms are “belief”/“believes,” “substantial,” “reasonable”/“reasonably,” “knowingly”/“known”/“knows,” and “reasonably should know.” The Committee proposes no change to the two defined D.C. terms, “law clerk” and “matter,” that do not appear in the Model Rule.

Four Model Rule terms have no counterparts to the D.C. Rule terms. The Committee recommends that the Court adopt two of the Model Rule terms – “screened” and “writing.” The ABA definition of “screened” is consistent with the discussion of screening in D.C. Legal Ethics Committee Opinions 227 and 279. The ABA definition of “writing” includes electronic as well as tangible records, as well as a definition of what constitutes a “signed” writing that is modeled on the Uniform Electronic Transactions Act.

Five concepts are treated differently in the Model Rules and D.C. Rules. The Committee proposes adoption of five Model Rule terms – “firm,” “fraud”/“fraudulent,” “informed consent,” “partner,” and “tribunal.” The existing D.C. definition for “fraud”/“fraudulent” is identical to the former Model Rules definition. The Ethics 2000 Commission explained that “[t]he present definition is ambiguous because it does not clearly state whether, in addition to the intent to deceive, the conduct must be fraudulent under applicable substantive or procedural law. In other words, it is possible that conduct might be considered ‘fraudulent’ merely because it involves an intention to deceive, even if it does not violate any other law. The Commission recommends clarifying that the conduct must be fraudulent under applicable substantive or procedural law.” The Committee agrees. The term “informed consent” taken from the ABA Model Rules is similar to the concept of consent after appropriate consultation contained in the existing D.C. Rules, and its adoption of this term is intended to achieve consistency, not to effect a substantive change in the D.C. Rules.

For consistency and ease of reference, the Committee recommends adoption of the Model Rule format by making what had been the Terminology Section a new Rule 1.0.

## **Redline Showing Proposed Changes**

### **Rule 1.0 – Terminology**

~~{1}~~(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.

~~{2}~~ “Consent” denotes a client’s uncoerced assent to a proposed course of action, following consultation with the lawyer regarding the matter in question.

~~{3}~~(b) “Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

~~{4}~~(c) “Firm” or “law firm” denotes a lawyer or lawyers ~~in a private firm, lawyers employed in the legal department of a corporation or other organization, and 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.

~~{5}~~(d) “Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information 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.

~~{6}~~(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

~~{7}~~(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.

~~{8}~~(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.

~~9~~(i) “Partner” denotes a member of a partnership, ~~and~~ 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.

~~10~~(j) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

~~11~~(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.

~~12~~(m) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

~~13~~(n) “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~~ 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, photostating, photography, audio or videorecording, 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**

### **Explanation of Proposed Changes**

The principal differences between D.C. Rule 1.1 and Model Rule 1.1 antedate the changes resulting from the ABA Ethics 2000 Commission’s review, and the Committee found no reason to revisit those differences, such as the inclusion of D.C. Rule 1.1(b), which is not part of the Model Rule.

The proposed amendment to Comment [6] explicitly includes, as part of a lawyer’s required competence, the obligation to maintain awareness of developments in the law pertinent to the lawyer’s practice. The Committee recommends deletion of the reference in Comment [6] to peer review because a peer review system does not exist in the District of Columbia.

### **Redline Showing Proposed Changes**

#### **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 and procedures 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.

### **Maintaining Competence**

[6] 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 ~~taking into account that the learning acquired through a lawyer's practical experience in actual representations may reduce or eliminate the need for special continuing study or education. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.~~

## **Rule 1.2 – Scope of Representation**

### **Explanation of Proposed Changes**

The original D.C. Rule was identical to the Model Rule, except that the D.C. Rule included a paragraph (d) on government lawyers with no counterpart in the Model Rules. The ABA adopted a number of changes to the Rule and Comments proposed by the ABA Ethics 2000 Commission. The Rules Review Committee recommends two of those changes for adoption.

The first recommended change is a new second sentence to Model Rule 1.2(a), confirming that implicit authorization from the client may be sufficient for the lawyer to act. The new sentence adds useful clarification.

The second recommended change adopts the ABA's changes to Comment [7] (now Comment [10] in the ABA's renumbered Comments). In its May 2001 report, the ABA Ethics 2000 Commission said that no change in substance was intended with the revision to the Comment. The Committee concluded that the revised Comment provides useful guidance to lawyers about what they must do to avoid assisting a client to commit a crime or fraud. A cross-reference to Rule 4.1 has been added to specify a lawyer's duties if the lawyer's silence would assist a client in committing a crime or fraud.

### **Redline Showing Proposed Changes**

#### **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 objective of the representation if the client ~~consents~~ gives informed consent after consultation.

(d) A government lawyer's authority and control over decisions concerning the representation may, by statute ~~or~~ 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 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.

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

[6] 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.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. ~~The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the~~ The lawyer is required to avoid furthering the purpose assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how it the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is supposed was legally proper but then discovers is criminal or fraudulent. Withdrawal The lawyer must, therefore, withdraw from the representation, therefore, may be required 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.

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

[9] 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**

### **Explanation of Proposed Changes**

The proposed new Comment [5] is derived from the ABA Model Rule's newly added Comment [5]. It recognizes the importance of advance planning by sole practitioners to ensure that their clients are not adversely affected by a sudden loss of legal representation due to the lawyer's death or disability. The Comment also reminds lawyers of the need to ensure proper disposition of client files. *See* D.C. Bar Legal Ethics Committee Opinion 283.

### **Redline Showing Proposed Changes**

#### **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 work load 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 advocate 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 decisions 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).

[56] 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.

[67] 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.

[78] 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.

[89] 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.

[910] 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**

### **Explanation of Proposed Changes**

The recent amendments to the ABA Model Rule identify with greater specificity the various elements of the lawyer’s duty to keep the client “reasonably informed” about the status of a matter, and consolidate all discussions of the duty to communicate in Model Rule 1.4. Various additions to the Comments significantly expand the discussion regarding communications with the client and provide examples and suggested “best practices,” including the statement that a lawyer who has blanket settlement authority does not have to advise the client of every settlement offer.

After considering the proposed amendments, the Committee concluded that the approach of the existing D.C. Rule was preferable. In particular, the Committee determined that the obligation to communicate settlement offers to the client is sufficiently important that it should be retained in the text of Rule 1.4(c) rather than be included as a Comment.

### **Redline Showing Proposed Changes**

No changes recommended.

## **Rule 1.5 – Fees**

### **Explanation of Proposed Changes**

D.C. Rule 1.5(a) currently requires a written disclosure of the rate or basis of the lawyer's fee. The ABA Model Rules reflect a mere preference for a writing requirement. In light of the benefits demonstrated by over ten years of experience with the writing requirement in the District of Columbia, the Committee saw no reason to change.

The Committee recommends inclusion in Rule 1.5(b) of a statement of the scope of the lawyer's representation and the expenses for which the client will be responsible. This is a useful addition, from the perspective of both the lawyer and the client, to reduce possible misunderstanding concerning the services to be performed by the lawyer and the costs to be borne by the client. The Committee further recommends that contingent fee agreements contain a statement of expenses, if any, for which the client will be liable regardless of the outcome of the litigation.

The Committee does not recommend adoption of ABA Model Rule language dealing with an obligation to communicate to the client any changes in the basis or rate of fees or expenses. The Committee was concerned that such language could suggest that a lawyer could unilaterally change a fee agreement without the client's agreement.

### **Redline Showing Proposed Changes**

#### **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, ~~and~~ other expenses to be deducted from the recovery, ~~and~~ whether such expenses are to be deducted before or after the contingent fee is calculated, 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 ~~consents~~ 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**

### **Explanation of Proposed Changes**

At its adoption, the D.C. Rule differed significantly from the Model Rule:

- The text of the D.C. Rule retained the concepts of “confidences” protected by the attorney-client privilege and “secrets” that are other client information protected by the lawyer’s ethical duty, as found in the former ABA Model Code of Professional Responsibility and the former D.C. Code of Professional Responsibility.
- The D.C. Rule rejected the ABA’s definition of ethically protected material, “relating to representation of the client,” as unduly broad and instead restricted the boundaries of ethical protection to “information gained in the professional relationship that the client has requested to be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.”
- ABA Rule 1.6 concerned only restrictions on disclosure and addressed restrictions on use of client information in ABA Rule 1.8(b). The D.C. Rule addressed both disclosure and use of client confidential information in Rule 1.6, and the restrictions on use of client information were broader than those in the ABA Rule.
- The D.C. Rule included some permissive disclosure options that were not included, or at least not mentioned explicitly, in the ABA Rule: bribery or intimidation of those involved in proceedings before a tribunal; with client consent; when permitted by law or court order; and with implied authorization of the client. In the ABA changes in response to the report of the Ethics 2000 Commission, the ABA moved closer to the D.C. Rule in one respect by adding to the Model Rule a disclosure option for compliance with law or court order.
- The D.C. Rule gives additional guidance with regard to confidentiality on points not addressed by ABA Rule 1.6: supervisory obligations regarding confidentiality; duration of the confidentiality obligations; extension of the confidentiality duty to confidences and secrets learned prior to becoming a member of the Bar; extension of confidentiality obligations to lawyers working with the Bar’s Lawyer Counseling Committee and Practice Management Service Committee (formerly known as the Lawyer Practice Assistance Committee); and clarification of the identity of the client of a government lawyer.

The Committee did not disturb the Court of Appeals’ original decisions to address confidentiality comprehensively in a single Rule, to retain the “confidences” and “secrets” terminology, and to define the scope of ethically protected material more narrowly than does the ABA Model Rule. The Committee thought it unwise to alter the structure of a Rule so central to lawyers’ day-to-day practice. The Committee also saw no compelling policy reasons to change any of the disclosure options currently included in the D.C. Rule.

The Committee proposes adding two permissive disclosure options to the Rule. The first, regarded as uncontroversial by the Committee, concerns consultations by a lawyer regarding the lawyer's obligations under law and ethics rules. The second, regarding substantial injury to the financial interests or property of another as a result of client crime or fraud furthered by use of a lawyer's services, has been hotly debated since the adoption of the original Model Rules. The following describes the two proposed changes to the text of the Rule before turning to proposed changes to the Comments.

The first new permissive disclosure option, through a new subparagraph (e)(6), would allow a lawyer to disclose client confidences and secrets to another lawyer to secure legal advice about the lawyer's legal obligations.<sup>3</sup> The ABA's wording on a lawyer seeking advice is limited to compliance with ethical rules, while the Committee's recommendation refers to the "lawyer's compliance with law, including these rules." Addition of this new subsection, and of the corresponding proposed Comment [13], is consistent with the holding of *Jacobs v. Schiffer*, 47 F. Supp. 2d 16, 21 (D.D.C. 1999), *rev'd and remanded on other grounds*, 204 F.3d 259 (D.C. Cir. 2000). In that case, the federal district court construed D.C. Rule 1.6 to allow a lawyer to disclose client confidences and secrets in order to obtain legal advice concerning the lawyer's ethical obligations.

A second proposed permissive disclosure option, D.C. Rule 1.6(d), would allow a lawyer to reveal information to the extent reasonably necessary to prevent, mitigate or rectify a client crime or fraud that has been furthered by use of a lawyer's services and that is reasonably certain to result or to have resulted in substantial injury to the financial interests or property of another.<sup>4</sup> This recommendation tracks Model Rule 1.6(b)(2) and (3), adopted by the ABA in August 2003 in response to the recommendations of the Corporate Responsibility Task Force. The proposed language has been adapted to the D.C. Rule's use of "confidences" and "secrets."

When a client has used the lawyer's services to further a crime or fraud, the well-recognized crime-fraud exception to the attorney-client privilege normally applies. Evidentiary law recognizes that the usual protections of privilege yield when a client abuses a lawyer's services by employing them to further a client crime or fraud. Consistent with the policy underlying this exception to the privilege, the Committee thought it appropriate that when a lawyer's services have been abused in this manner and when past, current, or future harm to substantial interests of third parties is reasonably certain to result or to have resulted, the lawyer should be given discretion to reveal client confidences and secrets to the extent reasonably necessary to prevent, mitigate, or rectify the harm.

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<sup>3</sup> This disclosure option is proposed as a new final clause to current D.C. Rule 1.6(d), but with the Committee's following proposal for a new subparagraph (d) regarding financial injury, this new provision would become Rule 1.6(e)(6).

<sup>4</sup> Addition of this new subsection requires the relettering of current Rule 1.6(d)-(j).

In addition to consistency with the policy supporting the crime-fraud exception to the attorney-client privilege, the Committee considered disclosure to protect third parties from substantial injury to have a justification as substantial as disclosure permitted by the Rules for lawyer self-defense. Furthermore, lawyer self-defense against a future civil action could be one reason a lawyer would contemplate disclosure.

The Committee considered whether to allow disclosure only of information which is no longer a confidence within the meaning of Rule 1.6(b) because the crime-fraud exception to the attorney-client privilege applies. The Committee ultimately concluded that the scope of a disclosure option defined in these terms would as a practical matter be virtually the same as the option proposed by the Committee, but that it would be far more difficult for lawyers to interpret and apply in practice.

The Committee considered whether addition of this permissive disclosure would render lawyers more vulnerable to civil actions. The ABA Corporate Responsibility Task Force Report pointed out that many states have had similar permissive provisions regarding client crime or fraud for a number of years, and that some states mandate disclosure of at least some categories of these matters. The Committee found no authority suggesting that a lawyer's claim of ethical duties of confidentiality would avail the lawyer in defense if a lawyer's disclosure was found necessary to avoid assisting in a client crime or fraud or to meet some other legal obligation of the lawyer.

ABA Rule 4.1(b) (identical to D.C. Rule 4.1(b)) forbids a lawyer's silence "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." With no financial injury exception to D.C. Rule 1.6, the result has been criticized as suggesting that a lawyer's failure to disclose, which would constitute assistance in the client's crime or fraud, could be immunized by Rule 1.6. *See* 2 GEOFFREY C. HAZARD JR. & WILLIAM HODES, *THE LAW OF LAWYERING*, §§37.5, 37.6 (3d ed. 2003). With the proposed D.C. Rule 1.6(d), Rule 4.1 would require a lawyer to disclose material falling within the Rule 1.6(d) exception if disclosure is necessary for the lawyer to avoid assisting the client's criminal or fraudulent act. Rule 4.1(b) is a specific application of the duty imposed by D.C. Rule 1.2(e) to avoid assistance in a client crime or fraud.

In addition to these proposed changes to the text of the Rule, the Committee proposes several changes to the Comments. Only one, a new Comment [40] on "Acting Prudently to Preserve Confidences," concerns a topic not currently addressed in the D.C. Comments. New Comment [40] would adopt ABA Comment [16] with a slight, nonsubstantive modification of the language. This new Comment primarily responds to issues raised by electronic communication.

The remaining proposals for change to the Comments concern points currently addressed in the D.C. Comments and revisions to conform to the two new proposed disclosure options.

A new Comment [5] would track the content of ABA Rule 1.6, Comment [4], added by the Ethics 2000 Commission. An admonition regarding indiscreet conversations now found in D.C. Comment [10] would be moved to this new Comment. The Committee agreed with the ABA that this general guidance on treatment of client information and the possible alternative of discussion by hypothetical should be addressed in general introductory paragraphs rather than in a section titled “Authorized Disclosure.”

A new final sentence is proposed for Comment [9] (currently Comment [7]) to conform the Comment to the addition of proposed Rule 1.18 regarding prospective clients. The new sentence substitutes for an existing sentence regarding treatment of potential clients.

A new Comment [13] has been added with regard to the proposed Rule 1.6(e)(6) disclosure exception for securing advice regarding a lawyer’s own legal and ethical obligations. Language from the preceding Comment (formerly Comment [10], now proposed Comment [12]) has been stricken. The last sentence of that Comment is moved to proposed Comment [5]. The rest of the language stricken from former Comment [10] is subsumed in proposed Comments [5] and [13].

The remaining changes proposed to the Comments relate to the addition of proposed Rule 1.6(d). Some new Comments would address the new exception specifically. Other proposals would reorganize and conform existing Comments on disclosure adverse to the client, withdrawal, and the relation of ethical protection to attorney-client privilege.

Current Comment [5] would be divided into proposed Comments [6] and [7].

Proposed Comments [15]-[22] on Disclosure Adverse to Client substitute for current Comments [12]-[20]. The Committee struck the “Withdrawal” heading and its contents. The Committee believed that guidance on withdrawal should be contained in Rule 1.16 and its Comments, not in Rule 1.6.

Some of the language in proposed Comments is taken from existing D.C. Comments. The last sentence of existing Comment [16] on the “reasonable belief” standard has been moved to proposed Comment [21]. In making the sentence applicable to both current D.C. Rule 1.6(c) and proposed D.C. Rule 1.6(d), the phrase “potentially serious consequences” has been substituted for “heinous purpose.” A sentence on the degree of appropriate disclosure has been moved from existing Comment [17] to proposed Comment [21]. Guidance on factors to take into account in deciding on disclosure in order to prevent death or substantial bodily injury has been moved from existing Comment [17] to proposed Comment [20].

The Committee thought it important to spell out limitations on the steps a lawyer might take with regard to prevention, mitigation, and rectification. The ABA Corporate Responsibility Task Force Report refers to the RESTATEMENT OF THE LAW GOVERNING

LAWYERS for the scope of permissible action. Proposed Comment [19] is adapted from the section cited by the Task Force. *See* Final Report, ABA Presidential Task Force on Corporate Responsibility, 54-55 n. 95 (Mar. 31, 2003), *at* [http://www.abanet.org/buslaw/corporateresponsibility/final\\_report.pdf](http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf) *quoting* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 67 cmt. *f* (2000).

The proposed comments also draw language from the ABA August 2003 amendments, often with some adaptation: proposed D.C. Comment [17], taking language from ABA Comment [7]; proposed D.C. Comment [18], adapted from ABA Comment [8]; proposed D.C. Comment [20], taking material from ABA Comment [15]; and proposed D.C. Comment [21], drawing on ABA Comment [14]. Most differences between D.C. Comments and the ABA version are attributable to the structure of the D.C. Rule and the Committee’s proposal to limit disclosure to information falling outside the attorney-client privilege.

Discussion of Rules cross-referencing to Rule 1.6 and to intersection with other law, now divided among existing Comments [14], [15], and [26], is consolidated in proposed Comments [20] and [22]. New language has been added to the Comments accompanying Rules 2.3, 3.4, 4.1, 8.1, and 8.3 to clarify the relation of the permissive disclosure options in Rule 1.6 to duties imposed by the cited Rules. The Comment to Rule 8.1 also refers to a relationship regarding disclosure and confidentiality that touches on Rule 3.3. The relation between permissive disclosure options in Rule 1.6 and exceptions for Rule 1.6 material in the cited Rules is already included in existing D.C. Rules 1.6(c) and (d), which provide various permissive disclosure options. Nevertheless, the addition of proposed D.C. Rule 1.6(d), addressing injury from financial crime or fraud using a lawyer’s services, prompted the Committee to clarify the interaction of Rule 1.6 with the cited Rules.

### **Redline Showing Proposed Changes**

#### **Rule 1.6 – Confidentiality of Information**

(a) Except when permitted under paragraph (c), ~~or~~ (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.

(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.

~~(d)~~ (e) A lawyer may use or reveal client confidences or secrets:

(1) with the informed consent of the client-affected, ~~but only after full disclosure to 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; ~~or~~

(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.

~~(e)~~(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, except that such persons may reveal information permitted to be disclosed by paragraphs (c), ~~or (d)~~, or (e).

~~(f)~~(g) The lawyer's obligation to preserve the client's confidences and secrets continues after termination of the lawyer's employment.

~~(g)~~(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.

~~(h)~~(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.

~~(i)~~(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<sup>5</sup>, 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.

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<sup>5</sup>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.

~~(j)~~(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**

~~[5]~~[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 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. ~~The fact that in exceptional situations the lawyer under this Rule has limited discretion to disclose a client confidence does not vitiate the proposition that, as a~~ 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.

~~[6]~~[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**

~~[7]~~[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. ~~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 under Rule 1.7, 1.8, or 1.9. Other duties of a lawyer to a prospective client are set forth in Rule 1.18.~~

### **Exploitation of Confidences and Secrets**

~~[8]~~[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 ~~(d)~~ (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 ~~made full disclosure to the client regarding the proposed use of the information and~~ obtained the client's affirmative informed consent to the use in question.

## Authorized Disclosure

~~[9]~~ [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.

~~[10]~~ [12] The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when the client gives informed consents ~~after full disclosure~~, 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. ~~Thus, in the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should the lawyer, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or the client's confidences or secrets would be revealed to such lawyer. Proper concern for professional duty should cause a lawyer to shun indiscreet conversations concerning clients.~~

[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.

~~[11]~~ [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.

## Disclosure Adverse to Client

[12] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Nevertheless, when the client's confidences or secrets are such that the lawyer knows or reasonably should know that the client or any other person is likely to kill or do substantial bodily injury to another unless the lawyer discloses client confidences or secrets, the lawyer may reveal the client's confidences and secrets if necessary to prevent harm to the third party.

[13] Several situations must be distinguished.

[14] First, the lawyer may not counsel or assist a client to engage in conduct that is criminal or fraudulent. See Rule 1.2(e). Similarly, a lawyer has a duty not to use false evidence of a nonclient and may permit introduction of the false evidence of a client only in extremely limited circumstances in criminal cases when the witness is the defendant client. See Rule 3.3(a)(4) and (b). This Rule is essentially a special instance of the duty prescribed in Rule 1.2(e) to avoid assisting a client in criminal or fraudulent conduct.

[15] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(e), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[16] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in death or substantial bodily harm unless disclosure of the client's intentions is made by the lawyer. As stated in paragraph (c), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. The "reasonably believes" standard is applied because it is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[17] 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. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by subparagraph (c)(1) does not violate this Rule.

## Withdrawal

~~[18] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, or if the client has used the lawyer's services to perpetrate a crime or a fraud, the lawyer may (but is not required to) withdraw, as stated in Rule 1.16(b)(1) and (2).~~

~~[19] After withdrawal under either Rule 1.16(a)(1) or Rule 1.16(b)(1) or (2), the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Giving notice of withdrawal, without elaboration, is not a disclosure of a client's confidences and is not proscribed by this Rule or by Rule 1.16(d). Furthermore, a lawyer's statement to a court that withdrawal is based upon "irreconcilable differences between the lawyer and the client," as provided under paragraph [3] of the Comment to Rule 1.16, is not elaboration. Similarly, after 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, 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.~~

~~[20] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization. See Comment to Rule 1.13.~~

[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**

~~[24]~~ [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.

~~[22]~~ [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.

~~[23]~~ [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 ~~(d)~~(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**

~~[24]~~ [26] Subparagraph ~~(d)~~(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 ~~(d)~~(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.

~~[25]~~ [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**

~~[26]~~ [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 ~~(d)~~(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.

~~[27] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3, and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption exists against such a supersession.~~

### **Former Client**

~~[28]~~ [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**

~~[29]~~ [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 ~~(g)~~(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 ~~law clerk~~, 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 1.12.

## **Bar Sponsored Counseling Programs**

~~[30]~~ [31] Paragraph ~~(h)~~(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-counsees 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 Bar Counsel, or if the lawyer-counselee feared that the counselor could be compelled by prosecutors or others to disclose information.

~~[31]~~ [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 ~~(i)~~(j) adds a provision addressing the confidentiality obligations of lawyers who are assisting in the counseling programs of the Practice Management Service Committee.

~~[32]~~ [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 ~~(h)~~(i) and ~~(i)~~(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

~~[33]~~ [34] Notwithstanding the obligation of confidentiality under paragraph ~~(i)~~(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.

~~[34]~~ [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-counsees by paragraphs ~~(h)(i)~~ and ~~(i)(i)~~ 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**

~~[35]~~ [36] Subparagraph ~~(d)(e)(2)~~ was revised, and paragraph ~~(i)(k)~~ was added, to address the unique circumstances raised by attorney-client relationships within the government.

~~[36]~~ [37] Subparagraph ~~(d)(e)(2)(A)~~ applies to both private and government attorney-client relationships. Subparagraph ~~(d)(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~~(d)(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 ~~(d)(e)(2)(B)~~ governs.

~~[37]~~ [38] The term "agency" in paragraph ~~(i)(j)~~ 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 General Accounting 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.

~~[38]~~ [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 ~~(d)(e)(2)(A)~~, not ~~(d)(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 extent to which~~ 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 a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

## **Rule 1.7 – Conflicts of Interest: General**

### **Explanation of Proposed Changes**

The Committee recommends retaining the fundamental structure of the D.C. version of Rule 1.7, which since its adoption has departed significantly in form (but not substance) from its Model Rule counterpart. The Committee concluded that Rule 1.7(c) should be amended to limit the lawyer's authority to obtain the client's consent to a conflict arising under Rule 1.7(b). As originally adopted, Rule 1.7(c)(2) permitted such consent only if "the lawyer is able to comply with all other applicable rules with respect to such representation." On the recommendation of the Board of Governors based on the Peters Committee report, the Court of Appeals deleted that language. The unintended result seems to permit the lawyer to obtain the client's consent to conflicts that should not be permitted – such as where the interests of one client will substantially and materially affect the lawyer's ability to represent another client, or where the lawyer's individual interests place the lawyer in a position directly adverse to that of the client. The proposed new language is identical to that in Model Rule 1.7(b)(1). The Committee's proposed Comment [29] further addresses this situation.

The Committee declined to recommend the adoption of a Rule addressing sexual relations between attorney and client, *cf.* Model Rule 1.8(j), and decided instead to recommend a Comment on the subject to accompany this Rule.

The Committee also recommends adoption of several Comments now found in the Model Rules, substantially in the form in which adopted by the ABA, that provide helpful interpretations consistent with the provisions of the D.C. Rule.

Comments [11] and [12], dealing with individual conflicts, are new. The language derives from Comments [10] and [11] accompanying the revised Model Rule 1.7. Comment [13] derives from Model Rule Comment [24], with amendments to reflect the modification of the D.C. version of the Rule recommended by the Peters Committee in order to accommodate issues arising on a recurrent basis in lobbying practice and with a specific reference to the D.C. Rule's "thrust upon" exception. Comments [14] through [18], addressing problems arising in common representation (where the lawyer undertakes to represent two or more similarly aligned clients), derive from Comments [29]-[33] accompanying the Model Rule. The current Comment [12] and its heading "Situations That Frequently Arise" would be deleted in recognition of the expanded discussion found in the newly added Comments [12]-[19]. Comment [30] derives from Comment [22] accompanying the Model Rule.

The Court of Appeals indicated that advance waivers are permissible under the D.C. Rules. *In re Hager*, 812 A.2d 904, 915 (D.C. 2002). The D.C. Bar Legal Ethics Committee previously had done so as well. D.C. Ethics Opinion 309 (2001). Proposed Comments [30] and [31] would confirm the availability of advance waivers and indicate the constraints that govern them.

## **Redline Showing Proposed Changes**

### **Rule 1.7 – Conflicts 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 ~~each~~

(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 firmwide 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 will be shared, and explain the circumstances in which that the lawyer may will have to withdraw from any or all representations if one client later objects to continued common representation or sharing of information ~~decides that some matter material to the representation should be kept from the other.~~ In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[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**

[4+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**

[2012] 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**

[1321] 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.

[422] 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, *supra*. 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.

[423] 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 [421] 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 [1421] are not applicable.

[1624] 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.

[1725] The provisions of paragraphs [1320] through [1623] are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client's business, any such agreement between client and lawyer will take precedence over these guidelines. Conversely, an organization client, in order to obtain the lawyer's services, may in the original engagement letter or otherwise give informed consent to the lawyer in advance to engage in representations adverse to an affiliate, owner or other constituent of the client not otherwise permissible under the foregoing guidelines so long as the requirements of Rule 1.7(c) can be met.

[1826] 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**

[1927] 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.

[2028] 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 tThe Rule does not require that disclosure be in writing or in any other particular form in all cases. ~~Nevertheless, it should be recognized~~ 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 ~~fully~~ informed consent. Moreover, under the District of Columbia substantive law, the lawyer bears the burden of proof ~~to demonstrate the existence of that informed consent was secured.~~ For those reasons, it ordinarily would be prudent for the lawyer to provide potential joint clients with at least a written summary of the considerations disclosed and to request and receive a written consent.

[2429] The term “informed consent” is defined in Rule 1.0(e) in the Terminology section of these Rules. As indicated in Comment [2] to that Rule ~~there~~, 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**

[2233] 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**

[2334] 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.

[2435] 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**

[2536] 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**

### **Explanation of Proposed Changes**

D.C. Rule 1.8(a)-(c) and (e)-(h) were adopted with language identical to that of their ABA counterparts. The District of Columbia did not adopt Model Rule 1.8(b) in the original D.C. Rules because use of confidential information was addressed in D.C. Rule 1.6.

D.C. Rule 1.8(d) differed from the ABA in policy regarding financial assistance to clients “which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding,” and the Committee saw no reason to revisit this policy choice.<sup>6</sup> D.C. Rule 1.8(i) omitted the general prohibition in its counterpart, Model Rule 1.8 (j), forbidding the acquisition of a “proprietary interest in the cause of action or subject matter of the litigation.” This provision, to which the 1995 Peters Commission proposed amendments that were adopted, provides more detailed guidance on imposition of lawyer’s liens than are found in the ABA Rule. The Committee also did not revisit these D.C. differences.

The Committee recommends adoption of the ABA’s change in the Rule’s title, which avoids any misleading implication that the Rule prohibits most transactions rather than allowing them subject to specified conditions.

The Committee recommends changes to four provisions of this Rule. First, the definition in D.C. Rule 1.8(b) of related persons, who cannot be benefited by a gift instrument prepared by a lawyer, would be amended to conform to that of the new ABA Rules. The Committee rejected the ABA’s extension of the Rule’s language to solicitation of substantial gifts, concluding that the scope of the existing ban is sufficient to prevent abuse.

Second, the Committee recommends that D.C. adopt the requirement of a written client consent in Rule 1.8(f), dealing with the aggregate settlement on behalf of two or more clients or, in a criminal matter, an aggregated agreement as to guilty or nolo contendere pleas. The Committee recommends retention of language, found in the existing D.C. Rule but not in its ABA counterpart, that specifies the content of the disclosure to be made by the attorney in seeking the clients’ informed consent to the proposed disposition.

Third, the Committee recommends conforming D.C. Rule 1.8(g) to the ABA’s addition of “potential claims” for malpractice and, with slightly different wording, tracks the ABA’s February 2002 amendments that provide greater specificity for the type of notice to be given to clients regarding their opportunity to seek independent legal advice about whether to settle a malpractice claim.

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<sup>6</sup> Because D.C. did not adopt ABA Model Rule 1.8(b), the lettering for the D.C. and ABA comparable sections differs.

Fourth, the Committee recommends following the ABA in moving the reference to Rule 1.8 imputations from Rule 1.10 to a new final section of Rule 1.8. The proposed Rule 1.8(j) applies to the entire firm all of the prohibitions in Rule 1.8, except the restrictions in Rule 1.8(h) on representation of clients when a related lawyer is on the other side.

The Committee recommends maintaining D.C. Rule 1.8(i), requiring notice and the client's informed consent if a lawyer's parent, child, sibling, or spouse is the lawyer on the other side of a directly adverse representation. The Committee thought D.C. Bar members were used to the location of this prohibition, and it could be confusing to move the reference to a Comment to 1.7 as the ABA did in new Comment [11]

The Committee does not recommend adoption of the prohibition in ABA Rule 1.8(j) of sex with clients but proposes a new Comment [35] to Rule 1.7 highlighting the circumstances in such relationships may give rise to a conflict of interest in the lawyer's duty to the client. Proposed Comment [21] to this Rule makes a cross-reference to that Comment.

The Committee recommends adoption of several Comments added by the ABA, which contain useful discussion not found in the D.C. counterpart: Comments [1]-[4], [6], [10]-[14], and [20]. Proposed Comment [10] includes the text of former D.C. Comment [6].

### **Redline Showing Proposed Changes**

#### **Rule 1.8 — Conflict of Interest: ~~Prohibited Transactions~~ 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 consents in writing thereto.

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

(f) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consents 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 ~~for such liability or potential claim for malpractice arising out of the lawyer's past conduct~~ with ~~an~~ unrepresented client or former client ~~without first advising unless~~ that person is advised in writing ~~that independent representation is appropriate 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] As a general principle, all transactions—A lawyer's legal skill and training, together with the relationship of trust and confidence 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, 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 transactions 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 that shows 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.

[36] 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**

[48] 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**

[59] 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**

[610] 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.

[715] 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) 1.10, 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.

[816] 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).

[917] 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 Rule 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.

[1018] 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 of the work product merely because a portion of the lawyer's fees had not been paid.

[1119] 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 [35]-[37] to Rule 1.7.

## **Rule 1.9 – Conflict of Interest: Former Client**

### **Explanation of Proposed Changes**

The Committee is satisfied that the D.C. version of Rule 1.9, which differs in form from the ABA version, should not be changed, as it is part of our Bar’s historically different presentation of conflict of interest obligations in this Rule and in Rules 1.7 and 1.10.

The ABA amendments to the text of the Rule were essentially limited to requiring confirmation in writing of client waivers. The Committee does not believe that client waivers need to be confirmed in writing.

The ABA also added an extensive comment discussing when two matters are “substantially related,” which is an important conflict of interest concept under Rule 1.9. The Comment is a helpful one, and the Committee recommends its adoption.

The Committee also recommends modification of an example about a former government attorney in Comment [1] of D.C. Rule 1.9 because Rule 1.9 does not govern conflicts of interest of a former government lawyer. *See* Rule 1.9, Comment [4].

### **Redline Showing Proposed Changes**

#### **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 ~~consents after consultation~~.

#### **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. ~~So also~~ 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). prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.~~

[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; see also *Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1315-34 (1981).

[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.

[43] 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.

[54] ~~With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is associated, see Rules 1.10; and, for former government lawyers, see Rule 1.11; for former judges and law clerks, see Rule 1.12.~~



## **Rule 1.10 – Imputed Disqualification: General Rule**

### **Explanation of Proposed Changes**

The Committee concluded that the basic structure of this Rule should be maintained, with the following exceptions.

The Committee recommends in subsection (a)(1), as provided in ABA Model Rule 1.10(a), an exception to imputation of a lawyer's conflicts to other lawyers in the firm for those conflicts described in our Rule 1.7(b)(4), i.e., conflicts arising out of the personal interests of the lawyer.

The Committee also recommends that subsection (c) be revised to conform to the principles set forth in ABA Model Rule 1.10(b). Under certain circumstances, subsection (c) would permit 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 Committee believes there is little reason to prohibit the firm of a departed lawyer from representing a client if the previously represented client and the lawyer have left the firm and none of the remaining lawyers has any protected information that is material to the matter.

The provisions in paragraph (a) and in the Comments relating to prospective clients have been superseded by proposed new Rule 1.18. Deletion of this material from Rule 1.10 is not a substantive change, because it is now incorporated in new Rule 1.18.

The Committee revised some Comments to conform to the foregoing recommendations. The Committee also proposing changing the order of some comments, so current Comments [4] and [5] would become Comments [6] and [7].

### **Redline Showing Proposed Changes**

#### **Rule 1.10 – Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, ~~1.8(b), or 1.9, or 2.2;~~ ~~provided, however, that this paragraph shall not apply if unless: an 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~~

(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, 1.12, or 1.18.

(b) 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 ~~the proviso to paragraph (a) of this Rule or by Rule 1.6(hg) or Rule 1.18.~~

(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 during such former association; 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

## 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 purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization, but does not include a government agency or other government entity. Whether two or more lawyers constitute a firm within this definition can depend

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

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

[3] Similar questions can also arise with respect to lawyers in legal aid 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.

[4] ~~Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11. The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.~~

[5] ~~Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer from the government to a private firm. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.~~

## Principles of Imputed Disqualification

[46] 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.

[7] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer from the government to a private firm. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6 and 1.11. Nevertheless, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

## Exception in the Case of a Prospective New Client

~~[7] As indicated by the proviso in paragraph (a) of this Rule, 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 the initial consultation, or for some other reason (e.g., the prospective client decided not to retain the law firm). As provided by Rule 1.6 (a), and Comment [9] thereunder, the individual lawyer involved in any such initial consultation is required to maintain in strict confidence all information obtained from the prospective client even if a client-lawyer relationship was never formed. That obligation 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 obtained 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.

~~[8] The individual lawyer of the firm who obtains information from a prospective client under the circumstances described in the proviso to paragraph (a) of this Rule is permitted by Rule 1.6 (a) to disclose that information to other persons in the lawyer's firm only to the minimum extent necessary to enable the firm to determine whether it may ethically accept the proposed representation, and if so, whether it desires to do so. For the reasons stated in paragraph [7], any such dissemination may necessarily cause additional individual lawyers of the firm to be personally disqualified from representing a current or future client of the firm adverse to the potential client. Nevertheless, as provided in Rule 1.10 (a), the personal disqualification of individual lawyers is not imputed to the firm as a whole. Accordingly, any other lawyer in the firm who is not personally disqualified vis-à-vis the prospective client may represent a current or future client of the firm adverse to the prospective client.~~

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

~~[89] 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. When a firm relies on the proviso in paragraph (a) to this Rule to avoid imputed disqualification of the firm as a whole, that 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. Conversely, the personally disqualified lawyers should not receive any confidences or secrets of the firm's clients in the conflicted matter. On the other hand, if an opposing party in a case were owned by a lawyer in the firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.~~

## Lawyers Moving Between Firms

[910] 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.

[104] 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.

[112] 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 impropriety 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.

[123] 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

[134] 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.

[145] 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.

[156] 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.

[167] 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

[178] 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).

[189] 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).

~~[1920] Conversely, when a lawyer terminates an 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 that 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. See Rule 1.9 and the Comment thereto for the definition of “substantially related matter.” [21] The last sentence of paragraph (b) 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 limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.12. 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 the last sentence of paragraph (b). Rule 1.6(hg) 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.~~

[204] 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.



**Lawyers Assisting the Office of the Attorney General of the District of Columbia Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority**

[212] The Office of the Attorney General of the District of Columbia Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority. 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority. 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.

[223] The term "made available to assist the Office of the Attorney General Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority, 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority.

[234] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority 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 Corporation Counsel or the

~~District of Columbia Financial Responsibility and Management Assistance Authority~~ from participating in every matter in which ~~the Attorney General Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[245] 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~, 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ might be created, the lawyer should advise the appropriate officials of the Office of ~~the Attorney General Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ and decline to participate. Similarly, if participation on behalf of the Office of ~~the Attorney General Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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.

[256] 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority. 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 ~~whom~~ 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

## **Rule 1.11 – Successive Legal Service Following Government Service**

### **Explanation of Proposed Changes**

The Committee recommends a change in the title of the Rule to reflect that it applies to instances in which the attorney moves from one government position to another (as from federal to state or local government), as well as from a government position to the private sector.

The Committee also recommends, consistent with the ABA approach, that issues relating to judges and law clerks be addressed not in this Rule but in Rule 1.12 (Former Judge, Arbitrator, Mediator or Other Third-Party Neutral). The Committee's decision to recommend expanding Rule 1.12 to former judges and third-party neutrals made duplicative the provisions in Rule 1.11 applicable to judges. In addition, most of the provisions and comments in Rule 1.11 are directed at former government lawyers rather than former judges.

References to the former D.C. Control Board are deleted from the text and accompanying Comments because the Board no longer exists.

### **Redline Showing Proposed Changes**

#### **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, except as provided in Rule 1.12. ~~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 Bar 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 provision of 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 Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 lawyer who act in other public capacities.~~ It is a counterpart of Rule ~~1.10(b)~~1.9, ~~which applies to lawyers moving from one firm to another 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, ~~t~~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] The relevant principles applicable to former judges, other adjudicators, judicial law clerks, mediators and third-party neutrals are set forth in Rule 1.12. ~~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, ~~it~~ 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~~Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~ 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 General~~Corporation Counsel or the District of Columbia Financial Responsibility and Management Assistance Authority~~, 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**

### **Explanation of Proposed Changes**

The Committee's recommended revisions and reasoning generally follow those of the ABA Ethics 2000 Commission. The title of the Rule would be modified to recognize that in addition to arbitrators, other third party neutrals now participate in court-based and private dispute resolution. The Committee determined that, like judges and arbitrators, mediators and other third-party neutrals should be able to utilize nonconsensual screening in order to avoid imputed disqualification of other lawyers in their firm. In particular, the Committee recognized that the failure to permit such screening might inhibit the willingness of lawyers to serve as third-party neutrals, particularly in voluntary, court-based alternative dispute resolution programs.

### **Redline Showing Proposed Changes**

#### **Rule 1.12 – Former Judge, Arbitrator, Mediator, Or Other Third-Party Neutral**

(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 judge or other adjudicative officer, or law clerk to such person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceedings give their informed consent after disclosure.

(b) ~~An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.~~ 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 a judge or other adjudicative office or as an arbitrator, mediator or other third party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer (other than one whose sole form of participation was as a judicial law clerk) 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 Bar 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).

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

## COMMENT

[1] This Rule extends the basic requirements of Rule 1.11 (a) to privately employed arbitrators. Paragraph (a) is substantially similar to Rule 1.11(a), except that it allows an arbitrator to represent someone in connection with a matter with which the lawyer was substantially involved while serving as an arbitrator if the parties to the arbitration consent. Paragraph (b) makes it clear that the prohibition set forth in paragraph (a) does not apply to partisan arbitrators serving on a multimember arbitration panel. This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare Comment [4] to Rule 1.11. The term “adjudicative officer” includes such officials as judges *pro tempore*, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Application Sections C(2) and D(2) of the Code of Judicial Conduct of the District of Columbia provide that an active or inactive senior judge may not “act as a lawyer in any proceeding in which the judge has served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those rules correspond in meaning.

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

[3] 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).

[4] 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.

[5] Requirements for screening procedures are stated in Rule 1.0(1). 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.

[6] 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.

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

## **Rule 1.13 – Organization as Client**

### **Explanation of Proposed Changes**

In 2002, the ABA made minimal changes to Model Rule 1.13. Following those revisions to the Model Rules, however, a number of corporate scandals surfaced, and the ABA then formed the Corporate Responsibility Task Force. Based on the report of that Task Force, the ABA reconsidered Rule 1.13 in August 2003, and adopted substantial changes. In sum, these changes addressed two concepts: (1) “reporting up” through the organization a lawyer’s concerns about violations of law; and (2) “reporting out” such misconduct if the organization fails to take action.

The current D.C. Bar Rule recognizes the desirability of “reporting up” through the organization in some circumstances. The current discussion is in Comment [5], which states that such reports are appropriate in some circumstances. Model Rule 1.13(b) takes a stronger position. It mandates some circumstances in which lawyers must report violations of law to higher authorities in the organization. The Committee recommends that these provisions of Model Rule 1.13 be adopted in a new paragraph 1.13(b) and Comments [4], [5], and [6].

The Committee does not recommend the adoption of the Model Rule’s provisions that would allow lawyers to report violations of law outside the organization. These provisions would allow lawyers to disclose client confidences and secrets. The current D.C. Bar Rules provide strong protections for this client information. The Committee does not believe these protections should be loosened.

The Committee is cognizant of the public interest that organizations disclose violations of law, reflected, for example, in provisions of the Sarbanes-Oxley Act concerning lawyers for publicly-traded companies. The Committee believes that its proposed amendments address that concern. If the lawyer’s services were used to commit a crime or fraud, the proposed changes to Rule 1.6 recognize that the attorney-client privilege would not apply and thus the lawyer could disclose relevant information. To ensure that attorneys are mindful of Rule 1.6’s provisions, the Committee recommends a cross-reference to that Rule in Comment [7] to Rule 1.13. The Committee also addressed this issue by strengthening the “reporting up” provisions requiring lawyers to report any violations of law known to the lawyer to corporate management, which has its own reporting obligations.

For these reasons, the Committee believes that a lawyer’s obligations under proposed Rule 1.13 are generally consistent with a lawyer’s obligations under the Sarbanes-Oxley Act (“SOX”) and the regulations the SEC has adopted pursuant to SOX. The “reporting up” requirements of Rule 1.13 parallel the reporting up requirements of SOX and the SEC rule. Although the statutory text of SOX does not include any “reporting out” requirements or require the SEC to include such requirements in any standards of professional conduct for attorneys appearing before the SEC on behalf of publicly-traded companies, the SEC’s Rule 205 (17 C.F.R. Part 205) does include “reporting out” provisions for such attorneys. Rule 205.3(b) requires reporting up if

attorney “becomes aware of evidence by a material violation” of a securities law or a fiduciary duty under federal or state law. Rule 205.3(d) authorizes, but does not require, an attorney to report out in certain circumstances. The SEC rule authorizes disclosure of client confidential information without the company’s consent in four circumstances:

1. The attorney may disclose certain confidential information to defend against charges that the attorney failed to comply with the SEC rule. That provision is consistent with D.C. Rule 1.6(e)(3), which allows a lawyer to disclose client confidences and secrets to the extent reasonably necessary to defend against “criminal charge, disciplinary action, or civil claim, formally instituted against the lawyer.”
2. The SEC rule authorizes disclosure to the extent reasonably necessary to prevent the company “from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors.” The Committee’s proposed new exception to Rule 1.6(d) allows disclosure of confidences and secrets when a client has used or is using a lawyer’s services to further a crime or fraud and disclosure is reasonably necessary to prevent the client from committing a significant financial fraud or to prevent, mitigate or rectify injury resulting from such a fraud. As explained above, although the D.C. Rule limits disclosure to situations where the client has used or is using the lawyer’s service to further the crime or fraud, the Committee believes as a practical matter that it is unlikely that a lawyer would *know* (and both the SEC and D.C. rule authorizes disclosure only with knowledge, and not suspicion, of fraud) that the client is involved in a serious financial fraud unless the lawyer’s services were somehow used in connection with the fraud.
3. The SEC rule authorizes disclosure to the extent the attorney believes reasonably necessary to prevent perjury or false statements likely to perpetrate a fraud on the SEC in an SEC investigation or proceeding. The Committee’s proposal contains a similar provision under Rule 3.3 concerning candor to a tribunal: paragraphs (a)(4) and (b) allow attorneys to refuse to offer testimony that the attorney knows or even reasonably believes is false. Even if the SEC is not acting as a “tribunal” within the meaning of Rule 3.3, Rule 1.6(d) authorizes disclosure to the extent that a cover-up in the context of an SEC investigation prevents the SEC from taking enforcement action that prevents or rectifies substantial injury to the financial interests of shareholders or others.
4. The SEC rules authorizes disclosure to rectify a material violation that has caused or may cause substantial injury to the financial interest or property of the issuer or investor, for which the attorney’s services were used. The Committee’s proposed Rule 1.6(d) contains a parallel provision.

In sum, the Committee’s proposal does not prevent any action mandated by SOX or the SEC regulation, and it allows almost all permissive disclosure included within Rule 205. Even if it is determined as a matter of federal law that broader disclosure

obligations are appropriate for attorneys representing publicly traded companies, a lawyer's obligation to protect client confidences and secrets should be the same for individual clients and other types of organizational clients. Most organizational clients are not publicly traded companies subject to SEC regulation, and nothing in SOX or the SEC rules establishes standards of conduct for lawyers representing such organizational clients. It is therefore appropriate for the Court of Appeals to adopt Rules of Professional Conduct that identify the ethical obligations of lawyers representing organizational clients.

Model Rule 1.13(c) goes further than proposed D.C. Rule 1.13, and provides for the disclosure of client confidential information the lawyer learned but which was not related to the services he or she performed for the organization. The Committee believes it is unlikely in such circumstances that a lawyer would *know*, within the meaning of Rule 1.0(f), that a violation of law had occurred or would occur. In the Committee's view, lawyers have authority, under Rule 1.6 as the Committee has proposed to amend it, to disclose information about crime or fraud by an organizational client in those circumstances where the lawyer is like to know of such conduct. The Committee therefore decided not to recommend adopting a provision that would trump Rule 1.6's protection of client confidences. The Committee notes that a number of states have decided not to adopt all provisions of Model Rule 1.13, although some states have.

Finally, the Committee recommends changing the Comment relating to the Rule's application to government entities (proposed Comment [8]) to conform to the changes recommended in Rule 1.6.

### **Redline Showing Proposed Changes**

(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.

(de) 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. [2]—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.

[23] 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.

[34] 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. However, different considerations arise when the lawyer knows that the organization may be substantially injured by tortious or illegal conduct by a constituent member of an organization that reasonably might be imputed to the organization or that might result in substantial injury to the organization. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review

over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to a higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

~~[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.~~

[5] 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.

[6] 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.



[7] 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**

[86] 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**

[97] The duty defined in this Rule encompasses the representation of governmental organizations. See Rule 1.6 comments [37] through [40]. Because the government agency that employs the government lawyer is the lawyer's client, the lawyer represents the agency acting through its duly authorized constituents. Any application of Rule 1.13 to government lawyers must, however, take into account the differences between government agencies and other organizations.

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

[108] 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.

[119] 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**

[1210] Paragraph (c) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

## **Derivative Actions**

[1314] 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.

[1412] 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 Under a Disability**

### **Explanation of Proposed Changes**

The Court of Appeals originally adopted ABA Rule 1.14 with only one change. The Jordan Commission recommended deletion of ABA Comment [4] regarding the possible obligation of a lawyer representing a guardian, as distinct from a ward, to prevent or rectify the guardian's misconduct. The Jordan Commission considered the Comment language too vague and expressed concern that it would conflict with Rule 1.6 obligations to the guardian. The Rules Review Committee did not revisit this deletion, which in the ABA version now has been moved to the end of the previous paragraph.

In 1997 the ABA adopted a new final section comprising two paragraphs and headed "Emergency Legal Assistance." The Committee was not aware of any previous consideration of these new paragraphs in the District of Columbia.

The ABA Ethics 2000 Commission proposed substantial revisions to Model Rule 1.14(b) and added a new Model Rule 1.14(c). The Commission added a new three-paragraph section called "Taking Protective Action" and made some revisions to all existing Comments, including some small changes to the 1997 amendments.

The changes proposed by the Ethics 2000 Commission shifted from talking about clients "under a disability" to clients with "diminished capacity," stressing that clients may fall along a continuum regarding the degree of diminution of capacity. The changes also reflect concerns in the disability rights community that seeking a guardian may have difficult consequences for a client and thus should be appropriate in extreme circumstances rather than being thought of as routine. The revised Comments also give additional guidance on the role of family members in representation of people with diminished capacity and when parents are natural guardians of children.

The Committee has recommended adoption of the ABA 1997 and 2002 changes with a few differences. Reflecting a similar concern to the ABA Commission that less intrusive forms of assisted decision-making should be favored when feasible, the Committee proposes the use of the term "surrogate decision-maker" to refer to a range of possibilities, rather than suggesting guardians and conservators are preferred. The term is defined in Comment [2] and indicates that a variety of forms of assisted decision-making may be appropriate. An additional sentence at the end of Comment [1] reminds lawyers that people with diminished capacity still may be able to express opinions about matters that affect their lives. An additional sentence at the end of Comment [4] says that lawyers should consult with the represented person to the maximum extent possible, even if there is a surrogate decision-maker. The Committee substituted the term "typical" client-lawyer relationship for the ABA term "normal," finding "normal" to suggest a value connotation that seemed unnecessary and inappropriate. An addition to Comment [5] points out that the client-lawyer relationship may be altered by the client's inability to communicate as well as difficulty in making adequately considered decisions. Comment [7] says the lawyer should advocate, on behalf of the client, the least restrictive form of

intervention in the client's decision-making rather than saying that the lawyer need only be aware of law which may so provide.

### **Redline Showing Proposed Changes**

#### **Rule 1.14 – Client Under a Disability with Diminished Capacity**

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

(b) ~~A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when~~ 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.

### **COMMENTS**

[1] The ~~normal~~ 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 disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~an~~ a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client ~~lacking legal competence~~ with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. ~~Furthermore, to an increasing extent the law recognizes intermediate degrees of competence.~~ 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. ~~If the person has no guardian or legal representative, the lawyer often must act as de facto guardian.~~ Even if the person ~~does have~~ has a legal representative, or 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.

~~[3]~~ [4] ~~If a legal representative 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. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part. 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 decisionmaking tools such as durable powers of attorney, 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 decisionmaking 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 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 decisionmaking.

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

~~[5][8] Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can diminished capacity could adversely affect the client's interests. For example, raising the question of disability 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. The lawyer may seek guidance from an appropriate diagnostician.~~

## Emergency Legal Assistance

[6] [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 disabled 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.

[7] [10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the disabled 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 disabled 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**

### **Explanation of Proposed Changes**

The Committee does not recommend any changes in the text of the D.C. Rule, which differs in form from the Model Rule. The Committee recommends changes to update and clarify Comments [3], [4], and [5].

### **Redline Showing Proposed Changes**

#### **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 shall be kept in a separate account maintained in a financial institution which is authorized by federal, District of Columbia, or state law to do business in the jurisdiction where the account is maintained and which is a member of the Federal Deposit Insurance Corporation, or the Federal Savings and Loan Insurance Corporation, or successor agencies. Other property shall be identified as such and appropriately safeguarded; provided, however, that funds need not be held in an account in a financial institution if such funds (1) are permitted to be held elsewhere or in a different manner by law or court order, or (2) are held by a lawyer under an escrow or similar agreement in connection with a commercial transaction. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(c) 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).

(d) 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 consents 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).



(e) Nothing in this Rule shall prohibit a lawyer or law firm from placing clients' funds which are nominal in amount or to be held for a short period of time in one or more interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program.

(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 paragraph (a). Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. 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 (d) of Rule 1.15 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).

[3] The District of Columbia Court of Appeals has promulgated specific rules allowing lawyers to place clients' funds that are nominal in amount, or that are to be held for a short period of time, into interest-bearing accounts for the benefit of the charitable purposes of a court-approved "Interest on Lawyers Trust Account (IOLTA)" program. ~~On February 22, 1985, the court added to DR 9-103 a new paragraph (C) that expressly permitted IOLTA accounts meeting the requirements of Appendix B to Rule X of the court's Rules Governing the Bar of the District of Columbia. Appendix B to Rule X of the Court's Rules Governing the Bar of the District of Columbia sets forth detailed rules to be followed in establishing and administering IOLTA accounts. Paragraph (e) of this Rule is substantially identical to DR 9-103(C). The rules contained in Appendix B to Rule X are hereby incorporated and must be followed in setting up IOLTA programs pursuant to paragraph (e).~~

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. ~~If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. 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.

[5] 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.

[6] 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.

[7] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] 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**

### **Explanation of Proposed Changes**

The proposed minor revisions and additions track many of the changes to the ABA Model Rule from the ABA Ethics 2000 Commission. However, the Committee decided not to recommend adoption of the new Model Rule provision allowing a lawyer to withdraw if the client “insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.” Consistent with the decision not to include in the existing D.C. Rule the ABA provision allowing a lawyer to withdraw from a matter not pending before a tribunal “if other good cause for withdrawal exists,” the Committee viewed the grounds for withdrawal in the new provision as unduly broad. In light of this policy judgment to permit withdrawal under D.C. Rule 1.16 in narrower circumstances than Model Rule 1.16 allows, the Committee recommends deletion of existing Comment [9] because it suggests that a lawyer may withdraw from a matter that is *not* pending before a court if “other good cause for withdrawal” exists, even though the text of D.C. Rule 1.16(b)(5) is limited to withdrawal in related circumstances only from a proceeding before a tribunal. The Committee would retain paragraph (b)(5) allowing withdrawal from a proceeding before a tribunal if “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.”

### **Redline Showing Proposed Changes**

#### **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).

## 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 decisionmaker 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.

~~[9] 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.~~

## **Assisting the Client Upon Withdrawal**

[409] 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**

[410] 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**

[1211] 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] [3] 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).

## **Rule 1.17 – Sale of Law Practice**

### **Explanation of Proposed Changes**

ABA Model Rule 1.17 allows for the sale of a law practice or an area of practice by a retiring lawyer. The ABA Rule has been in existence since 1990 and has been adopted in various forms by at least 36 states, including Maryland, Virginia, and New York. The D.C. Rules have no such provision, but in Opinion 294, the D.C. Bar Legal Ethics Committee opined that the sale of a law practice was permissible under conditions and restrictions similar but not identical to the ABA rule. The D.C. Court of Appeals has not addressed the issue. For reasons of conformity and clarity, the Committee believes that the District of Columbia should reflect its authorization of the sale of a law practice in a Rule, rather than simply continue to endorse the concept in an ethics opinion.

Both the Model Rule and the proposed D.C. Rule permit the sale of either an entire practice or an area of practice. The Model Rule allows for the sale of either a practice or an area of practice to multiple purchasers. The proposed D.C. Rule allows for the sale of an entire practice to multiple purchasers, but restricts the sale of an area of practice to a single purchaser. The Committee made this change to the Model Rule out of a concern that permitting the sale of an area of practice to multiple purchasers comes too close to allowing individual sales of individual clients or matters, with more lucrative clients or matters getting more favorable treatment (such as more experienced counsel or better service) than less profitable ones. The Committee felt that the danger of “cherry-picking” to the detriment of some clients was more acute when only an area of practice was sold and therefore recommended the additional restriction of a sole purchaser.

The Model Rule prohibits fee increases by reason of the sale; Opinion 294 explicitly permits them so long as they are reasonable. The Committee adopted the Model Rule’s provisions in this regard, because sales should not be financed by increases in fees charged the clients of the practice. The Model Rule presumes client consent to representation by the purchaser if the client is silent after disclosure by the selling attorney; the Opinion requires consent by the client. The Committee adopted the Model Rule’s provisions in this regard.

### **Redline Showing Proposed Changes**

#### **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 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.

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 mergers 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**

### **Explanation of Proposed Changes**

The D.C. Rules currently do not have a separate rule equivalent to ABA Model Rule 1.18 concerning a lawyer's duties to prospective clients. D.C. Rule 1.10(a), Comments [7]-[9] to D.C. Rule 1.10, and D.C. Bar Legal Ethics Committee Opinion 279, however, do address some issues relating to prospective clients. In the Committee's view, this significant subject should be addressed comprehensively in the Rules, and the Committee recommends adopting a version of Model Rule 1.18 to provide useful consistency with the Model Rules.

The Committee's recommendation differs from the ABA Model Rule in some, relatively minor, respects. The Committee's proposal requires personal disqualification if a lawyer receives a confidence or secret from the prospective client, and not (as the Model Rule provides) only if the lawyer received information "that could be significantly harmful" to the prospective client; the Committee concluded that the approach in the Model Rules gives insufficient protection to prospective clients and that the "significantly harmful" standard is difficult to apply. Consistent with the current Comments to Rule 1.10 and with D.C. Bar Legal Ethics Committee Opinion 279, the Committee's proposal allows lawyers in a firm to represent clients in a matter in which a prospective client has provided confidences or secrets to other lawyers in the firm, provided that the affected client and the prospective client consent and the disqualified lawyer is timely screened; the Committee considered unnecessary and inappropriate the additional requirement in ABA Model Rule 1.18(d) that the personally disqualified lawyer have limited exposure to disqualifying information.

### **Redline Showing Proposed Changes**

#### **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.

### **COMMENTS**

[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.

**Rule 1.19 (Renumbered D.C. Rule 1.17) – Trust Account Overdraft Notification**

Aside from the renumbering required by the addition of Rules 1.17 and 1.18, the Committee recommends no changes in this Rule or its accompanying Comment.

**Redline Showing Proposed Changes**

No change to the text of the Rule or the Comments is recommended.



## **Rule 2.1 – Advisor**

### **Explanation of Proposed Changes**

The Committee recommends modifying Comment [5] in order to maintain reasonable consistency with the ABA Model Rules.

### **Redline Showing Proposed Changes**

#### **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 2.2 – Intermediary

### Explanation of Proposed Changes

As recommended by the Ethics 2000 Commission, the ABA deleted Rule 2.2 and moved the discussion of intermediation and common representation issues to the commentary to Rule 1.7. This Committee agrees that the D.C. version of Rule 2.2, which is identical to the former ABA version, should be rescinded because the relationship between Rules 1.7 and 2.2 is confusing and issues relating to intermediation can satisfactorily be addressed by Rule 1.7 and its comments. *See* proposed Rule 1.7, Comments [14] through [18] (relating to Special Considerations in Common Representation and derived from the commentary to Rule 2.2).

### Redline Showing Proposed Changes

~~(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 client'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.~~

## COMMENT

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

[2] Because the potential for confusion is so great, paragraph (b) imposes the requirement that an explanation of the risks of the common representation be furnished in writing, except in unusual circumstances. The process of preparing the writing causes the lawyer involved to focus specifically on those risks, a process that may suggest to the lawyer that the particular situation is not suited to the use of the lawyer as an intermediary. In any event, the writing performs a valuable role in educating the client to such risks as may exist—risks that many clients may not otherwise comprehend. Mere agreement by a client to waive the requirement for a written analysis of the risks does not constitute the “unusual circumstances” that justify omitting the writing. The “unusual circumstances” requirement may be met in rare situations where an assessment of risks is not feasible at the beginning of the intermediary role. In such circumstances, the writing should be provided as soon as it becomes feasible to assess the risks with reasonable clarity. The consent required by paragraph (b) should refer to the disclosure upon which it is based.

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

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

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

contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

[6] The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

[7] 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.

### **Confidentiality and Privilege**

[8] A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. 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. 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.

### **Consultation**

[9] In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

[10] Paragraph (c) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

### **Withdrawal**

[11] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right

~~to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.~~

## **Rule 2.3 – Evaluation for Use by Third Persons**

### **Explanation of Proposed Changes**

The D.C. and ABA versions of Rule 2.3 were identical until ABA Model Rule 2.3 was amended to adopt changes suggested by the Ethics 2000 Commission. Information obtained in connection with an evaluation is subject to Rule 1.6. The ABA changes clarify that a lawyer may be impliedly authorized to provide a third party an evaluation that does not provide any significant risk to the client. But client consent to disclosure is needed when the evaluation would have a significant risk of materially and adversely affecting the client's interests. The ABA also added a comment emphasizing that in preparing and providing an evaluation a lawyer is never allowed to knowingly make false statements of material fact or law. The Committee agrees with the ABA changes, and recommends conforming D.C. Rule 2.3 and its Comments to the current ABA version.

### **Redline Showing Proposed Changes**

#### **Rule 2.3 – Evaluation for Use by Third Persons**

(a) A lawyer may ~~undertake~~ provide an evaluation of a matter affecting a client for the use of someone other than the client if: ~~(1)~~ the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; ~~and,~~

~~(2)(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~~ consents after consultation.

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

#### **COMMENT**

##### **Definition**

[1] An evaluation may be performed at the client's direction ~~but~~ 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 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.

### **Duty Duties Owed to Third Person and Client**

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

### **Access to and Disclosure of Information**

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

[56] 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**

### **Explanation of Proposed Changes**

ABA Model Rule 2.4 sets forth guidance for lawyers serving as third-party neutrals. The D.C. Rules currently have no such provision, although current Rule 1.12 addresses the ability of former arbitrators to represent clients in related matters. The Committee recommends that coverage of Rule 1.12 be expanded to third-party neutrals as well. In Opinion 276, “Lawyer Mediator Must Conduct Conflicts Checks,” the D.C. Bar Legal Ethics Committee discussed the ethical obligations of lawyer neutrals to conduct a conflicts check. The District of Columbia Court of Appeals has not addressed the matters covered in ABA Rule 2.4. For conformity with the ABA and because the policies followed by the District of Columbia Courts are consistent with the Model Rule, the Committee recommends that ABA Model Rule 2.4 be adopted.

### **Redline Showing Proposed Changes**

#### **Rule 2.4 – Lawyer Serving as Third Party Neutral**

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

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

### **COMMENT**

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

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee

of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly 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.

## **Rule 3.1 – Meritorious Claims and Contentions**

### **Explanation of Proposed Changes**

The Committee recommends three clarifying changes that maintain the basic consistency between D.C. Rule 3.1 and ABA Model Rule 3.1: adding a reference in the text of the Rule requiring a non-frivolous basis “in law and fact” for a lawyer’s position in a proceeding; and adding statements in Comments [2] and [3] about a lawyer’s duty to investigate before making factual or legal contentions, and about the primacy of constitutional requirements in criminal cases.

### **Redline Showing Proposed Changes**

#### **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**

### **Explanation of Proposed Changes**

The primary difference between D.C. Rule 3.2 and ABA Model Rule 3.2 is that the Model Rule does not contain a provision analogous to D.C. Rule 3.2(a), which provides that a lawyer shall not delay a proceeding when such action would serve solely to harass or maliciously injure another. The Committee believes that there is no reason to eliminate this provision, which serves a salutary purpose. Thus, the Committee proposes no changes to Rule 3.2.

### **Redline Showing Proposed Changes**

No changes are recommended.

## **Rule 3.3 – Candor to Tribunal**

### **Explanation of Proposed Changes**

The Committee proposes to continue the basic approach in D.C. Rule 3.3. The D.C. Rule gave more protection to client secrets and confidences than the corresponding ABA Model Rule even before the changes proposed by the ABA’s Ethics 2000 Commission. By expanding lawyers’ duty to disclose client confidences and secrets in order to rectify a fraud on the tribunal, the Ethics 2000 changes widened the gap between the ABA and D.C. approaches.

The Committee recommends three changes to the text of Rule 3.3:

1. Consistent with ABA Model Rule 3.3, the first change eliminates the requirement in D.C. Rule 3.3(a)(1) prohibiting a lawyer from making a knowingly false statement to a tribunal only if the statement is “material,” because lack of materiality does not excuse a knowingly false statement to a tribunal.

2. As amended, Rule 3.3(a)(4) would permit, but not require, a lawyer to refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false. New Comment [7] explains the reason for this change.

3. Rule 3.3(d) is amended consistent with the Committee’s recommendations concerning Rule 1.6. Rule 3.3(d) retains the prior general rule that a lawyer may not disclose information protected by Rule 1.6 if the lawyer learns that a fraud has been perpetrated upon the tribunal. The proposed amendment, however, would make an exception requiring a lawyer to disclose such information to the extent the amended Rule 1.6 permits disclosure, for example, when a client has used or is using the lawyer’s services to further a crime or fraud and disclosure is necessary to prevent, mitigate, or rectify substantial injury to the financial interests or property of another. The rule is also changed to make clear that the lawyer should not disclose the fraud if less drastic remedial measures are reasonable.

The Committee also recommends corresponding changes in the comments, as well as some additional clarifying comments consistent with the comments to the ABA Model Rule.

The Committee considered the ABA’s amendment to paragraph (a)(1) requiring a lawyer to correct the lawyer’s own false statement of material fact or law to a tribunal that the lawyer learns was false later in the proceeding. The Committee was evenly divided about whether to recommend this amendment, and because of the lack of a majority in favor of the amendment, the Committee does not recommend it. Those members of the Committee opposed to this amendment believed that the current D.C. Rule properly gives primacy to a lawyer’s duty to protect client confidences and secrets in situations where Rule 1.6 prohibits disclosure of client information. Other members of the Committee believed that when a lawyer has personally made a statement of material fact or law that turns out to be false, the lawyer should correct that statement even if correction involves disclosure of information otherwise protected by Rule 1.6; those members would, consistent with the current D.C. Rule, make an exception in a criminal case where the lawyer’s client is the accused and correction would require disclosure of information provided by the client that is otherwise protected by Rule 1.6.

The Committee agreed, however, on a change to Rule 3.3(a)(1) that would impose a duty to correct unless correction would require disclosure of information that is prohibited by Rule 1.6. The Committee also recommends adding a clarifying sentence to Comment [2] that nothing in Rule 3.3(a)(1) limits any disclosure duty under Rule 4.1(b) when substantive law require a lawyer to disclose client information to avoid being deemed to have assisted the client’s crime or fraud.

### **Redline Showing Proposed Changes**

#### **Rule 3.3 – Candor to Tribunal**

(a) A lawyer shall not knowingly:

(1) Make a false statement of ~~material~~ 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) ~~reveal the fraud to the tribunal unless compliance with the 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.~~

## COMMENT

[1] This Rule defines the duty of candor to the tribunal. See Rule 1.0(1) 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* Comment to Rule 8.4(b).

### **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 False 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**

[86] Paragraph (d) provides that if a lawyer learns that a fraud has been perpetrated on the tribunal, the lawyer must take reasonable remedial measures ~~reveal the fraud to the tribunal~~. 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) ~~if the notification of the tribunal would require disclosure of information protected by Rule 1.6, the lawyer may not inform the tribunal of the fraud; the lawyer's only duty in such an instance is to call upon the client to rectify the fraud.~~ 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**

[97] 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.

[108] 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**

[119] 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**

### **Explanation of Proposed Changes**

The Committee recommends adding a new provision, Rule 3.4(g), to prohibit any lawyer from making peremptory strikes to prospective jurors based on impermissible factors. Currently, Rule 3.8(h) addresses this issue, and the prohibition applies only to prosecutors. In the Committee's view, no lawyer – not only prosecutors – should engage in discriminatory use of peremptory challenges.

As suggested by the ABA Ethics 2000 Commission, the ABA added the following sentences to the end of Comment [2]:

Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

The Committee determined that this comment was in part unnecessary in light of the approach taken by D.C. Rule 3.4 and may impose requirements that are inconsistent with D.C. practice. D.C. Comment [5] suggests that Rule 1.6 may prevent disclosure of physical evidence received from a client and offers a procedure in some cases to turn over physical evidence to the Office of Bar Counsel. D.C. Comment [7] addresses the issue of testing and return of property to the client or owner.

### **Redline Showing Proposed Changes**

#### **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 effort to comply with a legally proper discovery request by an opposing party;

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

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

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

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; 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~~1981~~). 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 ~~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. However, Bar Counsel may refuse to accept evidence; thus lawyers should keep the following in mind before accepting evidence from a client, and should discuss with Bar 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**

### **Explanation of Proposed Changes**

The recommended changes to this Rule follow closely the changes made by the ABA in the Model Rules. The current D.C. Rule is identical to the prior ABA Rule. The Committee found the ABA’s reasons for changing the Rule persuasive and recommends that similar changes be made. The proposed changes address the issue of post-discharge contact with jurors separately from other contacts. They also change the focus of the Rule from a presumptive prohibition on such contact to presumptive permission. This proposal permits more post-verdict communication with jurors, but provides jurors with greater protection. Finally, following the ABA, the reference to “court order” would be added to alert lawyers to the availability of judicial relief in the rare situation in which an ex parte communication is needed.

### **Redline of Proposed Changes**

#### **Rule 3.5 – Impartiality and Decorum of the Tribunal**

A lawyer shall not:

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

(b) Communicate ex parte with such a person ~~except as permitted~~ during the proceeding unless authorized to do so by law or court order; ~~or~~

(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 ~~ABA Model~~ Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[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**

### **Explanation of Proposed Changes**

In contrast to D.C. Rule 3.6, which is expressly limited to “a case being tried to a judge or jury,” ABA Model Rule 3.6 applies to any proceeding. The Committee determined to retain the approach of the D.C. Rule and limit the application of Rule 3.6 to trial proceedings. The Committee does recommend that the D.C. Rule be brought closer to the Model Rule in one respect. The ABA Model Rule addresses extrajudicial statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” The Committee believes that the stricter standard in the D.C. Rule (“serious and imminent threat”) is more appropriate than the standard in the Model Rule (“substantial likelihood”), but the Committee agrees that the material prejudice test is more appropriate: it reaches the problem in bench trials of extrajudicial statements that affect witnesses; and it eliminates the exclusive focus on the impartiality of judges, who are less likely to be influenced by extrajudicial statements than are jurors. The other changes proposed by the Committee are clarifying.

### **Redline Showing Proposed Changes**

#### **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 ~~reasonable person would expect to be disseminated by means of mass public communication~~ if the lawyer knows or reasonably should know ~~that the statement will be disseminated by means of mass public communication and~~ will create a serious and imminent threat of material prejudice to the proceeding to the impartiality of the judge or jury.

#### **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**

### **Explanation of Proposed Changes**

There are no substantive or policy differences between ABA Model Rule 3.7 and the current D.C. Rule 3.7, although particularly the Comments contain slight differences in language. Because the Committee could not identify any benefits from changing the current language of D.C. Rule 3.7, it does not recommend any changes to this Rule.

### **Redline Showing Proposed Changes**

No changes are recommended.

## **Rule 3.8 – Special Responsibilities of a Prosecutor**

### **Explanation of Proposed Changes**

The Jordan Committee concluded that ABA Model Rule 3.8 did not identify the most important ethical issues relating to the conduct of prosecutors. Accordingly, D.C. Rule 3.8 does not resemble the ABA version. In the Ethics 2000 process, the ABA did not make any substantive changes in the text of Model Rule 3.8, and the changes to the comments were directed at provisions that do not appear in the D.C. Rule.

The Committee recommends that the prohibition against discriminatory use of peremptory challenges be moved to Rule 3.4(g), and it has therefore been dropped from Rule 3.8. This change is proposed to extend the Rule to all attorneys, not just prosecutors.

### **Redline Showing Proposed Changes**

#### **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 avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense;
- (e) 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 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 upon request 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;
- (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; ~~or,~~

~~(h) Peremptorily strike jurors on grounds of race, religion, national or ethnic background, or sex.~~

## 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. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. This Rule is intended to be a distillation of some, but not all, of the professional obligations imposed on prosecutors by applicable law. The Rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.

[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.



## **Rule 3.9 – Advocate in Non-adjudicative Proceedings**

### **Explanation of Proposed Changes**

The only substantive difference between ABA Model Rule 3.9 and D.C. Rule 3.9 relates to the incorporation of Rules 3.3-3.5, dealing with conduct before a tribunal. The ABA Model Rule incorporates all of these rules, while the D.C. Rule currently incorporates only 3.3, 3.4(a)-(c), and 3.5. The Committee found no reason to change the current D.C. Rule.

### **Redline of Proposed Changes**

No changes are recommended.

## **Rule 4.1 – Truthfulness in Statements to Others**

### **Explanation of Proposed Changes**

The ABA did not amend the text of Rule 4.1, but modified the comments. The Committee recommends adoption of the ABA’s revisions to Comments [1] and [2] without change. The revisions clarify that partially true but misleading statements or omissions that are the equivalent of false statements are within the scope of Rule 4.1, and that under some circumstances an estimate of price or value could constitute a false statement.

The Committee proposes adopting the ABA’s revisions to Comment [3] with only slight modification. The revisions include: (1) a cross reference to Rule 1.2(e); (2) a statement that Rule 4.1(b) is a specific application of Rule 1.2(e)’s directive not to assist client fraud or crime; (3) reminders that withdrawing from the representation can be used to avoid a problem, and that a noisy withdrawal may sometimes be required; (4) and a modified explanation of a lawyer’s disclosure obligations under Rule 4.1 in light of restrictions imposed by Rule 1.6. The ABA’s reference to “certain information relating to the representation” was rephrased because D.C. does not follow this formulation for material protected by Rule 1.6. The Committee also added an additional final sentence to make explicit that, in circumstances in which a lawyer is permitted to disclose information under Rule 1.6, the disclosure is not “prohibited” by that Rule. Thus, if a lawyer’s failure to disclose information would constitute assistance in a client’s crime or fraud under Rule 4.1, the lawyer has a mandatory duty to disclose the information for which a Rule 1.6 exception permits disclosure.

The Legal Ethics Committee asked the Rules Review Committee to consider changing the D.C. Rules to make clear that certain governmental and private investigative tactics that may involve deceit are not ethical violations. The Rules Review Committee decided not to recommend any change because the current Rules do not appear to inhibit any legitimate investigative techniques, and it is difficult to craft a general standard appropriate for all circumstances.

### **Redline of Proposed Changes**

#### **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 ~~failure to act~~ 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) ~~recognizes that~~ 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 ~~certain client~~ information to avoid being deemed to have assisted the client's crime or fraud. ~~The requirement of-~~ 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 created by this paragraph is, however, subject to the obligations created 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**

### **Explanation of Proposed Changes**

The Committee recommends retaining Rule 4.2 in substantially the same form as it currently exists. It recommends, however, a few clarifying changes.

The language of the Rule would be changed to address communications between lawyers and “parties” to those between lawyers and “persons.” The ABA made this change several years ago, and current D.C. Comment [4] makes clear that this is the intent of the Rule. The recommended change clarifies this issue.

The Committee did find useful several comments in the ABA Model Rules, and recommends that they be included in Rule 4.2. These comments provide guidance to practitioners about the reach of the Rule and its applicability in several specific situations. *See* Comments [5] – [8].

The Committee did not find any indication that the rule regarding contact with employees of an organization and the government is creating problems. It concluded that the standards in the Rule are sufficiently clear that they should not be changed.

### **Redline of Proposed Changes**

#### **Rule 4.2: Communication Between Lawyer And ~~Opposing Parties~~ 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 ~~party~~ person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other ~~party~~ 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 ~~the opposing party~~ an organization without obtaining the consent of that ~~party’s~~ organization’s lawyer. If the organization is an adverse party, h 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~~ 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 party~~ an organization, who has the authority to bind ~~an party~~ 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 a party or 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.

[23] 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.

[34] 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-(1983). 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] ~~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.~~ 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.

[59] 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.

[610] 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.

[711] 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.

[812] 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 – Dealings with Unrepresented Parties**

### **Explanation of Proposed Changes**

The recommended changes to the formatting of Rule 4.3 are intended to eliminate an ambiguity in the Rule. By separately enumerating the requirement that lawyers should take steps to ensure that their roles are not misunderstood (new section (b)), it is clearer that this requirement applies to both types of conduct listed in the Rule (new section (a)). The recommendation also includes some of the revised ABA commentary that provides useful guidance to lawyers negotiating with unrepresented persons.

### **Redline of Proposed Changes**

#### **Rule 4.3 – Dealings with Unrepresented Parties**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

(1a) 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

(2b) 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**

### **Explanation of Proposed Changes**

New Rule 4.4(b) and Comments [2] and [3] are proposed to address the frequently occurring problem of inadvertent production. They incorporate the approach taken by D.C. Bar Legal Ethics Committee Opinion 256, but because of the frequency with which these issues occur, the Committee felt it would be beneficial to members of the Bar to include this guidance in the Rule itself. Comment [3] describes some of the differences between the D.C. and ABA Model Rule approaches to inadvertent disclosure. Comment [3] also makes clear that these Rules do not address the questions of privilege in such situations or the treatment of documents that may have been wrongfully obtained by the sending party.

### **Redline of Proposed Changes**

#### **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.

#### **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 the obligations of a lawyer who receives writings containing client secrets or confidences in material delivered by an adversary 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 this circumstances, and also prohibits the receiving lawyer from reading or using the material. See also ABA Formal Opinion 92-368, which found 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. 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] On the other hand, 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. 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 legal 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. See D.C. Bar Legal Ethics Committee Opinion 318.

## **Rule 5.1 – Responsibilities of a Partner or Supervising Lawyer**

### **Explanation of Proposed Changes**

The ABA Model Rules reflect several changes to the text and comments of Rule 5.1 to clarify that the obligations it imposes apply not only to law firm partners, but also to supervisory lawyers in corporate legal departments, government agencies, and legal services organizations. The Committee agreed with this approach, and noted that D.C. Rule 5.1 already reflected this view in its Comment [1] to D.C. Rule 5.1. For clarification, the phrase “government agency” was added to the text of the Rule.

A new Comment [2] was added to highlight the additional ethical obligations of attorneys with managerial responsibilities within a law firm or similar organization to ensure that policies and procedures exist to provide reasonable assurance that the conduct of all lawyers in the firm will conform to the Rules of Professional Conduct and that the firm as an institution has policies and procedures to address conflicts of interest, docketing, client funds, and supervision of attorneys and employees.

New Comment [9] was added to clarify that the responsibilities of managing and supervisory lawyers do not alter or absolve subordinate lawyers from their personal obligations under Rule 5.2(a).

### **Redline of Proposed Changes**

#### **Responsibilities of a Partner or 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] Paragraphs (a) ~~and (b)~~ refer to applies to lawyers who have supervisory managerial authority over the professional work of a firm ~~or legal department of a~~ government agency. This includes members of a partnership, ~~and~~ the shareholders in a law firm organized as a professional corporation and members of other associations authorized to practice law; lawyers having supervisory 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.

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

[34] 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.

[45] 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.

[56] 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.

[67] 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.

[78] 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**

### **Explanation of Proposed Changes**

There are no substantive differences between ABA Model Rule 5.2 and D.C. Rule 5.2. As described above, a new Comment [8] has been proposed for Rule 5.1 to clarify that the responsibilities of supervisory or managerial attorneys do not in any way alter or absolve the ethical responsibilities of subordinate lawyers.

### **Redline of Proposed Changes**

No changes are recommended.

## **Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants**

### **Explanation of Proposed Changes**

The proposed changes are intended to recognize that the partnership model no longer is the only way in which lawyers may associate in a firm and that the obligation to supervise nonlawyer assistants applies to all lawyers, regardless of title, who individually or collectively exercise comparable managerial authority in the firm.

### **Redline of Proposed Changes**

#### **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 ~~the~~ 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 ~~[43]~~, ~~[54]~~, and ~~[65]~~ 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 ~~[43]~~, ~~[54]~~, and ~~[65]~~ of Rule 5.1 apply as well to Rule 5.3.

## **Rule 5.4 – Professional Independence of a Lawyer**

### **Explanation of Proposed Changes**

There are significant differences between ABA Model Rule 5.4 and D.C. Bar Rule 5.4 because the District of Columbia recognizes nonlawyer partners, in contrast to the ABA rule, which prohibits such relationships. The Committee saw no need to revisit the policy determination previously made by the District of Columbia Court of Appeals in this regard. As a result, many of the modifications proposed by the Ethics 2000 Committee and subsequently adopted by the ABA Model Rules are inconsistent with or inapplicable to the D.C. Rules, and so are not included in the Committee's proposed recommendation.

The proposed change dealing with payments to the estate or representatives of a deceased, disabled, or missing lawyer is, in the view of the Committee, necessary to conform Rule 5.4(a) with D.C. Bar Legal Ethics Committee Opinion No. 294 and proposed Rule 1.17, which permit the sale of a law practice. If such payments can be made to a living lawyer, the Committee could not identify any policy reason why similar payments cannot be made to the estate or representatives of a deceased or disabled lawyer.

The second proposed change permits lawyers to share legal fees with bona fide nonprofit organizations that employed, retained or recommended employment of the lawyer in the matter. The ABA recognized that any threat to independent professional judgment is less when fees are shared with a nonprofit organization than with a for-profit entity. New subparagraph (a)(5) draws on the current Model Rule, but permits lawyers to contribute legal fees to such organizations in a broader range of circumstances. In the Committee's view, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission.

### **Redline of Proposed Changes**

#### **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;~~and~~

(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**

### **Explanation of Proposed Changes**

Issues relating to unauthorized practice of law in the District of Columbia are addressed in Rule 49 of the District of Columbia Court of Appeal’s Rules. The Board of Governors recently approved recommendations of the D.C. Bar Special Committee on Multijurisdictional Practice concerning whether Rule 49 should be changed in light of recent amendments to the ABA Model Rules. Given this recent review, the Rules Review Committee determined that it would not revisit the issue of unauthorized practice and so has not proposed any substantive changes to Rule 5.5. To assist D.C. Bar members seeking guidance on unauthorized practice rules, the Committee recommends adding as Comment [1] an explicit reference to Rule 49.

### **Redline of Proposed Changes**

#### **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.

[42] 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**

### **Explanation of Proposed Changes**

The Committee proposes (as did the ABA) that additional language be added to the rule to clarify the types of agreements that are covered by the rule. The Committee does not propose that subsection (b) be revised to conform to the ABA rule because the D.C. rule does not contain the ambiguity that existed in the prior ABA rule as to whether the rule regarding settlements applied to government clients. A new comment is proposed to clarify the rule and the interrelation of this rule with a proposed new rule governing the sale of a law practice. The Committee also proposes the addition of two new comments and some language to an existing comment (clarifying that this rule does not apply to sale of law practice).

### **Redline of Proposed Changes**

#### **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 ~~or employment 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] 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**

### **Explanation of Proposed Changes**

The Committee recommends adoption of ABA Model Rule 5.7, which addresses some of the issues discussed in current Comment [25] (which would be renumbered as [34] under the Committee’s recommendations) to D.C. Rule 1.7. That Comment was adopted instead of an earlier, broader version of Model Rule 5.7 entitled “Provision of Ancillary Services,” which the ABA adopted in 1991 and deleted in 1992. The ABA adopted the current form of Rule 5.7 in 1994 and revised it slightly in 2002. The current form of Model Rule 5.7 is not inconsistent with existing Comment [25] to D.C. Rule 1.7, nor had it been the subject of any review by the Committee’s predecessors. In the interests of uniformity, the Committee recommends adoption of this new Rule.

### **Redline Showing Proposed Changes**

#### **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 of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures 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's 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 of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to 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.

## **Rule 6.1 –Pro Bono Publico Service**

### **Explanation of Proposed Changes**

A new Comment [6] is proposed for this Rule to highlight the importance of providing pro bono services. It is intended to remind attorneys with managerial responsibilities in law firms and other organizations that they must exercise these responsibilities in way that encourages individual attorneys to provide pro bono services and supports the provision of these services by members of their firms through appropriate institutional policies.

### **Redline of Proposed Changes**

#### **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 1997 and 1998, respectively, call on members of the D.C. Bar, as 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 \$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.

[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**

### **Explanation of Proposed Changes**

The text and comments of ABA Model Rule 6.2 are identical to D.C. Rule 6.2. The Committee did not identify any issues requiring changes to this Rule.

### **Redline of Proposed Changes**

No changes are recommended.

## **Rule 6.3 – Membership in Legal Services Organization**

### **Explanation of Proposed Changes**

The text and comments of ABA Model Rule 6.3 are substantially similar to D.C. Rule 6.3. The Committee did not identify any issues requiring changes to this Rule.

### **Redline of Proposed Changes**

No changes are recommended.

## **Rule 6.4 – Law Reform Activities Affecting Client Interests**

### **Explanation of Proposed Changes**

D.C. Rule 6.4(a) and Comment [1] are unique to this jurisdiction; D.C. Rule 6.4(b) and Comment [2] are identical to ABA Model Rule 6.4 and its commentary. The Ethics 2000 Committee did not recommend any changes to Rule 6.4. The Committee did not identify any issues requiring changes to this Rule.

### **Redline of Proposed Changes**

No changes are recommended.

## **Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs**

### **Explanation of Proposed Changes**

Consistent with the recommendation of the D.C. Bar Pro Bono Committee, the Rules Review Committee recommends adoption of ABA Model Rule 6.5, which is a new addition to the Model Rules of Professional Conduct. This rule facilitates pro bono legal services by limiting the imputation of unknown conflicts of interest in circumstances where it would be impractical to perform a normal conflicts check, thereby making it possible for attorneys with law firms to provide services they otherwise might have believed to have been precluded by the inability to perform a conflicts check with their firms. Rule 1.10(e) contains a similarly-motivated exception from imputation for attorneys who assist the District of Columbia government with certain matters. In the interests of uniformity and to encourage and facilitate pro bono legal services, the Committee recommends adoption of Model Rule 6.5.

### **Redline Showing Proposed Changes**

#### **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 does 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.

## **Rule 7.1 – Communications Concerning Lawyer’s Services**

### **Explanation of Proposed Changes**

Current Rule 7.1 includes a provision not found in any other jurisdiction in the United States, which permits a lawyer to pay intermediaries to recommend the lawyer’s services to potential clients. At the time the D.C. Rules were originally adopted, lawyer advertising was still in its early stages of development, and so it was felt that permitting third persons to contact persons to advise them of the availability of a lawyer would assist such persons, particularly those who might otherwise not know how to hire a lawyer, to receive legal services.

For two reasons, the Committee recommends removal of that provision. First, lawyer advertising is 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. Thus, activities of paid intermediaries may, in some cases, actually be causing harm or at least making the hiring of a lawyer more difficult.

Lawyers themselves may continue to contact prospective clients, but such contacts are subject to the regulatory provisions of this Rule. The Committee recommends adoption of the ABA’s regulatory standard, which prohibits the use of “coercion, duress or harassment ” in lieu of the current, more limited, prohibition on the use of “undue influence.”

The Committee also recommends the addition of a new paragraph (e) in response to reports from the Public Defender Service, the United States Attorney’s Office, and the Office of Bar Counsel of lawyers who regularly solicit inmates already represented by counsel for fee-paying representations with promises of a quick release from prison or a favorable resolution of their case. Requiring notice to current counsel before a lawyer accepts funds accords the inmate protection from this practice.

### **Redline of Proposed Changes**

#### **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) ~~(1)~~ 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:

~~(A1)~~ The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

~~(B2)~~ The solicitation involves the use of coercion, duress or harassment ~~undue influence; or~~

~~(C3)~~ 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.

(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.

(d) 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.

(e) 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 ~~moderate~~ means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

[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. ~~had extensive prohibitions against television advertising, against advertising going beyond specific facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the Bar can accurately forecast the kind of information that the public would regard as relevant.~~

[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 ~~additional~~ 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.

### **Payments for Advertising ing Others to Recommend a Lawyer**

[6] A lawyer is allowed to pay for advertising or marketing permitted by this Rule. This Rule also permits a lawyer to pay another person for channeling professional work to the lawyer. Thus, an organization or person other than the lawyer may advertise ~~or recommend the lawyer's services~~. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs. ~~However, special concerns arise when a lawyer is making payments to intermediaries to recommend the lawyer's services to others. These concerns are particularly significant when the payments are not being made to a recognized or established agency or organization, such as an organized lawyer referral program. In employing intermediaries, the lawyer is bound by all of the provisions of this Rule. However, subparagraphs (b)(4) and (b)(5) contain provisions specifically relating to the use of intermediaries.~~

[7] ~~Subparagraph (b)(4) forbids a lawyer to solicit clients through another person when the lawyer knows or could reasonably ascertain that such conduct violates a contractual or other legal obligation of that other person. For example, a lawyer may not solicit clients through hospital or court employees if solicitation by such employees is prohibited by their employment contracts or rules established by their employment. This prohibition applies whether or not the intermediary is being paid.~~

[8] ~~Subparagraph (b)(5) imposes specific obligations on the lawyer who employs an intermediary to ensure that the potential client who is the target of the solicitation is informed of the consideration paid or to be paid by the lawyer to the intermediary, and any effect of the payment of such consideration on the total fee to be charged. The concept of payment, as incorporated in subparagraph (b)(5), includes giving anything of value to the recipient and is not limited to payments of money alone. For example, if an intermediary were provided the free use of an automobile in return for soliciting clients on behalf of the lawyer, the obligations imposed by subparagraph (b)(5) would apply and impose the specified disclosure requirements.~~

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

[7] Paragraph (d) 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 (d) 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**

[8] Paragraph (e) 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 7.2 – Advertising**  
**Rule 7.3 – Direct Contact with Prospective Clients**  
**Rule 7.4 – Communication of Fields of Practice and Specialization**

**Explanation of Proposed Changes**

The D.C. Rules on advertising and solicitation are contained only in Rules 7.1 and 7.5. When the Board of Governors submitted its petition to the D.C. Court of Appeals in 1986, it did not recommend adoption of Model Rules 7.2, 7.3, and 7.4, and none of the committees which have reviewed the Rules since that time recommended reversal of this decision. The Committee agrees with these consistent decisions.

**Redline of Proposed Changes**

Not contained in District of Columbia Rules



## **Rule 7.5 – Firm Names and Letterheads**

### **Explanation of Proposed Changes**

The Ethics 2000 Committee made only minor, clarifying changes to Rule 7.5. With one exception, these changes all appear to be improvements and fully compatible with the D.C. Rule, so the Committee recommends their adoption. The one exception involves a change to the last sentence of Comment [1] in both the D.C. and prior ABA Model Rules versions. That sentence stated that it is misleading to use in a firm name the name of a lawyer not associated with the firm, or a predecessor of the firm. As a result of the Ethics 2000 review, the phrase “or the name of a nonlawyer” was added at the end of this sentence in the ABA Model Rule, presumably reflecting the fact that, in virtually all states, associations with nonlawyers are forbidden.

The District of Columbia, however, permits associations with non-lawyers under the particular circumstances spelled out in D.C. Rule 5.4(b), thereby rejecting an absolute prohibition on lawyers and nonlawyers joining together to provide legal services. There is nothing in Rule 5.4(b) to suggest that the nonlawyer’s name could not be included in the firm name. Hence, consistent with the policy choice made by the District of Columbia in adopting Rule 5.4(b), the Committee rejected a prohibition on the use of a nonlawyer’s name in the comments to Rule 7.5.

The additional sentence regarding distinctive website addresses or comparable designations was added to Comment [1] to recognize the increased importance of the Internet as a means of communicating information regarding legal services and to clarify that the same principles regarding use of firm name apply regardless of the method used to communicate. The proposed changes to Comment [2] simply recognize that lawyers may associate themselves in a variety of means that do not constitute a law firm and, to the extent lawyers do so, they should not employ professional designations that suggest the existence of a firm.

### **Redline of Proposed Changes**

#### **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 partners associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law that they are practicing law together in a firm.

**Rule 7.6 – Political Contributions to Obtain Government  
Legal Engagements or Appointments by Judges**

**Explanation of Proposed Changes**

The D.C. Rules currently do not contain a provision analogous to ABA Model Rule 7.6, which contains an express prohibition on making political contributions in order to obtain government legal engagements or appointments by judges. Given that the District of Columbia does not utilize an election process to select judges and that there does not appear to be any evidence of abuse in obtaining government legal employment, the Committee determined not to recommend the adoption of the ABA Model Rule. The Committee also noted that neither Virginia nor Maryland has adopted this rule.

**Redline of Proposed Changes**

The Committee does not recommend adoption.

## **Rule 8.1 – Bar Admission and Disciplinary Matters**

### **Explanation of Proposed Changes**

Consistent with the ABA Ethics 2000 changes, the Committee recommends two clarifying changes in the comments to Rule 8.1. The text of the D.C. Rule has been and would remain substantively identical to Model Rule 8.1. The change to the first comment clarifies that the duty to disclose facts necessary to correct any misapprehension known to have arisen in bar admission or disciplinary matters includes a duty to correct prior misstatements.

The proposed changes to Comment [3] clarify the duties of a lawyer who is representing a bar applicant or another lawyer who is the subject of a disciplinary inquiry. In an appearance in an adjudicative proceeding in either regard, the lawyer is subject to the rules regarding candor to the tribunal found in Rule 3.3, which provides specific guidance regarding the relative precedence of candor to the tribunal versus the confidentiality duty to the client. When a lawyer has a lawyer-client relationship with a bar applicant or lawyer subject to a disciplinary proceeding in some capacity outside Rule 3.3, *e.g.*, counseling only, new language added to Comment [3] clarifies that information falling in a permissive disclosure exception to Rule 1.6 remains “protected by Rule 1.6.” If a disclosure exception to Rule 1.6 is triggered by the facts of the situation, a lawyer may reveal the client information, as is generally the case under Rule 1.6 with regard to permissive disclosure options arising in lawyer-client relationships. Rule 8.1, however, does not mandate reporting of material protected by Rule 1.6, even if Rule 1.6 gives an attorney a permissive option to disclose.

### **Redline of Proposed Changes**

#### **Rule 8.1 – Bar Admission and Disciplinary Matters**

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

- (a) Knowingly make a false statement of ~~material~~ fact; or
- (b) Fail to disclose a fact necessary to correct a misapprehension known by the 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 ~~material~~ 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. This 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 8.2 – Judicial and Legal Officials**

### **Explanation of Proposed Changes**

ABA Model Rule 8.2, which has no counterpart in the D.C. Rules, provides:

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

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

The ABA Ethics 2000 Commission made no changes to this Rule or its accompanying Comments.

The District of Columbia did not adopt Rule 8.2. The Jordan Committee and the Board of Governors recommended the omission of this rule for the following reasons:

The Committee and Board recommend deleting Rule 8.2 in its entirety. It is unnecessary to the District of Columbia, and in any event overbroad in subjecting lawyers' comments regarding potential appointees to public office to requirements not applicable to nonlawyers.

Because judges in the District of Columbia court system are not elected, but are appointed and reappointed through a carefully crafted statutory procedure involving the D.C. Judicial Nomination Commission, the President and the Senate, the portions of proposed paragraph (a) which contemplate public elections have no bearing in D.C. The remaining portion of paragraph (a) is viewed as unnecessary, since proposed Rule 8.4(c) would prohibit conduct by a lawyer involving dishonesty, fraud, deceit or misrepresentation. The ban on misrepresentation would include any knowing falsehoods embodied in statements about potential appointees to public legal or adjudicatory positions. To the extent that the 'reckless disregard' language is intended to encompass conduct which would not constitute misrepresentation under proposed Rule 8.4, the Committee was concerned about the possible chilling effect of such a broader rule upon candid comments regarding potential appointees.

Report dated Nov. 19, 1986, at 243.

The Committee recommends that Model Rule 8.2 continue to be omitted from the D.C. Rules based on the past determinations of predecessor committees not to adopt ABA Model Rule 8.2 or any similar variant, the absence of any recommended changes in

the ABA's most recent revisions, and the lack of demonstrated need for the Rule in this jurisdiction.

**Redline of Proposed Changes**

The Committee does not recommend adoption.

## **Rule 8.3 – Reporting Professional Misconduct**

### **Explanation of Proposed Changes**

The Committee’s proposed changes in paragraphs (a) and (b) modify the current “lawyer having knowledge” standard to conform to the “lawyer who knows” standard; this change is consistent with changes throughout these proposals. The Committee also proposes a clarification to paragraph (c) to indicate that the duty to report misconduct may be limited by law external to these Rules.

The Committee proposes to amend Comments [2], [4], and [5] to clarify the relationship among the mandatory duty to report in Rule 8.3, the exception for material protected by Rule 1.6, and the status of permissive disclosure options to Rule 1.6. Existing Comment [5] clarifies that relationship with regard to lawyers participating in the Lawyer Counseling Committee by saying that a permissive disclosure option to Rule 1.6 gives the lawyer an option to report misconduct, but the lawyer is not required to do so. Proposed revisions to Comment [2] and [4] would make clear that the same rule applies to lawyers who gain information about another lawyer’s misconduct in a professional relationship with a client (Comment [2]) and lawyers who gain information about another lawyer’s misconduct in a lawyer-client relationship with that lawyer (Comment [4]). In both situations, the information about the lawyer’s misconduct is “protected by Rule 1.6.” As clarified by proposed Comment [3] to Rule 8.1, if a disclosure exception to Rule 1.6 is triggered, the lawyer may make disclose the information, here by making a report of misconduct, but the lawyer is not required to make the report. In other words, Rule 8.3 does not mandate reporting of material protected by Rule 1.6, even if Rule 1.6 gives an attorney a permissive option to disclose. Existing Comment [5] refers only to the disclosure option in D.C. Rule 1.6(c) and fails to mention (d), which also includes disclosure options. Under the Committee’s proposal, disclosure options would be found in Rule 1.6 (c), (d), and (e).

### **Redline of Proposed Changes**

#### **Rule 8.3 – Reporting Professional Misconduct**

(a) A lawyer ~~having knowledge~~ 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 ~~having knowledge~~ who knows that a judge has committed a violation of applicable ~~R~~rules of ~~J~~udicial ~~C~~onduct 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 Bar Counsel. A lawyer who believes that another lawyer has a significant problem of alcohol or other substance abuse which does not require reporting to Bar 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 fall 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**

### **Explanation of Proposed Changes**

The Committee's proposes to combine Comments [2]-[5]. This change is intended not to affect the substance of these comments, but only to recognize that many other D.C. cases could be cited to illustrate conduct that serious interferes with the administration of justice, and that it no longer makes sense to list specific cases. The Committee recommends a new Comment [3], a modified version of ABA Comment [3], to emphasize that offensive, abusive, or harassing conduct that serious interferes with the administration of justice may include words or actions manifesting bias or prejudice.

### **Redline of Proposed Changes**

#### **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 ~~R~~rules of ~~J~~judicial ~~C~~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 extensive case law on that standard, as set forth below, is hereby incorporated into this Rule.~~

~~[3] The majority of these cases under paragraph (d) include acts by a lawyer such as: involve a lawyer's failure to cooperate with Bar Counsel; a lawyer's failure to respond to Bar Counsel's inquiries or subpoenas; may constitute misconduct, see *In re Cope*, 455 A.2d 1357 (D.C. 1983); *In re Haupt*, 444 A.2d 317 (D.C. 1982); *In re Lieber*, 442 A.2d 153 (D.C. 1982); *In re Whitlock*, 441 A.2d 989 (D.C. 1982); *In re Spencer*, No. M-112-82 (D.C. June 4, 1982); *In re L. Smith*, No. M-91-82 (D.C. App. Mar. 9, 1982); *In re Walsh*, No. M-70 (81) (D.C. Sept. 25, 1981) *en banc*; *In re Schattman*, No. M-63-81 (D.C. June 2, 1981); *In re Russell*, 424 A.2d 1087 (D.C. 1980); *In re Willeher*, 404 A.2d 185 (D.C. 1979); *In re Carter*, No. D-31-79 (D.C. Oct. 28, 1979); *In re Bush (Bush II)*, No. S-58-79 (D.C. Oct. 1, 1979); *In re Tucker*, No. M-13-75/S-56-78 (D.C. Nov. 15, 1978), as may the failure to abide by agreements made with Bar Counsel; *In re Harmon*, M-79-81 (D.C. Dec. 14, 1981) (breaking promise to Bar Counsel to offer complainant refund of fee or vigorous representation constitutes conduct prejudicial to the administration of justice).~~

~~[4] A lawyer's failure to appear in court for a scheduled hearing; is another common form of conduct deemed prejudicial to the administration of justice. See *In re Evans*, No. M-126-82 (D.C. Dec. 18, 1982); *In re Doud*, Bar Docket No. 442-80 (Sept. 23, 1982); *In re Bush (Bush III)*, No. S-58-79/D/39/80 (D.C. Apr. 30, 1980); *In re Molovinsky*, No. M-31-79 (D.C. Aug. 23, 1979). Similarly, failure to obey court orders; may constitute misconduct under paragraph (d). *Whitlock*, 441 A.2d at 989-91; *In re Brown*, Bar Docket No. 222-78 (Aug. 4, 1978); *In re Bush (Bush I)*, No. DP-22-75 (D.C. July 26, 1977).~~

~~[5] While the above categories—failure to cooperate with Bar Counsel and failure to obey court orders—encompass the major forms of misconduct proscribed by paragraph (d), that provision is to be interpreted flexibly and includes any improper behavior of an analogous nature. For example, the failure to turn over the assets of a conservatorship to the court or to the successor conservator; has been held to be conduct "prejudicial to the administration of justice." *In re Burka*, 423 A.2d 181 (D.C. 1980). *In Russell, supra*, the court found that failure to keep the Bar advised of respondent's changes of address, after being warned to do so; was also misconduct under that standard. And in *Schattman, supra*, it was held that a lawyer's giving and tendering a worthless check known to be worthless in settlement of a claim against the lawyer or against the lawyer's client by a client was improper. 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**

### **Explanation of Proposed Changes**

Rule 8.5 addresses two issues: (a) disciplinary authority and (b) choice of law. With respect to disciplinary authority, adoption of ABA Model Rule 8.5(a) would expand the disciplinary system to cover not only members of the D.C. Bar (and lawyers admitted *pro hac vice*), but also lawyers who practice here but are not admitted here. The D.C. Bar’s Multijurisdictional Practice (“MJP”) Committee recently considered this issue and recommended the ABA approach, subject to review by the D.C. Bar’s Disciplinary System Study (“DSS”) Committee. The Rules Review Committee understands that the DSS Committee, pursuant to the Board’s request, is currently considering the impact of this expansion on the D.C. disciplinary system. The Rules Review Committee therefore did not address this change to Rule 8.5(a).

With respect to choice of law, the Rules Review Committee recommends that the current approach in Rule 8.5(b) be retained. The current D.C. Rule is identical to the former version of the ABA Model Rule. However, the Ethics 2000 review resulted in a major change to the Model Rule. Both the former and current ABA Model Rule are the same with respect to conduct in connection with matters before tribunals: the rules of the jurisdiction in which the tribunal sits generally apply. However, for other conduct, disciplinary authorities apply the rules of the jurisdiction in which the lawyer’s conduct occurred or, if different, the rules of the jurisdiction where the predominant effect of the conduct occurred. In contrast, the D.C. Rule, like the former version of the Model Rule, provides that the rules of a jurisdiction in which the lawyer is licensed to practice apply: if the lawyer is licensed in only one jurisdiction, that jurisdiction’s rules apply; if the lawyer is licensed in more than one jurisdiction, the rules of the admitting jurisdiction in which the lawyer principally practices apply, unless the conduct at issue clearly has its predominant effect in another admitting jurisdiction.

The Rules Review Committee concluded that the new Model Rule would subject lawyers to substantial burden in trying to determine (a) where the predominant effect of the lawyer’s conduct occurs and (b) whether and how that jurisdiction’s ethics rules differ from the D.C. Rules of Professional Conduct, and that any countervailing benefits do not outweigh this burden.

The Committee recommends only two, relatively minor changes – one to the text of the Rule and one to a comment:

1. Consistent with ABA Model Rule 8.5, D.C. Rule 8.5(b)(1) substitutes “matter pending before a tribunal” for “proceeding in a court.” The reporter for the ABA Ethics 2000 Commission stated that this change is clarifying, not substantive, and that “the term ‘matter pending before’ more clearly reflects that the rules of the tribunal become controlling from the moment the matter can be said to be ‘before’ that tribunal (typically the date the case is filed), even if no specific ‘proceeding’ is pending at the time the conduct occurs.” Making this change in the D.C. Rule promotes uniformity and permits D.C. courts to benefit from decisions in other jurisdictions interpreting this Model Rule.

2. The ABA Comment concerning transnational practice is substituted for the current D.C. comment. The ABA Comment is preferable because it states what choice of law provision applies – Rule 8.5(b) – if no international agreement specifies the choice of law applicable to lawyers engaged in transnational practice.

### **Redline of Proposed Changes**

#### **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 ~~proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding)~~, the rules to be applied shall be the rules of the jurisdiction in which the tribunal ~~court~~ sits, unless the rules of the tribunal ~~court~~ 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 ~~proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice)~~, the lawyer shall be subject only to the rules of professional conduct of that tribunal ~~court~~. 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. ~~The choice of law provision is not intended to apply to transnational practices. Choice of law in this context should be the subject of agreements between jurisdictions or appropriate international law.~~

## **Rule 9.1 – Nondiscrimination**

### **Explanation of Proposed Changes**

D.C. Rule 9.1 has no counterpart in the ABA Model Rules. The Committee is not aware of any reason to recommend any change in the Rule. Comment [2] is updated to include the current D.C. Code cite, and Comment [3] is dropped as unnecessary.

### **Redline of Proposed Changes**

#### **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 § ~~4-2512 (1981)~~ 2-1402.11 (2001), though in some respects 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] A similar rule has been adopted by the highest court in Vermont. A similar rule is also under consideration for adoption by the courts in New York based on the recommendations of the New York State Bar Association.~~

~~[3] 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.~~

~~[4] 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 Bar Counsel may be deferred or abated where there is substantial similarity between the complaint filed with Bar Counsel and material allegations involved in such other proceedings. See § 19(d) of Rule XI of the Rules Governing the District of Columbia Bar Court of Appeals.~~