

PROPOSED AMENDMENTS TO THE TENNESSEE RULES OF PROFESSIONAL CONDUCT

May 27, 2008, Discussion Draft
of the
Tennessee Bar Association
Standing Committee on Ethics and Professional Responsibility

(With deletions from existing rule indicated as ~~struck through~~
and additions to existing rule indicated as double-underlined)

PREAMBLE AND SCOPE

PREAMBLE : A LAWYER'S RESPONSIBILITIES

~~[1] A lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service and engaging in these pursuits as part of a common calling to promote justice and public good. Essential characteristics of the lawyer are knowledge of the law, skill in applying the applicable law to the factual context, thoroughness of preparation, practical and prudential wisdom, ethical conduct and integrity, and dedication to justice and the public good.~~

[~~1~~2] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

[~~2~~3] As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest ~~dealing~~dealings with others. ~~As an intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.~~

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., RPC 1.12 and RPC 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to

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[discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See RPC 8.4.](#)

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

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

[6] As a public citizen, a lawyer should seek improvement of the law, ~~in~~access to the legal system, the administration of justice, and ~~in~~ the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance; ~~the lawyer.~~ Therefore, all lawyers should ~~therefore~~ devote professional time and ~~civic influence in their behalf.~~ A lawyer should also resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

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

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ~~upright~~ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

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

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

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

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

SCOPE

[~~14~~14] 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 ~~Rules~~ 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 discretion to exercise professional ~~discretion—~~judgment. 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 ~~either additional~~ guidance for practicing in compliance with the Rules ~~or make suggestions about good practice, which lawyers would be well advised to heed even though the Rules do not require them to do so.~~

[215] 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. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] 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.

[317] Furthermore, for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under ~~Rule~~PC 1.6, that ~~may~~ attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Tenn. Sup. Ct. R. 8, RPC. 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[418] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may differ from those of lawyers in private client-lawyer relationships. For example, in certain circumstances, the Attorney General of Tennessee has authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Also, certain government lawyers under the supervision of these officers may be authorized to represent several government agencies, officers, or employees in legal controversies in circumstances where a private lawyer could not represent multiple private clients. Government lawyers in Tennessee are also subject to the Open Meetings Act as interpreted by the Tennessee courts. Further, they may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate the powers and responsibilities of government lawyers as set forth under federal law or under the Constitution, statutes, or common law of Tennessee. The

resolution of any conflict between these Rules and the responsibilities or authority of government lawyers under any such legal provisions is a question of law beyond the scope of these Rules.

[519] 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, ~~the presence of~~ extenuating factors, and whether there have been previous violations.

[620] Violation of a Rule should not itself give rise to a cause of action; ~~against a lawyer~~ nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. ~~Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.~~ Nevertheless, in some circumstances, a lawyer's violation of a Rule may be relevant evidence for determining whether there was also a breach of the applicable standard of conduct.

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

~~[8] The lawyer's exercise of discretion not to disclose information when permitted to do so by Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.~~

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[~~9~~22] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended ~~either~~ as guides to interpretation ~~or as suggestions of good practice~~, but the text of each Rule is authoritative.

[~~10~~23] Standard Citation Format: Citations to each Rule of Professional Conduct (“RPC”) shall be in the following format: Tenn. Sup. Ct. R. 8, RPC ____.

CHAPTER 1 THE CLIENT-LAWYER RELATIONSHIP

RULE 1.0: TERMINOLOGY-DEFINITIONS

(a) “Belief” or “~~B~~believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

~~(b) “Consents in Writing” or “Written Consent” denotes either (i) a written consent executed by a client, or (ii) oral consent given by a client which the lawyer confirms in writing in a manner which can be easily understood by the client and which is promptly transmitted to the client by means reasonably calculated to reach the client.~~

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

~~(c) “Consult” or “Consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.~~

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government agency, or other organization.

~~(d)~~(d) “Fraud” or “~~F~~fraudulent” denotes an intentionally false or misleading statement of material fact, an intentional omission from a statement of fact of such additional information as would be necessary to make the statements made not materially misleading, and such other conduct by a person intended to deceive a person or tribunal with respect to a material issue in a proceeding or other matter.

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

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

~~(g)~~(g) “Partner” denotes a partner in a law firm organized as a partnership or professional limited liability partnership, a shareholder in a law firm organized as a professional

corporation, a member in a law firm organized as a professional limited liability company, or a sole practitioner who employs other lawyers or nonlawyers in connection with his or her practice.

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

~~(i)(k)~~ “Reasonable belief” or ~~“R”~~“reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

~~(h)~~ (i) ~~“Reasonably Ssould Kknow”~~ when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screening” and “Screened” denote the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

~~(m)(l)~~ “Substantial” or “sSubstantially” ~~denotes something that is not only material but also~~ when used in reference to degree or extent denotes a material matter of clear and weighty importance.

~~(n)(m)~~ “Tribunal” denotes a court ~~or other adjudicative body,~~ 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) — “Unreasonably” when used in relation to conduct by a lawyer denotes conduct contrary to that of a reasonably prudent and competent lawyer.~~

(n) “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.

~~“Fiduciary” denotes a person who is required to act for the benefit of another person on all matters within the scope of their relationship, under which relationship the person acting for the benefit of the other person owes the duties of good faith, trust, confidence, and candor.~~

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~~“Fiduciary” includes a trustee, executor, administrator, personal representative, guardian, conservator, partner, agent, officer of a corporation, or any other person acting in a fiduciary capacity for any person, trust or estate.~~

(o) “Material” or “Materially” denotes something that a reasonable person would consider important in assessing or determining how to act in a matter.

COMMENT

Comment

~~— In circumstances in which these rules require either consent in writing or written consent, the requirement may be satisfied by an electronic transmission that is reasonably calculated to reach the client, provided that the transmission can be reduced to writing or permanently retained in electronic format.~~

Confirmed in Writing

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

Firm

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

[3] With respect to the law department of an organization, including a governmental agency, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise

concerning an unincorporated association and its local affiliates.

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

[5] [Comment intentionally omitted]

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., RPCs 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

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

Screening

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[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under RPCs 1.10, 1.11, 1.12 or 1.18.

[9] 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 on 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. Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm. For example, a screened lawyer is not prohibited from receiving a salary or partnership share established by prior independent agreement.

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

Rule 1.1 : COMPETENCE

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

COMMENTS

Comment

Legal Knowledge and Skill

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

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

~~[3] In a situation in which a client is threatened with imminent and irreparable harm,~~ [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 ~~such a situation~~ 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 ~~principle~~ applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also RPC 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 the use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more ~~elaborate~~extensive treatment than matters of lesser ~~consequence~~complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See RPC 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in ~~regular~~ continuing study and education ~~that is pertinent to the lawyer's practice and should conscientiously satisfy all requirements for continuing legal education in all jurisdictions in which the lawyer is licensed to practice law. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.~~ and comply with all continuing legal education requirements to which the lawyer is subject.

DEFINITIONAL CROSS-REFERENCES

“Reasonably” See RPC 1.0(ih)

Rule 1.2: SCOPE OF THE REPRESENTATION AND THE ALLOCATION OF AUTHORITY BETWEEN THE CLIENT AND LAWYER AND CLIENT

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of ~~the~~ representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. 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 settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

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

(c) A lawyer may limit the scope of ~~a client's~~ the representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing, ~~after consultation.~~

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know 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.

COMMENTS

Comment

Allocation of Authority Between Client and Lawyer

~~[1]—Both lawyer and client have authority and responsibility in the objectives and means of the representation. The client has [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.—Also, the The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client.—Other decisions may be made by the lawyer pursuant to the lawyer's implied authority to take action necessary. See RPC 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by RPC 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation, subject to the lawyer's duty to keep the client reasonably informed about the status of the representation. See RPC 1.4. 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, for example, the lawyer normally will assume responsibility for technical and legal tactical issues, but the lawyer~~

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.~~Law defining the lawyer's scope of authority in litigation varies among jurisdictions. [2] Paragraph (a) recognizes that clients normally defer to the special knowledge and skill of their lawyer. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may instruct the lawyer do so. Although a lawyer, as an agent, normally must abide by the client's instructions with respect to the representation, a lawyer may always refuse to engage in conduct that the lawyer reasonably believes to be unlawful or prohibited by the Rules of Professional Conduct and may take action that the lawyer reasonably believes to be required by law or the Rules of Professional Conduct. Also, if a~~ Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See RPC 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See RPC 1.16(a)(3).

~~[3] Communication between the lawyer and the client is necessary for the client to effectively participate in decisions relating to client's representation. The lawyer must, therefore, keep the client reasonably informed about the lawyer's actions on behalf of the client. See RPC 1.4.~~

[43] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation.~~Ordinarily, Absent a material change in circumstances and subject to RPC 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time, and a lawyer may not rely on an advance authorization if there has been such a material change in the circumstances known to the lawyer that the client's prior authorization can no longer be regarded as an adequately informed decision.~~

[54] In a case in which the client appears to ~~have a mental disability~~ be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to RPC 1.14.

Independence From Client's Views or Activities

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

Agreements Limiting the Scope of the Representation

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

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

[98] ~~Other~~All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., RPCs 1.1, 1.8, and 5.6.

Criminal, Fraudulent, and Prohibited Transactions

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

~~[11]~~ [10]—When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. In some situations the lawyer may be permitted or required by Rule 1.6 to reveal the client’s wrongdoing. See RPC 1.6(b)(1) and (c)(1). In any case, however, the lawyer is required to avoid ~~furthering~~assisting the ~~purpose~~client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how ~~the wrongdoing~~ might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See RPC 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 RPC 4.1.

~~[12]~~ [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

~~[13]~~ [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a ~~sham transaction; for example, a~~ transaction to effectuate criminal or fraudulent ~~escape~~avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

~~[14]~~ [13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law, or if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. See RPC 1.4(a)(5).

DEFINITIONAL CROSS-REFERENCES

~~“Consultation” See RPC 1.0(e)~~

“Fraudulent” See RPC 1.0(~~d~~e)

“Informed consent” See RPC 1.0(e)

“Knows” See RPC 1.0(f)

“Reasonable” See RPC 1.0(~~h~~i)

“Reasonably Should Know” See RPC 1.0(~~jk~~)

“Writing” See RPC 1.0(n)

RuleULE 1.3 : **DILIGENCE**

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

Comment **COMMENTS**

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

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

[~~2~~3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[~~3~~4] Unless the relationship is terminated as provided in ~~Rule~~RPC 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client ~~but has not been specifically instructed concerning pursuit of an~~ and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer ~~should~~ advisemust consult with the client ~~of~~about the possibility of appeal before relinquishing responsibility for the matter. See RPC 1.4(a)(2). Whether the lawyer is obligated to prosecute

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the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See RPC 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See Tenn. Sup. Ct. R. 9, § 22.

DEFINITIONAL CROSS-REFERENCES

“Reasonable” See RPC 1.0([h](#))

Rule 1.4: COMMUNICATION

- (a) A lawyer shall ~~keep a:~~
- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter; ~~and~~
 - (4) promptly comply with reasonable requests for information ~~within a reasonable time; and~~
 - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENTS

Keeping the Client Reasonably Informed

Comment

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

Communicating with Client

[2] If these Rules require that a particular decision about the representation ~~must~~ be made by the client, paragraph (a)(1) requires that the lawyer ~~must~~ promptly consult with and secure the client's consent prior to taking action. ~~Thus unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example,~~ a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case ~~should~~ must promptly inform the client of its substance; ~~unless prior discussions with the client have left it clear~~ has previously indicated that the proposal ~~would be unacceptable. With respect to the decisions for which the client's prior consent is not required by Rule 1.2, the lawyer's responsibility is to keep the client reasonably informed. will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See RPC 1.2(a).~~

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

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

Explaining Matters

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

[36] Ordinarily, the information to be provided is that appropriate for a client who is a

comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or ~~has a mental disability~~; suffers from diminished capacity. See RPC 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ~~and~~; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See RPC 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. ~~—Practical exigency may also require a lawyer to act for a client without prior consultation.~~

Withholding Information

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

DEFINITIONAL CROSS-REFERENCES

“Informed consent” See RPC 1.0(e)

“Knows” See RPC 1.0(f)

“Reasonable” and “Reasonably” See RPC 1.0(i)

RULE ~~1.5~~ 1.5 : FEES

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

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent; and
- ~~(9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and~~
- ~~(10)~~ whether the fee agreement is in writing.

(b) ~~When the lawyer has not regularly represented the client,~~ The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing, signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of ~~litigation~~, settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before

or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and ~~whether, if~~ there ~~was~~is a recovery, ~~and~~ showing the remittance, ~~if any,~~ to the client and the method of its determination.

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

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property-division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or

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

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

(1) the division is in proportion to the services performed by each lawyer or, ~~by written consent of the client,~~ each lawyer assumes joint responsibility for the representation; ~~and~~

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

(2) the client agrees to the arrangement, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

Comment

Reasonableness of Fee and Expenses

COMMENTS

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (9) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by

charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[12] When the lawyer has regularly represented a client, ~~there~~they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to ~~the fee should~~fees and expenses must be promptly established. ~~It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the~~fee terms of the engagement reduces the possibility of misunderstanding. ~~Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.~~

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

Terms of Payment

[24] A lawyer may require advance payment of a fee, but ~~he or she~~ is obliged to return any unearned portion. See RPC 1.16(d). The obligation to return any portion of a fee does not apply, however, if the lawyer charges a reasonable non-refundable retainer by which the lawyer is compensated for being available to represent the client in one or more matters. Nor does the obligation to return any portion of a fee apply if the client agrees to pay to the lawyer at the outset of the representation a reasonable fixed fee for the representation. Such fees are earned fees so long as the lawyer remains available to provide the services called for by the retainer or for which the fixed fee was charged. Lawyers should take special care to assure that clients understand the implications of agreeing to pay a non-refundable retainer or a fixed fee payable in advance, and such agreements should be memorialized in a writing, preferably signed by the client.

[4a] A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to RPCule 1.8 (j). 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. If the property belongs to the client, the lawyer will also have to comply with~~ the requirements of RPCule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

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

Prohibited Contingent Fees

[45a] In some circumstances, ~~other law may regulate the fees and expenses charged by lawyers~~ Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage. For example, Tennessee law regulates contingent fees in medical malpractice cases. *See* Tenn. Code Ann. § 29-26-120 (1980). In these circumstances, charging unlawful fees or expenses may be considered unreasonable under section (a) of this Rule and may violate RPCule 8.4 or other rules. *See* RPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice).

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or an award of custody or upon the amount of alimony or support or property settlement to be obtained. This provision permits a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders provided that the fee arrangement is disclosed to the court.

Division of Fee

[57] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used

when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee ~~on~~ either on the basis of the proportion of services they render or ~~by agreement between the participating lawyers if all assume~~ if each lawyer assumes responsibility for the representation as a whole ~~and the client is advised and does not object.~~ . In addition, the client must agree to the arrangement, and the agreement must be confirmed in writing. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails the obligations stated in ~~RPC~~ Rule 5.1 for purposes of the matter involved. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See RPC 1.1.

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

Disputes ~~Over~~ over Fees

[~~6~~9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

DEFINITIONAL CROSS-REFERENCES

"Confirmed in writing" See RPC 1.0(b)

"Firm" See RPC 1.0(~~d~~)

"Reasonable" and ~~"Reasonableness"~~ See RPC 1.0(~~i~~)

"Writing" See RPC 1.0(n)

RULE 1.6 : CONFIDENTIALITY OF INFORMATION

(a) ~~Except as provided below, a~~ A lawyer shall not reveal information relating to the representation of a client unless:

~~(1) the client consents after consultation, except that the lawyer may make such disclosures as are~~ gives informed consent;

~~(2) the disclosure is~~ impliedly authorized ~~by the client~~ in order ~~for the lawyer~~ to carry out the representation;

~~(3) the disclosure is limited to information relating to the representation of a client which has already been made public and the disclosure is made in such a way that there is no reasonable likelihood of adverse effect to the client; or~~

~~(4) the disclosure is permitted by paragraph (b) or required by paragraph (c).~~

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

(1) to prevent the client or another person from committing a crime, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;

~~(2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, unless disclosure is prohibited or restricted by~~ RPC 3.3;

~~(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a fraud in furtherance of which the client has used the lawyer's services, unless disclosure is prohibited or restricted by~~ RPC 3.3;

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

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

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
- (3) to comply with RPCules 3.3, 4.1, or other law.

~~COMMENTS~~

Comment

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

[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 it also encourages people to seek early legal assistance.~~ A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relation to the representation. See RPC 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. [3] ~~Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze~~complex 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 maintain confidentiality of information relating to the representation. This contributes to the trust that is the hallmark of the client lawyer relationship. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging~~

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~~subject matter.~~

[53] The principle of ~~lawyer-client~~client-lawyer confidentiality is given effect by related bodies of law, ~~including~~; the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege ~~applies and~~work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or ~~as~~ required by the Rules of Professional Conduct or other law. See also Scope Comment [7].

[63a] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

[3b] Information made confidential by this Rule does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. For example, during legal research of an issue while representing a client, a lawyer may discover a particularly important precedent, devise a novel legal approach, or learn the preferable way to frame an argument before a particular judge that is useful both in the immediate matter and in other representation. Such information is part of the general fund of information available to the lawyer.

[74] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A disclosure of information in a way that cannot reasonably be linked to the client does not reveal information relating to the representation of a client in violation of this Rule. For example, a lawyer's use of hypotheticals 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.

[4a] Unless there is a reasonable likelihood of adverse effect to the client, this Rule does not prohibit a lawyer from disclosing information relating to representation of a client for purposes of providing professional assistance to other lawyers, whether informally, as in educational conversations among lawyers, or more formally, as in continuing-legal-education lectures. Thus, a lawyer may generally confer with another lawyer (whether or not in the same firm) concerning an issue in which the disclosing lawyer has gained experience through representing a client in order to assist the other lawyer in representing that lawyer's own clients.

Authorized Disclosure

[85] Except to the extent that the client's instructions or special circumstances limit that authority, ~~a~~ lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, ~~except to the extent that the client's instructions or special circumstances limit that authority.~~ In ~~litigation~~some situations, for example, a lawyer may ~~disclose information by admitting~~be impliedly authorized to admit a fact that cannot properly be disputed, or ~~in negotiation by making~~to make a disclosure that facilitates a satisfactory conclusion to a matter.~~[9]~~ Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[5a] Paragraph (a)(3) provides that a lawyer is not prohibited from disclosing information relating to the representation of a client that has already been made public as long as the disclosure is made in such a way that there is no reasonable likelihood of adverse effect to the client. Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client's objectives in representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

Disclosure Adverse to Client

~~[10]~~[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. For example, paragraph (b)(1) ~~enables~~permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime.

[7] Paragraph (b)(2) is another limited exception to the rule of confidentiality that permits disclosure to the extent necessary to prevent the client from perpetrating a fraud, as defined in RPC 1.0(d), but only if the fraud is reasonably certain to result in substantial injury to the financial or property interests of another and the client has used or is using the lawyer's services in furtherance of the fraud. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although ~~P~~paragraphs (b)(1) and (b)(2) ~~does~~ not require ~~that~~ the lawyer to reveal the client's misconduct, the lawyer may not ~~in any way~~ counsel ~~the client to engage,~~ or assist the client, in conduct ~~that~~ the lawyer knows is criminal or fraudulent. See RPC 1.2(d); ~~See also~~ See also RPC 1.16 ~~(respecting~~with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances). ~~Where, and~~ RPC 1.13(c), which permits the lawyer, where the client is an organization to reveal information relating to the representation in limited circumstances. In addition, where the client is an organization, the

lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization's constituents. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in RPCule 1.13(b). RPCule 3.3, rather than paragraphs (b)(1) and (b)(2) of this Rule governs disclosure of a client's intention to commit perjury or other crimes in connection with an adjudicative proceeding.

~~[118]~~ ~~In addition, p~~ Paragraph (b)(~~34~~) ~~states that a~~ addresses the situation in which a crime in furtherance of which a client has used a lawyer's services has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(~~34~~) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. For the protection of the client, such disclosures may be made only if they will be protected by the attorney-client privilege.

~~[1210]~~ 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 brought by the lawyer involving the conduct or representation of a former client, such as when in-house counsel brings suit to redress his or her discharge from an organizational employer in retaliation for abiding by, or refusing to violate, a clear expression of public policy in the Rules of Professional Conduct. See also RPC 1.16 Comment [4]. ~~Other charges~~ Such a charge can arise in a civil, criminal, ~~or professional~~ disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, ~~such as for example,~~ a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond ~~under these circumstances~~ arises when an assertion of such complicity has been made. Paragraph (b)(~~35~~) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, ~~applies~~ where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. ~~In any event, disclosure~~

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

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes RPC 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by RPC 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (c)(3) requires the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by RPC 1.4. Unless review is sought, however, paragraph (c)(2) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes is necessary to vindicate innocence accomplish the purpose. If the disclosure will be made in connection with a proceeding of a tribunal, 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.

~~— [13] — A lawyer entitled to a fee is permitted by paragraph (b)(3) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.~~

~~[14]~~[15] Paragraph (b) permits but does not require the disclosure ~~or use~~ of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through ~~(3b)(5)~~. In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and any other factors

that may extenuate the conduct in question. ~~Where practical, the lawyer should seek to persuade the client to take suitable action. 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~~ disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See e.g., RPCs 8.1 and 8.3. RPC 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See RPC 3.3(h) and (i). Also, in some circumstances, Rules 4.1(b) and (c) require disclosure of the lawyer's withdrawal from the representation of a client and disaffirmation of written materials prepared for the client.

Disclosure Otherwise Required or Authorized

~~————[15]— The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See RPCs 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.~~

[~~16~~15a] Paragraph (c)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life threatening and debilitating illnesses and the consequences of child sexual abuse. Such harm is ~~injuries are~~ reasonably certain to occur if such injuries ~~they~~ will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[~~17~~15b] As provided by paragraph (c)(2), a lawyer must also comply with lawful orders of a tribunal, an administrative or executive agency, or a legislative body. If a lawyer is called as a witness to give testimony concerning a client, or is otherwise ordered to reveal information relating to the client's representation, the lawyer must, absent authorization from the client to do otherwise, assert on behalf of the client all non-frivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.- In the event of an adverse ruling, the lawyer should consult with the client about the possibility of appealing the adverse ruling. See RPCs 1.4 and 1.2. Unless an appeal is taken, the lawyer must comply with the order.

Acting Competently to Preserve Confidentiality

[~~18~~16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or ~~by~~ other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See RPCs 1.1, 5.1, and 5.3.

[~~19~~17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer ~~utilize~~use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Clients

[~~20~~18] The duty of confidentiality continues after the client-lawyer relationship has ~~been~~ terminated. See RPC 1.9(c)(~~2~~), See RPC 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

DEFINITIONAL CROSS-REFERENCES

~~“Consultation” See RPC 1.0(e)~~

“Fraud” See RPC 1.0(~~e~~d)

“Informed consent” See RPC 1.0(e)

“Reasonably” See RPC 1.0(~~i~~h)

“Reasonably Believes” See RPC 1.0(~~j~~i)

“Substantial” See RPC 1.0(*l*)

“Tribunal” See RPC 1.0(m)

RULE 1.7: CONFLICT OF INTEREST: ~~GENERAL RULE~~ CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client, ~~unless:~~ or

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

~~(2) each client consents in writing after consultation.~~

~~(2) (b) A lawyer shall not represent a client if~~ there is a significant risk that the representation of ~~that client may~~ one or more clients will be materially limited by the lawyer's responsibilities to another client ~~or to,~~ a former client, or a third person, or by a personal interest of the lawyer's ~~own interests, unless:~~

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

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

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

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

(2) the representation is not prohibited by law;

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

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

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless

(1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and

- (2) each client ~~consents in writing after consultation concerning the implications of the common representation, along with the advantages and risks involved~~ gives informed consent.

COMMENTS

Comment

~~Loyalty to a Client~~

General Principles

[1] Loyalty ~~is an~~ and independent judgment are essential elements in the lawyer's relationship to a client. ~~An impermissible~~ Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see RPC 1.9. For conflicts of interest involving prospective clients, see RPC 1.18. For definitions of "confirmed in writing" and "informed consent," see RPC 1.0(b) and (e). When a lawyer is representing two or more clients in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them, then RPC 2.2 and not this Rule governs.

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

[3] A conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties persons and issues involved ~~and to determine whether actual or potential conflicts of interest exist. [2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See RPC 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Comment to RPC 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule.~~ As to whether a client-lawyer relationship exists or, having once been established, is continuing, see the Comment [4] to RPCule 1.3 and ~~the statement in the~~

~~Preamble about the paragraph [17] of Scope of these Rules.~~

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

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

Identifying Conflicts of Interest: Directly Adverse

~~[6][3] As a general proposition, loyalty to a~~Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's ~~consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily~~ informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even ~~if it is wholly unrelated. when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.~~ On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally economically adverse, such as representation of competing economic enterprises, ~~does in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may~~ not require consent of the respective clients. ~~Paragraph (a) applies only when the representation of one client would be directly adverse to the other.~~

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by

the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

~~[8][4] Loyalty to a client is also impaired when a lawyer cannot~~ Even where there is no direct adversity between clients, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client because will be materially limited as a result of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. ~~Paragraph (b) addresses such situations. A possible conflict~~ The mere possibility of subsequent harm does not itself ~~preclude the representation.~~ require disclosure and consent. The critical questions are: what is the likelihood that a ~~conflict~~ difference in interests will eventuate and, if it does, ~~whether it will~~ it materially interfere with the lawyer's independent professional judgment in considering alternatives or ~~otherwise~~ foreclose courses of action that reasonably should be pursued on behalf of the client? ~~Consideration should be given to whether the client wishes to accommodate the other interest involved.~~

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

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

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

Sexual Relations Between Lawyer and Client

[12] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. Because of this fiduciary duty to clients, combining a professional relationship with any intimate personal relationship 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 paragraph (a)(2) or violate other disciplinary rules, and it generally is imprudent even in the absence of an actual violation of these Rules.

[12a] 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 the 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 communications will be protected by the attorney-client privilege, because communications 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.

[12b] Sexual relationships with the representative of an organizational 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).

Interest of Person Paying for a Lawyer's Service

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

~~Consultation and Consent~~

Prohibited Representations

[14] ~~[5]—A client~~Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph ~~(a)(1) with respect to representation directly adverse to a client, and paragraph (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances,~~b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client ~~is involved~~, the question of ~~conflict~~consentability must be resolved as to each client. ~~Moreover, there may be circumstances where it is~~

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

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

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal.

Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under RPC 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

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

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

[19a][6] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

Informed Consent Confirmed in Writing

[20][7] ~~This Rule~~ Paragraph (b) requires the lawyer ~~either to secure a written consent~~ to obtain the informed consent of the client, confirmed in writing. The required writing ~~may consist of a document~~ executed by the client or ~~to memorialize one that the lawyer promptly records and transmits to the client following~~ an oral consent ~~given by the client.~~ ~~See RPC 1.0(b) Definitions (defining "Consents in Writing").~~ See RPC 1.0(b). See also RPC 1.0(n) (writing includes electronic transmission). If it is not feasible to ~~secure~~ ~~obtain~~ or ~~memorialize~~ ~~transmit~~ the writing ~~either at the time the conflict arises or~~ at the time the client gives informed consent, then the lawyer must ~~secure~~ ~~obtain~~ or ~~memorialize~~ ~~transmit~~ it within a reasonable time thereafter. See RPC 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened ~~by~~ ~~with~~ a conflict of interest, ~~to explain the~~ ~~as well as~~ reasonably available alternatives, and to

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afford the client ~~an~~ reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision ~~they are~~ the client is being asked to make and to ~~resolve~~ avoid disputes or ambiguities that might later occur ~~by virtue of there being no writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as memorialization of the client's agreement to the representation despite such risks.~~ in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result. See also RPC 1.9.

~~Lawyer's Interests~~

Consent to Future Conflict

~~[8] The lawyer's own interests should not be permitted to have an adverse effect on the representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See RPCs 1.1 and 1.5. 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. 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 interest.~~

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

subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[923] Paragraph (a)(3) prohibits representation of opposing parties in the same litigation. Simultaneous, regardless of consentability. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as ~~co-plaintiffs or co-defendants~~ complaintiffs or codefendants, is governed by paragraph (b). An impermissible a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, ~~by an~~ incompatibility in positions in relation to an opposing party, or ~~by~~ the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in both civil and criminal cases. ~~However, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare RPC 2.2 (involving intermediation between clients).~~

~~— [12] Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as an advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.~~

[1324] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action ~~in~~ on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken ~~by the lawyer~~ on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending; whether the issue is substantive or procedural; the temporal relationship between the matters; the significance of the issue to the immediate and long-run ~~run~~ 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.

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Interest of Person Paying for a Lawyer's Service

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a) of this Rule. Thus, for example, with respect to RPC 1.7(a)(1), the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

~~— [14] — A lawyer may be paid from a source other than the client if the client is informed of that fact and consents and if the arrangement does not compromise the lawyer's duty of loyalty to the client. See RPC 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.~~

Nonlitigation Conflicts

~~Other Conflict Situations~~

~~[15]~~[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation ~~sometimes may be difficult to assess.~~ For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for ~~an adverse effect~~ material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that ~~actual conflict~~ disagreements will arise, and the likely prejudice to the client from the conflict ~~if it does arise.~~ The question is often one of proximity and degree.

~~— [16] — For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. See Rule 2.2 with respect to a lawyer serving two or more clients as an intermediary. See Comment [8].~~

~~[27]~~[17] — Members of a family may reasonably seek joint representation by a single lawyer in a matter affecting the family. ~~Conflict~~For example, conflict questions may arise ~~in such circumstances. For example, in estate planning, a~~ and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may ~~arise. Resolution of conflicts of interest between family members pursuant to this Rule must be consistent with the lawyer's duty of undivided loyalty to each client, but the lawyer may take into account the willingness of each~~

~~individual client to accommodate the interests of the family as a whole or the individual interests of other family members.~~ be present. In estate or trust administration, the identity of the client may be unclear under Tennessee law. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. ~~The~~ In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

~~[18] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.~~

~~Conflict Charged by an Opposing Party~~

~~[19] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.~~

[28] When a lawyer represents a client in a partisan role, whether as an advocate, an advisor, or the author of a legal opinion to be rendered on behalf of the client for use by a third person, this Rule provides special protections for the client to assure that the lawyer's loyalty will not be diluted by interests of other clients, the lawyer, or third persons. This Rule, however, is not applicable to conflicts of interest affecting clients the lawyer undertakes to serve as an intermediary. If, for example, business persons or members of a family are seeking the lawyer's advice or assistance in a non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual relation between them, such as the formation of a business or a purchase or sale of property, RPC 2.2 applies. Similarly, if the effectuation of an estate plan or other gratuitous transfer entails the formation, modification, or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, RPC 2.2 applies. Otherwise, this Rule applies. Nor is this Rule applicable to conflicts of interest affecting parties who a lawyer undertakes to serve as a dispute resolution neutral. See RPC 2.4.

Special Considerations in ~~Joint~~Common Representation

~~[2029]~~ In considering whether to represent multiple clients ~~jointly~~ in the same matter,

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~~such as representing co-plaintiffs or co-defendants,~~ a lawyer should be mindful that if the jointcommon representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, ~~embarrassment, and recrimination~~complication, or even litigation. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the jointcommon representation fails,~~unless each client consents after consultation.~~ In some situations, the risk of failure is so great that common 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.

[2130] A particularly important factor in determining the appropriateness of jointcommon representation is the effect on ~~lawyer-client-lawyer~~ confidentiality and the attorney-client privilege. With regard to the ~~evidentiary~~ 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 ~~if litigation eventuates between the clients,~~ and the clients should be so advised.

[2231] As to the duty of confidentiality, jointcontinued common representation will almost certainly be inadequate if one client ~~attempts to keep something in confidence between~~asks the lawyer ~~and that client, which is not to be disclosed~~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 RPC 1.4. The lawyer should, at the outset of the jointcommon representation and as part of the process of obtaining each client's informed consent, advise each client that ~~the lawyer will share all information material to the representation with each of the jointly represented clients, unless specifically instructed by one of the clients not to do so. The lawyer should also advise each client that the lawyer will abide by the client's instructions to maintain the confidentiality of the specified information if any client later insists~~information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other,~~but that it is likely that the lawyer will be required to withdraw from the representation.~~ In limited circumstances, ~~however,~~ 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.

[2332] Subject to the above limitations, each client in the jointcommon representation has the right to loyal and diligent representation and the protection of RPCule 1.9 concerning the obligations to a former client. ~~Each~~ The client also has the right to discharge the lawyer as stated in RPCule 1.16.

Relation to Other Rules

Organizational Clients

~~— [24] — When a lawyer represents a client in a partisan role, whether as an advocate, an advisor, or the author of a legal opinion to be rendered on behalf of the client for use by a third person, this Rule provides special protections for the client to assure that the lawyer's loyalty will not be diluted by interests of other clients, the lawyer, or third persons. This Rule, however, is not applicable to conflicts of interest affecting clients the lawyer undertakes to serve as an intermediary. If, for example, business persons or members of a family are seeking the lawyer's advice or assistance in a non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual relation between them, such as the formation of a business or a purchase or sale of property, Rule 2.2 applies. Similarly, if the effectuation of an estate plan or other gratuitous transfer entails the formation, modification, or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, Rule 2.2 applies. Otherwise, this Rule applies. Nor is this Rule applicable to conflicts of interest affecting parties who a lawyer undertakes to serve as a dispute resolution neutral. See RPC 2.4.~~

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

[34] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of

professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Common Representation of Co-Defendants in Criminal or Juvenile Delinquency Proceedings

[35] ~~[10]~~—The potential for conflict of interest in representing multiple defendants in a criminal case or in juvenile delinquency proceedings is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. However, where the lawyer chooses to undertake such a joint representation, paragraph (c) requires that the lawyer demonstrate to the satisfaction of the tribunal that good cause exists to believe that no conflict of interest prohibited by paragraph (b) presently exists or is likely to exist in the future. This showing reflects the same standard currently required by Tennessee Rule of Criminal Procedure 44(c).

[36] ~~[11]~~ However, to avoid the premature disclosure of defense tactics, strategy, or other information relating to the representation, defense counsel may request that the tribunal hold an *ex parte* hearing to determine the propriety of the joint representation. See RPC 3.3(a)(3) (setting forth a lawyer's duty of candor in an *ex parte* hearing); see also RPC 3.5(b) (permitting a lawyer to speak *ex parte* to a judge when permitted to do so by law). Once the tribunal is satisfied that no good cause exists to believe that a conflict of interest currently exists or is likely to exist, a rebuttable presumption arises throughout the proceedings that the joint representation comports with the requirements of this Rule. However, this presumption in no way relieves counsel of any duty imposed under these Rules should such an actual conflict of interest later arise.

DEFINITIONAL CROSS-REFERENCES

“Confirmed ~~sents~~ in ~~W~~writing” See RPC 1.0(b)

~~“Consultation” See RPC 1.0(e)~~

“Informed consent” See RPC 1.0(e)

“Materially” See RPC 1.0(~~g~~o)

“Reasonably Believes” See RPC 1.0(~~j~~i)

“Tribunal” See RPC 1.0(m)

RULE 1.8 : CONFLICT OF INTEREST: ~~PROHIBITED TRANSACTIONS~~
CURRENT CLIENTS: SPECIFIC RULES

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

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

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

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client; unless the client ~~consents after consultation~~gives informed consent, except as ~~otherwise~~ permitted or required by ~~Rule 1.6 or Rule 3.3~~these Rules.

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

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

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

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

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

(f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless:

(1) the client ~~consents after consultation~~ gives informed consent;

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

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

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:

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

(2) ~~each client consents in writing after consultation, including disclosure of each client~~ gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) ~~enter into~~ make an agreement ~~with a prospective, current, or former client~~ to prospectively ~~limit~~ limiting the lawyer's liability to ~~the~~ a client or prospective client for malpractice; or

(2) settle a claim or potential claim for such liability; ~~with an unrepresented client or former client~~ unless: (a) the client is represented in the matter by independent counsel; or (b) the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client and advises the client in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel, ~~and affords the client a reasonable opportunity to do so in connection therewith.~~

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

~~(j) — A lawyer~~ shall not acquire a proprietary interest in the cause of action or subject matter of

litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien ~~granted~~authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(j) [Reserved]

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

COMMENTS

Comment

Business Transactions Between Client and Lawyer

~~[1]—As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however,~~[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See RPC 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee or salary arrangements between client and lawyer, which are governed by RPC 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business, such as shares of stock, stock options, or an equivalent equity interest in an unincorporated business, or other nonmonetary property as payment, or security for payment, of all or part of a fee. It also applies when a lawyer seeks to renegotiate the terms of the fee agreement with the client after representation begins in order to reach a new agreement that is more advantageous to the lawyer than the original agreement. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, such as for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities.

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services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

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

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

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

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a

government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See RPCs 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

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

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, ~~however,~~ the client should have the detached advice that another lawyer can provide. ~~Paragraph (c) recognizes an~~ The sole exception to this Rule is where the client is a relative of the donee ~~or the gift is not substantial.~~

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

Literary Rights

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

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

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

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

~~———— [4] ——— Rule 1.8(f) 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 conflicts of interest. Where the client is a class, consent may be obtained on behalf of the class by court supervised procedure.~~

Aggregate Settlements

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Limiting Liability

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under RPC 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, RPC 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must give each client a reasonable opportunity to seek the advice of independent counsel in the transaction and inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also RPC 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

~~[5] Paragraph (h) is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.~~

Limiting Liability and Settling Malpractice Claims

Relationships Between Lawyers

[14] 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. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with RPC 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.

~~[6] Rule 1.8(i) 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. The disqualification stated in Rule 1.8(i) is personal and is not imputed to members of firms with whom the lawyers are associated. See RPC 1.10.~~

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

Acquisition of Interest in Litigation

Acquiring Proprietary Interest in Litigation

[716] Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. ~~This Like paragraph (e), the general rule, which has its basis in common law champerty and maintenance, and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the~~ The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. In Tennessee these may include liens granted by statute (see Tenn. Code Ann. §§ 23-2-102, 23-2-103, and 40-33-111), liens originating in common law or liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by RPC 1.5.

[17] [Intentionally omitted]

[18] [Intentionally omitted]

[19] [Intentionally omitted]

Imputation of Prohibitions

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

DEFINITIONAL CROSS-REFERENCES

~~“Consents in Writing” See RPC 1.0(e)~~

“Firm” See RPC 1.0(c)

“Informed Consent” See RPC 1.0(e)

“Knowingly” and “Knows” See RPC 1.0(f)

“Reasonable” and “Reasonably” See RPC 1.0(ih)

“Substantial” See RPC 1.0(l)

“Writing” See RPC 1.0(n)

Rule 1.9 CONFLICT OF INTEREST: DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives informed consents confirmed in writing ~~after consultation~~, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

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

(2) _____ about whom the lawyer had acquired information protected by ~~RPC~~ rules 1.6 and 1.9(c) that is material to the matter;

(c) ~~Unless the former client consents after consultation, a~~ A lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter ~~(1) use information relating to the representation to the disadvantage of the former client~~ reveal information relating to the representation ~~of the former client except as these Rules otherwise permit or require with respect to a client.~~ or ~~(2) use such information relating to the representation to the disadvantage of the former client except as these Rules otherwise permit or require with respect to a client, or when the information has become generally known; or, unless~~ (1) the former client gives informed consent, confirmed in writing, or (2) these Rules ~~otherwise would~~ permit or require the lawyer to do so with respect to a client, or (3) ~~when~~ the information has become generally known.

COMMENTS

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client ~~other than~~ except in conformity with this Rule, ~~except that in the case of a government or former government lawyer, Rule 1.11 applies rather than paragraphs (a) and (b) of this Rule~~ Current and former government lawyers must comply with this Rule only to the extent required by RPC 1.11.

Changing Sides in a Matter

[1a]. Representing one side in a lawsuit and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in non-litigation matters. Thus, a lawyer negotiating a

complex agreement on behalf of a seller could not withdraw and represent the buyer against the interests of the seller in the same transaction. Nor could a lawyer who has represented multiple clients in a matter ordinarily represent one of the clients against the others in the same matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]

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

Substantially Related Matters

[3] ~~The current m~~ Matters are ~~is~~ “substantially related” to the former matter for purposes of this Rule if ~~the current matter they~~ involves the same transaction or legal dispute or other work the lawyer performed for the former client or if there is a substantial risk that ~~representation of the present client will involve the use of information acquired in the course of representing the former client, confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter,~~ unless that information has become generally known. Any conclusion or presumption concerning the type of confidential factual information that would normally have been obtained in the prior representation may be overcome or rebutted by the lawyer by proof concerning the information actually received in the prior representation.

Loyalty to Former Client

[3a] Matters are substantially related if they involve the same transaction or legal dispute or other work the lawyer performed for the former client. ~~[4] — Representing one side and then switching to represent the other in the same matter clearly implicates loyalty to the first client and protection of that client's confidences. Similar considerations apply in non-litigation matters. For example, a lawyer negotiating a complex agreement on behalf of a seller could not withdraw and represent the buyer against the interests of the seller in the same transaction. Further, just as a lawyer may not represent both sides concurrently in the same case, see RPC~~

~~1.7(a), the lawyer also may not represent them consecutively. [5] Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments arising out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client.~~ For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor. Although the subsequent representation is a different matter, it is substantially related to the former matter because it involves work done for the former client. The lawyer's duty of loyalty survives the termination of the former representation to the extent that it precludes the lawyer from acting to deprive the former client of the benefit of the lawyer's prior work on the former client's behalf.

Protecting Confidentiality

~~[63b] The substantial relationship standard is employed most frequently to protect the confidential information of the former client. A subsequent matter is~~ Even where the current matter does not involve the work previously done by the lawyer for the former client, it may still be substantially related to ~~an earlier the former~~ the former matter if there is a substantial risk that ~~the subsequent representation will involve the use of confidential~~ factual information ~~of the former client in violation of the restrictions these Rules and other law place on disclosure. Substantial risk exists where one could reasonably conclude that it~~ would normally be obtained in the prior representation would materially advance the client's position in the subsequent matter ~~to use confidential information obtained in the prior representation. [9]~~ For example, a lawyer who has represented a ~~business person~~ businessperson and learned extensive private financial information about that person may not then ordinarily 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 ~~who sought~~ seeking to oppose rezoning of the property. ~~However, the lawyer could defend 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 ~~non-payment~~ nonpayment of rent, ~~as no substantial relationship exists between the two matters.~~

~~[3c]~~ Formerly confidential 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. [10] Information that might be confidential for some purposes under these Rules (so that, for example, a lawyer would not be free to discuss it publicly) might nonetheless be so general, readily observable, or of so little value in the subsequent litigation that it should not by itself result in a substantial relationship being found. Thus, a lawyer may master a particular substantive area of the law while representing a client, but that does not preclude the lawyer from

later representing another client adversely to the first in a matter involving the same legal issues, if the facts are not 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. For example, a lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, or financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

[73d] Inquiries concerning the existence, exchange, and potential for use of such confidential information may themselves raise concerns and difficulties. A concern to protect a former client's confidential information would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation. On the other hand, closed or in camera proceedings may implicate issues of fairness to other parties. Further, the interests of subsequent clients also militate against extensive inquiry into the precise nature of the lawyer's representation of the subsequent client and the nature of exchanges between them.

[83e] The substantial relationship test attempts to avoid requiring actual disclosure of confidential information by focusing upon the general features of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation. Thus, 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. In the first instance, a preliminary 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. Consistent with the preservation of the former client's confidentiality, however, the inquiry into the issues involved in the prior representation should be as specific as possible~~without thereby revealing the confidential client information itself or confidential information concerning the second client.~~ Nevertheless, so as to avoid undue impairment of the subsequent client's interest in selection of counsel of ~~his or her~~ choice ~~requires that the lawyer be permitted, and the capacity of the lawyer~~ within appropriate limits, to defeat any presumption or inference concerning the lawyer's receipt or exchange of confidential information.

Lawyers Moving Between Firms

[114] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There

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

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

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

[147] 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 RPCs 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be revealed by the lawyer or used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using or disclosing generally known information about that client when later representing another client.

[8a] Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage

is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known. A lawyer may not, however, justify adverse use or disclosure of client information simply because the information has become known to third persons, if it is not otherwise generally known. Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily.

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

Relation to Other Rules

[~~15~~10] Except in situations governed by ~~RPCule~~ 1.11, ~~RPCule~~ 1.9 applies in all circumstances in which a lawyer has previously represented a client as an advocate, an advisor, an intermediary, or an author of a legal opinion to be rendered on behalf of a client for use by a third person. Except as provided in ~~RPCule~~ 2.4, ~~RPCule~~ 1.9 does not apply to parties being served by a lawyer as a dispute resolution neutral. If, however, the lawyer's service as a neutral will be materially adverse to a former client and the dispute is substantially related to the former representation, the lawyer must afford the former client the protections of ~~RPCule~~ 1.9

DEFINITIONAL CROSS-REFERENCES

“~~Confirmed~~ ~~sents~~ in ~~W~~writing” See RPC 1.0(b)

“~~Consultation~~” ~~See RPC 1.0(e)~~

“Firm” See RPC 1.0(~~d~~)

“Informed consent” See RPC 1.0(e)

“Knowingly” and Known” See RPC 1.0(f)

“Material” and “Materially” See RPC 1.0(~~g~~)

“Substantially” See RPC 1.0(~~l~~)

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST
DISQUALIFICATION: GENERAL RULE

(a) ~~Except as permitted by paragraph (c), w~~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 RPCules 1.7, 1.8(c), 1.9(a), 1.9(b), or 2.2. unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

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

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by RPCules 1.6 and 1.9(c) that is material to the matter.

(c) ~~Except with respect to paragraph (d) below, i~~If a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may ~~nonetheless~~ represent the person, notwithstanding paragraph (a) above, if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

- (1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and
- (2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by RPCule 1.9(c); ~~and~~
- (3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and
- (4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed

disqualification of the firm, if

- (1) the disqualified lawyer was substantially involved in the representation of a former client; ~~and~~
 - (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and
 - (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.
- (e) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in RPC~~ule~~ 1.7.

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

COMMENTS

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" ~~includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization~~ denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association in which lawyers may practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See RPC 1.0(~~dc~~) (defining "Firm" or "Law Firm"). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See RPC 1.0, Comments [2] - [4]. ~~For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.~~

~~[2] With respect to the law department of an organization, there is ordinarily no~~

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~~question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.~~

~~—— [3] — Similar questions can also arise with respect to lawyers in legal services organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved and on the specific facts of the situation.~~

Principles of Imputed Disqualification

[42] The rule of imputed disqualification stated in paragraph (a) ~~recognizes the community of interest and shared loyalty presumed to exist among lawyers who are associated in a law firm.~~ 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 ~~paragraphs (b), (e), and (d).~~ RPCs 1.9(b) and 1.10(b).

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

[4] [intentionally omitted]

Lawyers Moving Between Firms

[5] When a lawyer who is associated in a firm leaves the firm, the question of whether a lawyer should undertake representation adverse to clients of the former firm is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised and that confidential information related to the representation will not

be used to the client's disadvantage. Second, the rule should not be cast so broadly as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[6] Paragraphs (a) and (b) govern the vicarious disqualification of a law firm in the situation in which a lawyer leaves the firm and continues or undertakes the representation of a client previously represented by the firm, the firm is no longer representing the client, and lawyers who have remained in the firm are asked to undertake a representation materially adverse to the firm's former client. If the new matter is substantially related to a matter in which the firm previously represented the client, the firm, absent the former client's consent, will be precluded by paragraph (a) from undertaking the representation if any lawyer remaining in the firm would be precluded by ~~RPC~~ Rule 1.9(a) from doing so because the lawyer had participated in the client's prior representation. Alternatively, paragraph (b) precludes the firm from undertaking the representation if any lawyer remaining in the firm has information protected by ~~RPCs~~ rules 1.6 and 1.9(c) that is material to the matter. If, on the other hand, no remaining lawyer participated in the client's representation or possessed confidential information, the firm is permitted to undertake the representation even though it is materially adverse to the former client in a substantially related matter.

[7] Paragraph (c) addresses the situation in which a lawyer leaves one law firm and joins another firm that is representing a client with interests materially adverse to a client of the new lawyer's former firm. The new lawyer may be personally disqualified from participating in the representation of some of the new firm's clients because of his prior representation of, or acquisition of confidential information about, clients of his or her former law firm. With one limited exception discussed in paragraph (d), this personal disqualification will not be imputed to other lawyers in the personally disqualified lawyer's new firm if they act reasonably to protect the confidentiality interests of the person being represented by the personally disqualified lawyer's former firm.

[8] Paragraph (c) sets forth the measures that must be taken in to order protect the confidentiality interests of the client being represented by the personally disqualified lawyer's former firm. [Requirements for screening procedures are stated in RPC 1.0\(k\) and RPC 1.0, Comments \[8\]-\[10\].](#) Whether a firm's screening procedures are effective to prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm is a question of fact. Factors to be considered include a written affirmation by the personally disqualified lawyer and the lawyers and firm personnel handling the matter in question that they are aware of and will abide by the screening procedures implemented by the

firm; the structural organization of the law firm or office; the likelihood of contact between the personally disqualified lawyer and the lawyers handling the matter in question; and the existence of firm rules and a filing system that prevents unauthorized access to files with respect to the matter in question. ~~Although this Rule does not require that the personally disqualified lawyer be prohibited from sharing in any fee generated by the representation in question, such a prohibition can be considered in determining the effectiveness of the screening procedures employed by the firm.~~—The question to be asked in each case is whether the screening mechanism effectively reduces to an acceptable level the potential for misuse of information related to the representation of the personally disqualified lawyer’s former client.

[9] The “appearance of impropriety” standard existing under the Code of Professional Responsibility has not been retained in these rules. Paragraph (d) ~~restates the rule of law established by Clinard v. Blackwood, 46 S.W.3d 177 (Tenn. 2001).~~ In that case, the Tennessee Supreme Court held that screening mechanisms were generally not effective to avoid imputed disqualification of a law firm when a lawyer was perceived as “switching teams” in the course of pending litigation. ~~Although the holding of Clinard was grounded in the prior standard from the Code of Professional Responsibility guarding against the “appearance of impropriety,” see Canon 9, EC 9-6, the Court also noted that its holding was necessary to further lawyer client communications and to avoid the impression that the judiciary favors considerations of lawyer mobility over those of client confidentiality. Consequently, the Clinard rule continues under the present Rules.~~ As was the case in Clinard, this narrow exception to paragraph (c) will vicariously disqualify the law firm only when the interests of a client of that firm are presently and directly adverse with those of a person who was formerly represented in substantial part by the disqualified lawyer. creates a narrow exception to the screening permitted by paragraph (c). This narrow exception prevents the use of nonconsensual screening when a substantially-involved lawyer switches sides during the course of a pending adjudicative proceeding. Whether a particular lawyer can be considered to have been “substantially involved” with respect to a particular adjudicative proceeding is a factual question. The following factors will usually be relevant in any such inquiry: (1) the time spent on the matter by the lawyer; (2) the nature of the tasks performed in the matter by the lawyer, including whether those tasks required access to confidential client information; (3) whether the lawyer accessed confidential client information and to what extent; and (4) the nature of the lawyer’s interactions with the client, if any.

[10] A client may give informed consent to a representation proscribed by this rule under the same conditions required for informed consent of a representation proscribed by RPC 1.7. As with RPC 1.7, prior to seeking a client’s informed consent, the lawyer must reasonably believe that the representation can be undertaken without material adverse effect. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see RPC 1.7, Comment [22]. For a definition of informed consent, see RPC 1.0(e).

[10a] The requirements set forth in this rule, including paragraph (d), includes law clerks, paralegals, secretaries, and other staff employed by a firm with due regard to their levels of responsibility in the matter.

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[1011] Where a lawyer has joined a private firm after having represented the government, ~~the situation~~imputation is governed by RPCule 1.11(~~ab~~) and (~~bc~~), not this Rule. Under RPC 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency~~private clients,~~ ~~the situation~~imputation is governed by RPCule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including RPCsules 1.6, 1.7, and 1.9(c).

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

[13] The disqualification of lawyers associated in a firm with a former judge, arbitrator, mediator, or other third-party neutral is governed by RPC 1.12. The disqualification of lawyers associated in a firm with a lawyer disqualified from a matter as a result of obligations under RPC 1.18 flowing from a consultation with a prospective client is governed by RPC 1.18(d).

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0(~~cd~~)
“Material” and “Materially” See RPC 1.0(~~og~~)
“Reasonably” See RPC 1.0(~~hi~~)
“Screening” See RPC 1.0(k)
“Substantially” See RPC 1.0(~~l~~)
“Writing” See RPC 1.0(n)

**RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER
SUCCESSIVE AND CURRENT GOVERNMENT OFFICERS AND PRIVATE
EMPLOYMENT EMPLOYEES**

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

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

(2) shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents in writing after consultation. No gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm; and

(4) advise the government agency in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

(bc) Except as is law may otherwise expressly permitted by law permit, a lawyer who has acquired known having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if both the personally disqualified lawyer and the

lawyers who are representing the client in the matter comply with the requirements set forth in paragraph (ab).

(ed) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

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

(2) shall not:

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

(2ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a staff attorney to a court or as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for private employment as permitted by RPCule 1.12(b) and subject to the conditions stated in RPCule 1.12(b).

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

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

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

~~(e) As used in this Rule, the term "confidential government information" means information~~

~~(1) that has been obtained under governmental authority; and~~

~~(2) that, at the time this Rule is applied, the government either is prohibited by law from disclosing to the public or has a legal privilege not to disclose; and~~

~~(3) that is not otherwise available to the public.~~

COMMENTS

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Comment

~~[1] This Rule prevents a lawyer from exploiting public office for the advantage of a private client.~~

[2] A lawyer ~~representing a government agency, whether employed or specially retained by the government,~~who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against ~~representing adverse interests~~concurrent conflicts of interest stated in ~~RPCule~~ 1.7 and the protections afforded former clients in ~~RPCule~~ 1.9. In addition, such a lawyer is subject to ~~RPCule~~ 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See RPC 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a private client. Although RPC 1.10 is not applicable to the conflicts of interest addressed by this Rule, paragraph (b) of this Rule permits screening and notice to avoid imputation for lawyers moving into, or out of, positions as government officers or employees in the same manner as set forth for other lawyers in RPC 1.10(c). Requirements for screening procedures are stated in RPC 1.0(k) and RPC 1.0, Comments [8]-[10]. Because of the problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), RPC 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[3][4] This Rule represents a balancing of interests. On the one hand, ~~W~~where the successive clients are a ~~public~~government agency and a private client, the risk exists that power or discretion vested in ~~public authority~~that agency might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of ~~public authority.~~the government. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.However, On the other hand, the rules governing lawyers presently

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or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

~~[4] — When the client is an agency of one government, that agency should be treated as a private~~^[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See RPC 1.13 Comment [6].

~~[6]~~^[5] Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with ~~RPC~~^{Rule} 1.11 and to take appropriate action if it believes the lawyer is not complying.

~~[6]~~ Paragraph (~~b~~^c) operates only when the lawyer in question has actual knowledge of the information; it does not operate with respect to information that merely could be imputed to the lawyer.

~~[7]~~ Paragraphs (~~a~~^b) and (~~e~~^d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by ~~RPC~~^{Rule} 1.7 and is not otherwise prohibited by law.

~~[8]~~ Paragraph (~~e~~^d) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

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

[911] In the absence of other law to the contrary, a government official or entity, like any other client, may waive a conflict of interest under this Rule.

DEFINITIONAL CROSS-REFERENCES

“~~Consents~~Confirmed in Writing” See RPC 1.0(b)

“~~Consultation~~” ~~See~~ ~~RPC 1.0(e)~~

“Firm” See RPC 1.0(~~e~~)

“Informed consent” See RPC 1.0(e)

“Knowingly” and “~~K~~knows” See RPC 1.0(f)

“Material” See RPC 1.0(~~o~~g)

“Reasonably” See RPC 1.0(~~h~~i)

“Screening” See RPC 1.0(k)

“Substantially” See RPC 1.0(*l*)

RULE 1.12 : FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, ~~or as an arbitrator~~ or law clerk or staff attorney to such a person or as an arbitrator, unless all parties to the proceeding give informed consent ~~after consultation, in a confirmed in writing~~ ~~or writings signed by all parties~~.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator. A lawyer serving as a staff attorney to a court or as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the lawyer is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer ~~or arbitrator~~.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in RPC 1.11 ~~(a)~~(1), ~~(a)~~(2), and ~~(a)~~(3) and have advised the appropriate tribunal in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

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

COMMENTS

Comment

[1] This Rule generally parallels RPC 1.11. The term “personally and substantially” signifies that a judge who was a member of a ~~multi-member~~multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to RPC 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. ~~[2]~~—The provisions of Tennessee Supreme Court Rule 10 concerning the Application of the Code of Judicial Conduct provide that a part-time judge, judge pro tempore, or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which the judge has served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those ~~rules~~Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See RPC 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See RPC 2.4.

[3] [intentionally omitted]

[4] Requirements for screening procedures are stated in RPC 1.0(k) and RPC 1.0, Comments [8]-[10].

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

DEFINITIONAL CROSS-REFERENCES

“Confirmed in writing~~sultation~~” See RPC 1.0(~~b~~e)

“Firm” See RPC 1.0(~~c~~d)

“Informed consent” See RPC 1.0(e)

“Knowingly” See RPC 1.0(f)

“Screening” See RPC 1.0(k)

“Substantially” See RPC 1.0(l)

“Tribunal” See RPC 1.0(m)

“Writing” See RPC 1.0(n)

RULE ~~1.13~~: ORGANIZATIONAL CLIENTS

(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 ~~has engaged or~~ is engaged in action, ~~has refused~~ intends to act or refuses to act, ~~or intends to act or refrain from acting~~ in a matter related to the representation that is ~~or will be~~ a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. ~~In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:~~

~~(1) — asking reconsideration of the matter;~~

~~(2) — advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and~~ ~~(3) — referring~~ 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 ~~seriousness of the matter, referral~~ circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and is likely to result in substantial injury to the organization, the lawyer may withdraw in accordance with ~~RPC~~ rule 1.16 and may make such disclosures of information relating to the organization's representation only to the extent permitted to do so by ~~RPC~~ rules 1.6 and 4.1.

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

~~(de)~~ 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 or~~

~~becomes apparent~~ the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of RPCule 1.7 and 2.2. If the organization's consent to the dual representation is required by RPCule 1.7 or RPCule 2.2, the consent shall be given ~~either~~ by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENTS

Comment

The Entity as the Client

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

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that ~~constituent~~person's organizational capacity, the communication is protected by RPCule 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 RPCule 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 RPCule 1.6.

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

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider or take action to rectify the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonable; 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. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the 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. 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 RPC 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.

~~[4]—In an extreme case, it may be~~5] Paragraph (b) also makes clear that when it is reasonably necessary ~~for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is~~ to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules

[56] The authority and responsibility provided in ~~paragraph (b)~~this Rule are concurrent

with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under ~~RPCs~~ 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, ~~Rule 1.2(d) can be applicable. The lawyer's right to withdraw~~ RPCs 1.6(b)(1), 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances RPC 1.2(d) may also be applicable, in which event, withdrawal from the representation ~~of an organizational client in the circumstances specified in paragraph (c) is in addition to the right to withdraw in the various circumstances specified in Rule 1.16(b) under~~ RPC 1.16(a)(1) may be required.

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

Government Agency

~~[68] The duties~~ duty defined in this Rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context ~~and is a matter beyond the scope of these Rules. See Scope [18].~~ Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part, ~~or the relevant branch of government as a whole,~~ may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. ~~Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation.~~ This Rule does not limit that authority. See Scope ~~Paragraph [4].~~

Clarifying the Lawyer's Role

~~[7]~~ [9] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or

potential conflict of interest, that the lawyer cannot represent such constituent, and that ~~the constituent~~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.

[~~8~~10] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[~~9~~11] Paragraph (~~e~~f) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[~~10~~12] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[~~11~~13] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs ~~and are~~ 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, ~~RPC~~Rule 1.7 governs who should represent the directors and the organization.

DEFINITIONAL CROSS-REFERENCES

"Knows" See RPC 1.0(f)

"Reasonably" See RPC 1.0(~~i~~h)

"Reasonably believes" See RPC 1.0(i)

"Reasonably should know" See RPC 1.0(j)

"Substantial" See RPC 1.0(l)

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 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 guardian ad litem, conservator or guardian.

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

COMMENTS

Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or ~~has~~suffers from a diminished mental ~~disorder or disability~~capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, ~~a~~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.

[2] The fact that a client ~~has~~suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. ~~If Even if~~ the person has ~~no guardian or legal representative, the lawyer often must act as a de facto guardian. Even if the person does have~~ a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer for the purpose of assisting the lawyer with the client's representation. When a lawyer considers such participation by family members or others, the lawyer should consider the effect of their presence on the applicability of the attorney-client privilege – a question of law that is beyond the scope of these Rules. 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, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client.~~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.~~ [4] In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See RPC 1.2(d).

Taking Protective Action

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

~~Disclosure of the Client's Condition~~

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the

substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

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

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of ~~disability~~diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment.—~~The lawyer's~~ Information relating to the representation is protected by RPC 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.—The lawyer may seek guidance from an appropriate diagnostician.

Legal Assistance

[69] If the health, safety, or a financial interest of a person ~~under a disability~~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 ~~is unable to~~make or express ~~or make~~ considered judgments about the matter, when the ~~disabled~~ person or another acting in good faith on ~~the~~that person's behalf has consulted with the lawyer. Even in such a situation, 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.

[710] A lawyer who acts on behalf of a ~~disabled person threatened with imminent and irreparable harm~~ person with seriously diminished capacity who is threatened with imminent and irreparable harm 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.

DEFINITIONAL CROSS-REFERENCES

“Reasonably” See RPC 1.0(h)

“Reasonably Believes” See RPC 1.0(i)

RULE 1.15 : SAFEKEEPING PROPERTY AND FUNDS

(a) A lawyer shall hold property and funds of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own property and funds. ~~A lawyer in possession of clients' or third persons' property and funds incidental to representation shall hold said property and funds separate from the lawyer's own property and funds. (1) Funds belonging to clients or third persons shall be kept in a separate~~ client trust account maintained in an insured depository institution located in the state where the lawyer's office is situated, ~~(or elsewhere with the consent of the client or third person),~~ and which participates in the overdraft notification program as required complies with the requirements in Section 29.1 of Supreme Court Rule 9. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in ~~such an~~ client trust account for the sole purpose of paying bank service charges on that account, but only in an amount reasonably necessary for that purpose.

(i) Except as provided by subparagraph (a)(1)(ii), interest earned on accounts in which the funds of clients are deposited, less any deduction for service charges (other than overdraft charges), fees of the depository institution, and intangible taxes collected with respect to the deposited funds, shall belong to the clients whose funds are deposited, and the lawyer shall have no right or claim to such interest. Overdraft charges shall not be deducted from accrued interest and shall be the responsibility of the lawyer.

(ii) A lawyer shall deposit funds of clients and third persons that are nominal in amount or expected to be held for a short period of time in a pooled account that participates in the Interest On Lawyers' Trust Accounts ("IOLTA") program, which provides that all interest earned be paid to the Tennessee Bar Foundation in accordance with the requirements of Supreme Court Rule 43. The determination of whether funds are nominal in amount or are to be held for a short period of time rests in the sound discretion of the lawyer, and no charge of ethical impropriety or other breach of professional conduct shall attend a lawyer's exercise of good faith judgment in that regard.

(iii) A lawyer may decline to participate in the IOLTA program by submitting a notice of such declination in writing, no less frequently than annually, to the Chief Justice of the Tennessee Supreme Court. In accordance with the provisions of Supreme Court Rule 43, such notice may be filed at the time the lawyer files the registration statement with the Board of Professional Responsibility.

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

~~(bd)~~ 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 funds or other property. ~~If a dispute arises between the client and a third person with respect to their respective interests in the funds or property held by the lawyer, the portion in dispute shall be kept separate and safeguarded by the lawyer until the dispute is resolved.~~

~~(ee)~~ When in the course of representation a lawyer is in possession of property or funds in which ~~both~~two or more persons (one of whom may be the lawyer ~~and another person)~~ claim interests, the property shall be kept separate by the lawyer until ~~there is an accounting and severance of their interests~~the dispute is resolved. The lawyer shall promptly distribute all portions of the property or funds as to which the interests are not in dispute.

COMMENTS

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, including prospective clients, must~~ be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted and reasonable internal control procedures and comply with any recordkeeping rules established by law or court order. See, e.g., Supreme Court Rule 9.

[2] The first paragraph of Section (a)(1) of this Rule contains the fundamental requirement that a lawyer maintain funds of clients and third parties in a separate trust account. All such accounts, whether or not they are a part of the Interest On Lawyers' Trust Accounts ("IOLTA") program, must comply with ~~be part of the overdraft notification program established under~~ Supreme Court Rule 9, Section 29.1, including the overdraft notification program established thereunder.

[3] A lawyer is also responsible for assuring the payment of any bank charges or fees on such trust accounts. Section (a)(1)(i) of this Rule makes clear that any interest earned on non-IOLTA trust accounts belongs to the client or third party whose funds generate the interest, and

that the interest earned on them may be used by a lawyer to pay bank charges or fees. A detailed accounting of such interest and fees may be necessary to avoid the payment of any client- or matter-specific bank charges or fees (for example, charges for a certified check obtained solely for the benefit of one client) by a client other than the one on whose behalf the charge or fee was incurred.

[4] Similarly, Section (a)(1)(ii) of this Rule and Supreme Court Rule 43 authorize a bank participating in the IOLTA program to deduct from any interest generated from an IOLTA account service charges (other than overdraft charges), fees of the depository institution, and intangible taxes collected with respect to the deposited funds, so long as such deductions do not diminish client funds and are not charged to interest in other IOLTA accounts. *See* Supreme Court Rule 43, Section (1)(d).

[5] In no event may overdraft charges imposed upon a trust account be paid from interest on a trust account.

[6] In order to allow a lawyer to pay appropriate bank charges or fees on a trust account, Section (a)(1)(i) of the Rule expressly relaxes the prohibition on commingling lawyer and client funds in a trust account to permit a lawyer to deposit the lawyer's own funds in the trust account for the sole purpose of paying bank service charges, but only in an amount reasonably necessary for that very limited purpose. Lawyers should exercise great care in using this limited permission to deposit funds in a trust account, given the cardinal importance of the principle otherwise banning commingling of funds.

[7] 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~~ The lawyer is not required to remit ~~the portion from which the fee is to be paid. 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 ~~posi~~ention ~~in a dispute with the client.~~ The disputed portion of the funds ~~should~~must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[8] Whether a fee that is prepaid by a client should be placed in the client trust account depends on when the fee is earned by the lawyer. An advance payment of funds upon which the lawyer may draw for payment of the lawyer's fee when it is earned or for reimbursement of the lawyer for expenses when they are secured must be placed in the client trust account. When the lawyer earns the fee, the funds shall be promptly withdrawn from the client trust account and timely notice of the withdrawal of funds should be provided to the client. RPC 1.16(d) requires the refund to the client of any part of a fee that is not earned by the lawyer at the time that the representation is terminated. See RPC 1.5, Comment [4] for a discussion of two situations in which an advance payment from a client is properly treated as an earned fee and therefore cannot be placed in the lawyer's client trust account.

[89] ~~Third~~Paragraph (e) also recognizes that 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 resolve ~~arbitrate~~ a dispute between the client and the third party.

[~~4a~~10] When two or more persons (one of whom may be the lawyer) have substantial grounds for dispute as to the person entitled to the funds or property held by the lawyer, the lawyer, with due regard to her confidentiality obligations under RPC 1.6, may file an interpleader action concerning funds in dispute between the client and a third party action to have a court resolve the dispute, including an interpleader action.

[~~9~~11] 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 only 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 and is not governed by this Rule.

[~~10~~12] In certain circumstances, Tennessee law governing abandoned property may apply to monies in lawyer trust accounts or other property left in the hands of lawyers and may govern its disposition. *See* Tenn. Code Ann. §§ 66-29-101 to 66-29-204 (~~1993 and Supp. 1999~~) (Uniform Disposition of Unclaimed Property Act).

DEFINITIONAL CROSS-REFERENCES

~~None.~~

"Reasonably" See RPC 1.0(h)

RULE 1.16 : ~~DECLINING~~ **AND/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 ~~the~~a client if:

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

(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 ~~the representation of~~representing a client if ~~the~~:

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

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

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

(4) ~~at~~the client insists upon ~~pursuing an objective or~~ taking action that the lawyer considers repugnant or imprudent;

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

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

(7) other good cause for withdrawal exists; or

(8) ~~after consultation with the lawyer,~~ the client gives informed consents confirmed in writing to the withdrawal of the lawyer.

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

(d) ~~Upon termination of the representation of a client, a~~ A lawyer who is discharged by a client, or withdraws from representation of a client, shall ~~take steps~~ to the extent reasonably practicable, take steps to protect ~~at~~ the client's interests, ~~including such as~~ (1) giving reasonable notice to the client, so as to allowing time for the employment of other counsel, and cooperating with any successor counsel engaged by the client; ~~(2) Further, after discharge or withdrawal, a lawyer shall promptly deliver to the client all client file materials, as defined in RPC 1.19(b) and surrendering papers and property of the client and any work product prepared by the lawyer for the client and for which the lawyer has been compensated;~~ (3) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse affect on the client with respect to the subject matter of the representation; ~~(4) promptly refunding to the client any advance payment of fees for expenses that have not been earned or incurred by the lawyer; and~~ (5) promptly refunding any advance payment for fees that have not been earned. With respect to any work product prepared by the lawyer for the client that is not defined as client file materials under RPC 1.19, the lawyer may, if permitted by other law, refuse to provide such work product to the client if such a refusal will not have a materially adverse effect on the client with respect to the subject matter of the representation.

COMMENTS

Comment

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

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client ~~might~~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 RPC 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination

of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under RPCs 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. ~~In the special case of in-house counsel, the organizational employer may also be liable for damages for retaliatory discharge in violation of public policy, but because of the client's right to discharge the lawyer, reinstatement would not be an available remedy under such circumstances. Further, where a~~ Where future dispute about the withdrawal ~~from the representation~~ may be anticipated, it may be advisable for the lawyer to prepare a written statement reciting the circumstances. In the special case of in-house counsel, the organizational employer may also be liable for damages for retaliatory discharge in violation of public policy, but because of the client's right to discharge the lawyer, reinstatement would not be an available remedy under such circumstances.

[5] Whether a client can discharge appointed counsel may depend on other applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client ~~to proceed without assistance of counsel.~~

[6] If the client ~~is mentally incompetent~~ has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, ~~in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See~~ may take reasonably necessary protective action as provided in RPC 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw for any reason if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on taking action that the lawyer considers repugnant or imprudent ~~objective or action.~~ The lawyer may also withdraw without the need to provide any justification and even if withdrawal would result in a material adverse effect on the client's interests if the client provides informed consent confirmed in writing to the lawyer's withdrawal.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation. The lawyer must, however, give the client reasonable notice of the lawyer's intention to withdraw.

Assisting the Client Upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. RPC 1.19(b) defines certain materials as client file materials and this Rule requires the lawyer to promptly deliver all RPC 1.19(b) client file materials to the client after discharge or withdrawal. After discharge or withdrawal from representation of a client, the lawyer may retain papers work product prepared by the lawyer for the client, other than work product defined by RPC 1.19(b) to be client file materials, as security for a fee only if doing so will not have a materially adverse effect on the client with respect to the subject matter of the representation and to the extent permitted by law.

[10] Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawing or being discharged by the organization's highest authority is beyond the scope of these Rules.

DEFINITIONAL CROSS-REFERENCES

“Confirmedsents in Wwriting” See RPC 1.0(b)

~~“Consultation” See RPC 1.0(e)~~

“Fraud” and “Fraudulent” See RPC 1.0(ed)

“Informed consent” See RPC 1.0(e)

“Material” and “Materially” See RPC 1.0(go)

“Reasonable” See RPC 1.0(ih)

“Reasonably Bbelieves” See RPC 1.0(ji)

“Substantial” and “Substantially” See RPC 1.0(l)

“Tribunal” See RPC 1.0(m)

“Writing” See RPC 1.0(n)

RULE ~~rule~~ 1.17 : SALE OF ~~A~~-LAW PRACTICE

(a) 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:

(~~1~~a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area in which the practice has been conducted; ~~and~~

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms. (~~2~~) ~~The practice is sold as an entirety to another lawyer or law firm,~~ and the seller provides the buyer with written notice of the fee agreement with each of the seller's clients and any other agreements relating to each client's representation; and

(c) (~~3~~) ~~Written notice is given~~ The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale, including the expected effective date of the proposed sale, the identity and office address of the purchaser, a brief description of the size and nature of the purchaser's practice and its capacity to assume the representation of the client in accordance with Rules of Professional Conduct;

(2) the client's right to retain other counsel or to take possession of the file and any other property or funds in the possession of the selling lawyer to which the client is entitled;

(3) the duties of the purchasing lawyer under paragraph (d) and (e) of this Rule, and

(4) the fact that the client's informed consent to representation by the purchaser and the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within thirty (30) days of receipt of the notice. (~~b~~) ~~—If a client cannot be given notice under paragraph (a)(3) above,~~ the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction or by the presiding judge in the judicial district in which the seller resides. 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.

(e) ~~Unless the client consents in writing after consultation, the fees and expenses~~

(d) The fees charged each ~~a~~-client shall not be increased by reason of the sale.

(e) The purchasing lawyer shall abide by any other agreements between the selling lawyer and the client with respect to the representation as are permitted by these Rules.

COMMENTS

Comment

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice ~~and another lawyer or firm takes~~, 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 RPCs 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 ~~purchaser and~~ purchasers but take their matters elsewhere, therefore, does not result in a violation. ~~—A selling lawyer's return~~ Return to private practice as a result of an unanticipated change in circumstances ~~also~~ 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 ~~his or her~~ 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 ~~a lawyer's~~ retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice ~~upon~~ on the occasion of moving to another state. Tennessee is sufficiently large that a move from one locale therein to another may justify allowing the lawyer to sell his or her practice, ~~is tantamount to leaving the state jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated,~~ Thus, the Rule permits the sale of the practice when the lawyer leaves the geographic area in which he or she is practicing as when the lawyer leaves the state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. 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 RPC 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 a jurisdiction or geographical area 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.

~~Single Purchaser~~

Sale of Entire Practice or Entire Area of Practice

[56] The Rule requires ~~a single purchaser that the seller's entire practice, or an entire area of practice, be sold.~~ The prohibition against ~~piecemeal~~ sale of ~~a 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 ~~purchaser is~~ purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. ~~If This requirement is satisfied,~~ however, ~~the even if a~~ purchaser is unable to undertake ~~all a particular~~ client ~~matters~~ matter because of a conflict of interest ~~in a specific matter respecting which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the requirement that there be a single purchaser is nevertheless satisfied.~~

Client Confidences, Consent and Notice

[67] Negotiations between ~~the~~ seller and ~~a~~ prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of ~~RPC~~ 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 can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the information specified in paragraphs (c)(1)-(3). ~~identity of the purchaser and any proposed change in the terms of future representation,~~ and must also be told informed in writing that the decision to consent or make other arrangements must be made within thirty (30) days. If nothing is heard from the client within that time, consent to the sale is presumed.

[78] 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, ~~paragraph (b) of this~~ the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in

camera.

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

Fee Arrangements Between Client and Purchaser

[910] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser, ~~unless the client consents after consultation~~.

Other Applicable Ethical Standards

[1011] 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 RPC 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 RPC 1.7 regarding conflicts and RPC 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation, (see RPCs 1.6 and 1.9).

[1112] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale. See RPC 1.16.

Applicability of the Rule

[1213] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. ~~Because~~ Since, however, no lawyer may participate in a sale of a law practice ~~that~~ which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to ~~ensure~~ see to it that ~~the requirements~~ they are met.

[1314] 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.

[1415] 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. This Rule also does not apply to mergers between firms.

DEFINITIONAL CROSS-REFERENCES

~~“Consents in Writing” See RPC 1.0(b)~~

~~“Consultation” See RPC 1.0(e)~~

“Law Firm” See RPC 1.0(~~cd~~)

“Informed consent” See RPC 1.0(e)

“Written” See RPC 1.0(n)

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 RPC 1.9 would permit with respect to information of a former client.

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

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

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

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

(i) the disqualified lawyer is timely screened from any participation in the matter; and

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

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence,

prospective clients should receive some but not all of the protection afforded clients.

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

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

[4] In order to avoid acquiring information from a prospective client that could be significantly harmful if used in the matter, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for 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 RPC 1.7, then consent from all affected present clients must be obtained before accepting the representation.

[5] With the informed consent of the prospective client, a lawyer and a prospective client can agree in advance that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See RPC 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

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

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in RPC 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See RPC 1.0(k) and comment [8]-[10] (requirements for screening procedures).

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

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

DEFINITIONAL CROSS-REFERENCES

“Confirmed in writing” See RPC 1.0(b)

“Firm” See RPC 1.0(c)

“Informed consent” See RPC 1.0(e)

“Knowingly” See RPC 1.0(f)

“Reasonable” and “Reasonably” See RPC 1.0(h)

“Screened” See RPC 1.0(k)

“Written” See RPC 1.0(n)

“Materially” See RPC 1.0(p)

RULE 1.19: CLIENT FILE MATERIALS

(a) A client is entitled, upon request, to receive all client file materials that are in the lawyer's possession, custody, or control.

(b) Client file materials are comprised of the following items:

(1) All papers and property provided by the client to the lawyer (other than as payment for services) in connection with the client's matter.

(2) All pleadings, motions, discovery, memoranda, and other litigation materials which have been served or filed in connection with the client's matter.

(3) All operative transactional materials related to the client's matter.

(4) All correspondence sent by, or received by, the lawyer in connection with the client's matter.

(5) Attorney notes, research materials, and other work product prepared by the lawyer for the client related to the client's matter if the lawyer has received payment for creating those materials.

(6) Any other items that lawyer and client have agreed, in writing, to treat as client file materials.

(c) A lawyer may, at the lawyer's own expense, copy client file materials for retention by the lawyer.

Comment

[1] This Rule affirms the principle that clients have the right to receive certain materials related to the client's matter that are in the lawyer's possession, custody, or control and provides clear guidance regarding the materials to which that right extends. With respect to each of the items identified in paragraph (b) of this Rule as client file materials, the client's right provided by this Rule extends to any electronic versions of such items in the lawyer's possession, custody, or control. Paragraph (b)(3) of this Rule is specifically addressed to nonlitigation matters and is intended to include items such as, but not limited to, estate plans, title opinions, contracts, and documents regarding the formation, operation, dissociation, dissolution, or termination of business or other associations or governing the relationship of those involved in them.

[2] Under paragraph (b)(5) of this Rule, attorney notes, research materials, and other

work product prepared by the lawyer for the client are client file materials only if the lawyer has received payment for creating that work product. If the lawyer has not been paid for her time creating that work product, the question of the client's entitlement to such materials is governed by RPC 1.16(d). Because of the principle underlying this Rule, paragraph (b)(6) of this Rule expressly allows for a written agreement between client and lawyer to extend the rights provided by this Rule to items in addition to those listed in paragraph (b)(1) through (b)(5).

[3] In addition to the lawyer's obligation under RPC 1.16(d) to promptly deliver client file materials to the client after termination of the representation, this Rule requires a lawyer, even after conclusion of a client's matter, upon request, to return any client file materials with respect to the client's matter still in the lawyer's possession, custody, or control.

[4] Paragraph (c) of this Rule makes clear that a lawyer may, at the lawyer's own expense, make a copy of client file materials to be retained by the lawyer for the lawyer's own purposes. The lawyer's obligations to keep information relating to the representation of a client confidential, as set forth in RPC 1.6 and RPC 1.9, persist as to copies of any client file materials retained by the lawyer pursuant to paragraph (c).

[5] A client may, of course, choose not to exercise their right to receive client file materials, preferring that the lawyer maintain possession of those items. Questions regarding how long after the conclusion of the client's matter, and in what format (e.g., electronic version or hard copies), a lawyer may be obligated to maintain possession of such items for a client's benefit are beyond the scope of this Rule and, generally, should be governed by the terms of any contractual agreement between client and lawyer. But see Tenn. Sup. Ct. R. 9, § 29.1(a)(2) (requiring retention for five years of trust account records).

DEFINITIONAL CROSS-REFERENCES

None.

CHAPTER 2
THE LAWYER AS COUNSELOR, INTERMEDIARY,
AND DISPUTE RESOLUTION NEUTRAL

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.

~~COMMENTS~~

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 an advisor may include indicating that more may be involved than strictly legal considerations.

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

experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under RPCule 1.4 may require that the lawyer ~~not~~offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under RPC 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.

DEFINITIONAL CROSS-REFERENCES

None.

RULE 2.2 : LAWYER SERVING AS AN INTERMEDIARY BETWEEN CLIENTS

(a) A lawyer represents clients as an intermediary when the lawyer provides impartial legal advice and assistance to two or more clients who are engaged in a candid and non-adversarial effort to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them.

(b) A lawyer shall not represent two or more clients as an intermediary in a matter unless:

(1) as between the clients, the lawyer reasonably believes that the matter can be resolved on terms compatible with the best interests of each of the clients, that each client will be able to make adequately informed decisions in the matter, that there is little risk of material prejudice to the interest of any of the clients if the contemplated resolution is unsuccessful, and that the intermediation can be undertaken impartially;

(2) the lawyer's representation of ~~another~~~~each of the~~ clients, ~~or the lawyer's relationship with each, will not be adversely affected by the lawyer's~~ responsibilities to a former other clients or a third persons, or ~~by the lawyer's own~~ personal interests, or the representation, responsibilities, or personal interests of a lawyer associated with the lawyer in a firm, will not prevent the lawyer from providing competent and diligent representation to each of the clients the lawyer will serve as an intermediary;

(3) the lawyer ~~discusses~~~~consults~~ with each client ~~about~~:

(i) the lawyer's responsibilities as an intermediary;

(ii) the implications of the intermediation (including the advantages and risks involved, the effect of the intermediation on the attorney-client privilege, and the effect of the intermediation on any other obligation of confidentiality the lawyer may have);

(iii) any circumstances that will materially affect the lawyer's impartiality between the clients; and

(iv) the lawyer's representation in another matter of a client whose interests are directly adverse to the interests of any one of the clients; and any ~~interests of the lawyer, the lawyer's other clients, or third persons that will materially limit the lawyer's representation of one of the clients~~responsibility of the lawyer to a former client or a third person, and any personal interest of the lawyer, or the representation, responsibilities or personal interests of a lawyer associated with the lawyer in a firm, that presents a significant risk of materially limiting the lawyer's representation of a client the lawyer will serve as an intermediary; and

- (4) each client gives informed consents, confirmed in writing, to the lawyer's representation and each client authorizes the lawyer to disclose to each of the other clients being represented in the matter any information relating to the representation to the extent that the lawyer reasonably believes is required to comply with RPCule 1.4.
- (c) While representing clients as an intermediary, the lawyer shall:
- (1) act impartially to assist the clients in accomplishing their common objective;
- (2) as between the clients, treat information relating to the intermediation as information protected by RPCule 1.6 that the lawyer has been authorized by each client to disclose to the other clients to the extent the lawyer reasonably believes necessary for the lawyer to comply with RPCule 1.4; and
- (3) shall discuss~~consult~~ with each client concerning the decisions to be made with respect to the intermediation and the considerations relevant in making them, so that each client can make adequately informed decisions.
- (d) A lawyer shall withdraw from service as an intermediary if:
- (1) any of the clients so requests;
- (2) any of the clients revokes the lawyer's authority to disclose to the other clients any information that the lawyer would be required by RPCule 1.4 to reveal to them; or
- (3) any of the other conditions stated in paragraph (b) are no longer satisfied.
- (e) If the lawyer's withdrawal is required by paragraph (d)(2) the lawyer shall so advise each client of the withdrawal, but shall do so without any further disclosure of information protected by RPCule 1.6.

COMMENTS

Comment

[1] A lawyer acts as an intermediary under this Rule when the lawyer represents two or more clients who are cooperatively trying to accomplish a common objective with respect to the formation, conduct, modification, or termination of a consensual legal relation between them. The hallmarks of an intermediation include the impartiality of the lawyer who serves as an intermediary; the open, candid, and non-adversarial nature of the clients' pursuit of a common objective; and the limited subject matters in which a lawyer may serve multiple clients as an intermediary (*i.e.*, the adjustment of a consensual legal relationship among or between the clients). Because intermediation differs significantly from the partisan role normally played by

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lawyers, and because it requires that the lawyer be impartial as between the clients rather than an advocate on behalf of each, a lawyer should only undertake this role with client consent after consultation about the distinctive features of this role. Also, given the risks associated with joint representation of parties whose interests may potentially be in conflict, the Rule provides a number of safeguards designed to limit its applicability and to protect the interests of the several clients.

[2] Paragraph (b) specifies the circumstances in which a lawyer may serve multiple clients as an intermediary. With respect to the clients being served by an intermediary, this Rule, and not [RPCule 1.7](#), applies. [RPCule 1.7](#) remains applicable, however, to protect other clients the lawyer may be representing or may wish to represent in other matters. For example, if the lawyer's representation of two clients as an intermediary in a matter will materially limit the lawyer's representation of another client the lawyer is representing as an advocate, the lawyer must afford that client the protections of [RPCule 1.7](#). Similarly, if the lawyer's representation of two clients as an intermediary would be materially adverse to one of the lawyer's former clients and the matters are substantially related, the lawyer must afford the former client the protection of [RPCule 1.9](#).

[3] [RPCule 2.2](#) does not apply to a lawyer acting as a dispute resolution neutral, such as an arbitrator or a mediator, as the parties to a dispute resolution proceeding are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. Other rules of conduct govern a lawyer's service as a dispute resolution neutral. See [RPC 2.4](#) and Tennessee Supreme Court Rule 31.

[4] Because this Rule only applies to the formation, conduct, modification or termination of consensual legal relationships between clients, it does not apply to the representation of multiple clients in connection with gratuitous transfers or other matters in which there is not a quid pro quo exchange. Thus, for example, conflicts of interest arising from the representation of multiple clients in estate planning or the administration of an estate are governed by [RPCule 1.7](#) rather than by this Rule. If, however, the effectuation of an estate plan or other gratuitous transfer entails the formation, modification or termination of a consensual legal relationship between clients, and the lawyer acts as an intermediary in connection with the transaction, this Rule, and not [RPCule 1.7](#), will apply.

[5] A lawyer may act as an intermediary in seeking to establish or adjust a consensual legal relationship among or between clients on an amicable and mutually advantageous basis, such as helping to organize a business in which two or more clients are entrepreneurs or working out the financial reorganization of an enterprise in which two or more clients have an interest. As part of the work of an intermediary, the lawyer may seek to achieve the clients' common objective or to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative may be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complications, or even litigation. Given these and other relevant factors, each client may prefer to have one lawyer act

as an intermediary for all rather than hiring a separate lawyer to serve as his or her partisan.

[6] In considering whether to act as an 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 or imprudent for the lawyer or the clients. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations, as is often the case when dissolution of a marriage is involved. 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.

[7] The appropriateness of intermediation can depend on its form. Forms of intermediation range from an informal "facilitation," in which the lawyer's responsibilities are limited to presenting alternatives from which the clients will choose, to a full-blown representation in which the lawyer provides all legal services needed in connection with the proposed transaction. 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; whether the situation involves creating a relationship between the parties or terminating one; the relative experience, sophistication, and economic bargaining power of the clients; and the existence of prior familial, business, or legal relationships.

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 RPCs 1.4 and 1.6. Complying with both requirements while acting as an intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper.

[9] Paragraphs (b)(4) and (c)(2) make clear that the obligations of attorney-client confidentiality apply to clients being served by a lawyer as an intermediary, but that, as between the clients being so served, confidentiality is inappropriate and must be waived by each of the clients. Thus, while the lawyer must maintain confidentiality as against strangers to the relationship, the lawyer has no such duty to keep information provided to the lawyer by one client confidential from the other clients. Moreover, the lawyer may well, depending on the circumstances, have an affirmative obligation to disclose such information obtained from one client to other clients. Obviously, this important implication of the lawyer's responsibilities as an intermediary must be disclosed and explained to the clients.

[10] 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 and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

~~Consultation~~Informed Consent

[11] In acting as an intermediary between clients, the lawyer is required to ~~discuss~~consult with the clients on the implications of doing so and may proceed only upon informed consent, confirmed in writing~~-based on such a consultation~~. The discussion~~consultation~~ should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.~~-This consent must be in writing.~~

[12] Paragraph (c)(3) is an application of the principle expressed in RPC~~ule~~ 1.4. Where the lawyer is an intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

[13] Common representation does not diminish the rights of each client in the client-lawyer relationship. Each client has the right to loyal and diligent representation, the right to discharge the lawyer as stated in RPC~~ule~~ 1.16, and the protection of RPC~~ule~~ 1.9 concerning obligations to a former client.

[14] Because of the obligations of a lawyer serving as an intermediary to the intermediation clients, the lawyer must withdraw from the representation if any of the intermediation clients so requests; if one or more of the clients denies the lawyer the authority to disclose certain information to any of the remaining clients, thereby preventing the lawyer from being able to discharge the lawyer's duties to the remaining clients to communicate with them and disclose information to them; or if any of the various predicate requirements for intermediation can no longer be satisfied.

[15] Upon withdrawal from the role of intermediary or completion of an intermediation, the lawyer must afford all of the clients formerly served as an intermediary the protections of RPC~~ules~~ 1.9 and 1.10.

DEFINITIONAL CROSS-REFERENCES

“Confirmed~~sents~~ in W~~w~~riting” See RPC 1.0(b)

~~“Consults” See RPC 1.0(e)~~

“Informed consent” See RPC 1.0(e)

“Material” and “Materially” See RPC 1.0(g~~o~~)

“Reasonably Believes” See RPC 1.0(j~~i~~)

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) — the client consents after consultation.~~

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client’s interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

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

COMMENTS

Comment

Definition

[1] An evaluation for use by third persons may be performed at the client’s direction ~~but~~or when impliedly authorized in order to carry out the representation. See RPC 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, ~~such as drafting~~ an opinion concerning the title of property rendered at the behest of ~~either~~ 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, ~~such as~~ an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[~~1a~~2] Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency’s authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

~~3~~2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor’s title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person’s affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to

client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This ~~identification~~ 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 a Third Person and Client

[43] 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 ~~these Rules.~~ 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 an 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

[54] 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 RPC 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by RPC 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 RPC 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 RPCs 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

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

DEFINITIONAL CROSS-REFERENCES

~~“Consultation” See RPC 1.0(e)~~

“Informed consent” See RPC 1.0(e)

“Reasonably Believes” See RPC 1.0(i)

“Reasonably should know” See RPC 1.0(j)

“Materially” See RPC 1.0(o)

Rule 2.4: LAWYER AS A DISPUTE RESOLUTION NEUTRAL

(a) A lawyer serves as a dispute resolution neutral when the lawyer impartially assists two or more persons who are not clients of the lawyer to reach a resolution of disputes that have arisen between them. Service as a dispute resolution neutral may include service as a mediator; an arbitrator whose decision does not bind the parties; a case evaluator; a judge or juror in a mini-trial or summary jury trial as described in Supreme Court Rule 31; or in such other capacity as will enable the lawyer to impartially assist the parties resolve their dispute.

(b) A lawyer may serve as a dispute resolution neutral in a matter if:

(1) the lawyer is competent to handle the matter;

(2) the lawyer can handle the matter without undue delay;

(3) the lawyer reasonably believes he or she can be impartial as between the parties;

(4) none of the parties to the dispute is being represented by the lawyer in other matters;

(5) the lawyer's ~~service as a dispute resolution neutral in the matter will not be adversely affected by the representation of clients with interests directly adverse to any of the parties to the dispute, by the lawyer's~~ responsibilities to a client, a former client, or a third person, or ~~by the lawyer's~~ personal ~~own~~ interests will not prevent the lawyer from providing competent and diligent service to each of the persons the lawyer will serve as a dispute resolution neutral;

(6) the lawyer communicates ~~results~~ with each of the parties to the dispute, or their attorneys, about the lawyer's qualifications and experience as a dispute resolution neutral, the rules and procedures that will be followed in the proceeding, and the lawyer's responsibilities as a dispute resolution neutral; provided, however, that any party to the dispute who is represented by a lawyer may waive his or her right to all or part of the communication ~~consultation~~ required by this paragraph;

(7) the lawyer communicates ~~results~~ with each of the parties, or their lawyers, about any responsibility ~~interests~~ of the lawyer, ~~the lawyer's clients, the clients of other lawyers with whom the~~ or a lawyer is associated with the lawyer in a firm, ~~or third persons that may materially affect the lawyer's impartiality in the matter~~ to a client, a former client, or third person, or a personal interest of the lawyer or a lawyer associated with the lawyer in a firm, that presents a significant risk of materially affecting the lawyer's impartiality or materially limiting the dispute resolution services the lawyer will provide to the parties;

(8) unless the service is pursuant to Supreme Court Rule 31, each of the parties, or their attorneys, provides informed consents confirmed in writing to the lawyer's service as a dispute resolution neutral in the matter; and

(9) when the service is pursuant to Supreme Court Rule 31, the lawyer is qualified to serve in accordance with the requirements of that Rule.

(c) While serving as a dispute resolution neutral, a lawyer shall:

(1) act reasonably to assure that the parties understand the rules and procedures that will be followed in the proceeding and the lawyer's responsibilities as a dispute resolution neutral;

(2) act impartially, competently, and expeditiously to assist the parties in resolving the matters in dispute;

(3) promote mutual respect among the parties for the dispute resolution process;

(4) as between the parties to the dispute and third persons, treat all information related to the dispute as if it were information protected by RPCules 1.6 and 1.8(b);

(5) as between the parties to the dispute, treat all information obtained in an individual caucus with a party or a party's lawyer as if it were information related to the representation of a client protected by RPCules 1.6 and 1.8(b);

(6) render no legal advice to any party to the dispute, but, if the lawyer believes that an unrepresented party does not understand how a proposed agreement might affect his or her legal rights or obligations, the lawyer shall advise that party to seek the advice of independent counsel;

(7) accept nothing of value, other than fully disclosed reasonable compensation for services rendered as the dispute resolution neutral, from a party, a party's lawyer, or any other person involved or interested in the dispute resolution process;

(8) not seek to coerce or unfairly influence a party to accept a proposal for resolution of a matter in dispute and shall not make any substantive decisions on behalf of a party; and

(9) when the service is pursuant to Supreme Court Rule 31, comply with all

other duties of a dispute resolution neutral as set forth in that Rule.

(d) A lawyer shall withdraw from service as a dispute resolution neutral or, if appointed by a court, shall seek the court's permission to withdraw from service as a dispute resolution neutral, if:

(1) any of the parties so request;

(2) the lawyer reasonably believes that further dispute resolution services will not lead to an agreement resolving the matter in dispute or that any of the parties are unwilling or unable to cooperate with the lawyer's dispute resolution initiatives; or

(3) any of the conditions stated in paragraph (b) are no longer satisfied.

(e) Upon termination of a lawyer's service as a dispute resolution neutral, the lawyer:

(1) may, with the informed consent of all the parties to the dispute and in compliance with the requirements of RPC 1.2(c) and 2.2, draft a settlement agreement that results from the dispute resolution process, but shall not otherwise represent any or all of the parties in connection with the matter, and

(2) shall afford each party to the dispute the protections afforded a client by RPC 1.6, 1.8(b), and 1.9.

COMMENTS

Comment

[1] Mediation, arbitration, and other forms of alternative dispute resolution have been in use for many years, but increasing demands in recent years for more prompt and efficient means of resolving disputes of all kinds have led to an increase in the demand for the services of dispute resolution neutrals skilled in the analysis of disputes and in conflict resolution. Lawyers are often particularly well-suited to perform this role and should be encouraged to do so.

[2] Although service as a dispute resolution neutral is considered a law-related service governed generally by these Rules, see RPC 5.7, the unique nature of a lawyer's role when serving as a dispute resolution neutral demands separate, more specific, treatment in this Rule for the guidance of the profession and the public.

[3] This Rule provides that a lawyer may serve as a dispute resolution neutral, whether as a mediator, a non-binding arbitrator, a case evaluator, or a judge or juror in a mini-trial or summary jury trial. The scope of a lawyer's possible service as a neutral is intended to be generally the same as that adopted in Tennessee Supreme Court Rule 31 governing court-

annexed alternative dispute resolution. However, although Rule 31 covers only court-annexed alternative dispute resolution, this Rule covers services as a dispute resolution neutral whether rendered in connection with court-annexed dispute resolution proceedings or in another, perhaps wholly private, context not covered by Rule 31.

[4] This Rule does not cover the rendering by a lawyer of services related to alternative dispute resolution that are not neutral in nature, but are more judicial in nature, such as service as an arbitrator in a binding arbitration. Although [RPCule 5.7](#) may address a lawyer's obligations in such a context, this Rule does not purport to address them.

[5] Although a lawyer who serves as a dispute resolution neutral is subject to the Rules of Professional Conduct, see [RPC 5.7](#), many of the Rules do not directly apply to such service because the participants in a dispute resolution proceeding are not the lawyer's clients. Other Rules do apply, however, and this Rule further provides specific applications of certain rules that must apply differently in this context (including, for example, the application of rules governing conflicts of interest).

[6] Although the requirements of this Rule are generally intended to be consistent with those imposed on dispute resolution neutrals under Rule 31, there are duties additional to those set out in Rule 31 that are imposed on lawyers who serve in this role. See also Supreme Court Rule 31, Appendix: Standards of Professional Conduct for Rule 31 Mediators. Even though nonlawyers certified by the Supreme Court under Rule 31 as dispute resolution neutrals may not be subject to these Rules and the parties to the dispute are not deemed to be the clients of the lawyer serving as their dispute resolution neutral, the parties are properly entitled to assume that lawyers serving in this capacity are largely subject to the same broad standards of conduct as are applicable to lawyers when they are providing legal services to clients.

[7] The Supreme Court has set forth in Rule 31 rules and standards of professional conduct applicable to all Rule 31 neutrals, including lawyers and nonlawyers. Thus, paragraph (b) contemplates that a lawyer may serve as a Rule 31 neutral if the lawyer complies with these requirements. Paragraph (b)(9) further requires that a lawyer serving as a dispute resolution neutral pursuant to Supreme Court Rule 31 must comply fully with the requirements of that Rule as well.

[8] Paragraph (b) specifies the circumstances in which a lawyer may serve parties to a dispute as a dispute resolution neutral. With respect to the parties to the dispute, [RPCule 1.7](#) is inapplicable because there is no client-lawyer relationship between the neutral and the parties to the dispute. [RPCule 1.7](#) remains applicable, however, to protect a client, as distinct from parties the lawyer is serving as a neutral, if the lawyer's service as a neutral will materially limit the lawyer's representation of that client. Similarly, if the lawyer's service as a neutral would be materially adverse to one of the lawyer's former clients, and the matters are substantially related, the lawyer must afford the former client the protection of [RPCule 1.9](#).

[9] Conflicts of interest for lawyers serving as dispute resolution neutrals are specifically addressed because the parties to a dispute resolution proceeding are not the clients of the dispute resolution neutral. The lawyer serving as neutral, however, must be impartial, must fully disclose any pertinent relationships to the parties to the proceeding, and must obtain their consent to the lawyer's service based on these disclosures. Paragraph (b)(4) does not provide for mandatory vicarious disqualification based on a lawyer's current or prospective service as a dispute resolution neutral. If, however, a lawyer asked to serve as a neutral has a partner who currently represents one of the parties to the dispute in other matters, the lawyer obviously would be required to disclose this fact to the parties under (b)(7) and obtain informed consent confirmed in writing to service as a neutral. Of course, this lawyer must also possess a reasonable belief that impartiality was possible despite this and other such pertinent relationships. If a lawyer may not make the disclosures required by paragraph (b)(7) because of his confidentiality obligations to a client, then the lawyer may not serve as a dispute neutral.

[10] Paragraph (c) further provides various standards of conduct particular to service by a lawyer as a dispute resolution neutral. Again, these rules of conduct are intended to be consistent with Rule 31 and to address the particular situation of a neutral who occupies a significantly different relationship to participants in a dispute resolution proceeding than a lawyer does with clients. Paragraphs (c)(4) and (c)(5) treat the confidentiality of all information related to the dispute (including that obtained in individual caucuses with the parties) by analogy to the rules concerning the confidentiality of client information. Thus, for example, any question concerning the potential disclosure of fraud by a participant in a dispute resolution proceeding would be addressed under RPCules 1.6, 3.3, or 4.1 as though the participant were, in fact, a client of the lawyer. Likewise, the ethical duty of a lawyer serving as a dispute resolution neutral to report unethical conduct in a dispute resolution proceeding by a lawyer for a participant is limited by RPC 8.3(c). Other portions of paragraph (c), such as the ban on undisclosed compensation by one of the participants in paragraph (c)(7), the prohibition on coercion or decision making on behalf of parties in paragraph (c)(8), and the ban on giving legal advice to the participants in paragraph (c)(6), impose restrictions needed to insure and reinforce the necessary impartiality of the lawyer serving as a dispute resolution neutral.

[11] Paragraph (d) requires that a lawyer serving as a dispute resolution neutral withdraw or seek an appointing court's permission to withdraw in certain specified circumstances, such as a request by a party to do so or the lawyer's reasonable belief that the lawyer's service will not be fruitful.

[12] Paragraph (e) establishes a lawyer's duties toward participants in a dispute resolution proceeding upon the termination of the lawyer's service as a neutral for any reason, whether because a settlement is achieved or because a party requests the lawyer's withdrawal. Given the impartial role of a dispute resolution neutral, it is inappropriate for a lawyer who had served as a dispute resolution neutral to later represent any of the parties to the dispute in connection with the subject matter of that dispute resolution proceeding. This disqualification, however, does not extend to other lawyers associated in a law firm with the dispute resolution

neutral. If, however, the parties have successfully resolved their dispute, paragraph (e)(1) permits the lawyer-neutral to draft the agreement settling their dispute, but this must be done in conformity with RPCules 1.2(c) and 2.2 and only with informed consent.

[13] Further, paragraph (e)(2) provides that, even though the participants to a concluded dispute resolution proceeding were not the clients of the lawyer who served as a dispute resolution neutral in that proceeding, these participants are nevertheless entitled to the protections relating to confidentiality and conflicts of interest afforded by RPCules 1.6, 1.8(b), and 1.9 as if they were former clients.

DEFINITIONAL CROSS-REFERENCES

“Confirmedsents in Writing” See RPC 1.0(b)

~~“Consultation” and “Consults”~~ See ~~RPC 1.0(e)~~

“Firm” See RPC 1.0(~~c~~d)

“Informed consent” See RPC 1.0(e)

“Materially” See RPC 1.0(~~o~~g)

“Reasonable” and “Reasonably” See RPC 1.0(~~h~~i)

“Reasonably Believes” See RPC 1.0(~~j~~i).

CHAPTER 3 ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

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

COMMENTS

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. ~~Both~~ The law, both procedural and substantive ~~law establish, establishes the~~ limits within which an advocate may proceed. However, the law is not always clear and ~~is never~~ is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they act reasonably to inform themselves about the facts of their client's case and the law applicable to the case and then act reasonably in determining that they can make ~~non-frivolous~~ good faith arguments in support of their client's position. Such an action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the ~~client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the~~ lawyer is unable either to make a ~~non-frivolous~~ good faith argument on the merits of the action taken or to support the action taken by a ~~non-frivolous~~ good faith argument for an extension, modification, or reversal of existing law.

~~[3] Although this Rule does not preclude a lawyer for~~ [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter ~~from defending the proceeding so as to require that every element of the case be established, the defense lawyer must not file frivolous motions and must give notice to the prosecution if the lawyer decides to abandon an affirmative defense that the lawyer had previously indicated would be presented in the case.~~ to present a claim or contention that

otherwise would be prohibited by this Rule.

~~— [4] — Prior to filing a complaint in a civil matter, a lawyer should act reasonably to promote settlement of the matter in dispute, including consultation with the client about the use of mediation or other alternative means of dispute resolution.~~

DEFINITIONAL CROSS-REFERENCES

“Reasonable” See RPC 1.0([i](#)[h](#))

Rule 3.2: EXPEDITING LITIGATION

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

COMMENTS

Comment

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, such as illness or a conflict with an important family engagement, ~~it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite~~ ~~litigation~~ be reasonable if done for the ~~primary~~ purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a ~~reasonable~~ competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. — [2] — ~~Even if a lawyer is justified in seeking to delay a proceeding, the lawyer may not do so by means otherwise prohibited by these rules. See, e.g., RPCs 3.1 and 3.4. For purposes of this Rule, realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

DEFINITIONAL CROSS-REFERENCES

“Reasonable” See RPC 1.0(h)

Rule 3.3: CANDOR TOWARD THE TRIBUNAL

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal; or
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) in an *ex parte* proceeding, fail to inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- (b) A lawyer shall not offer evidence the lawyer knows to be false, except that a lawyer who represents a defendant in a criminal proceeding, and who has been denied permission to withdraw from the defendant's representation after compliance with paragraph (f), may allow the client to testify by way of an undirected narrative or take such other action as is necessary to honor the defendant's constitutional rights in connection with the proceeding.
- (c) A lawyer shall not affirm the validity of, or otherwise use, any evidence the lawyer knows to be false.
- (d) A lawyer may refuse to offer or use evidence, other than the testimony of a client who is a defendant in a criminal matter, that the lawyer reasonably believes is false, misleading, fraudulent or illegally obtained.
- (e) If a lawyer knows that the lawyer's client intends to perpetrate a fraud upon the tribunal or otherwise commit an offense against the administration of justice in connection with the proceeding, including improper conduct toward a juror or a member of the jury pool, or comes to know, prior to the conclusion of the proceeding, that the client has, during the course of the lawyer's representation, perpetrated such a crime or fraud, the lawyer shall advise the client to refrain from, or to disclose or otherwise rectify, the crime or fraud and shall discuss ~~consult~~ with the client ~~about~~ the consequences of the client's failure to do so.
- (f) If a lawyer, after discuss~~consultation~~ with the client as required by paragraph (e), knows that the client still intends to perpetrate the crime or fraud, or refuses or is unable to disclose or otherwise rectify the crime or fraud, the lawyer shall seek permission of the tribunal to withdraw from the representation of the client and shall inform the tribunal, without further disclosure of information protected by RPC~~rule~~ 1.6, that the lawyer's request to withdraw is required by the Rules of Professional Conduct.
- (g) A lawyer who, prior to conclusion of the proceeding, comes to know that the

lawyer has offered false tangible or documentary evidence shall withdraw or disaffirm such evidence without further disclosure of information protected by [RPCule](#) 1.6.

(h) A lawyer who, prior to the conclusion of the proceeding, comes to know that a person other than the client has perpetrated a fraud upon the tribunal or otherwise committed an offense against the administration of justice in connection with the proceeding, and in which the lawyer's client was not implicated, shall promptly report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by [RPCule](#) 1.6.

(i) A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by or toward a juror or a member of the jury pool shall report the improper conduct to the tribunal, even if so doing requires the disclosure of information otherwise protected by [RPCule](#) 1.6.

(j) If, in response to a lawyer's request to withdraw from the representation of the client or the lawyer's report of a perjury, fraud, or offense against the administration of justice by a person other than the lawyer's client, a tribunal requests additional information that the lawyer can only provide by disclosing information protected by [RPCule](#) 1.6 or 1.9(c), the lawyer shall comply with the request, but only if finally ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected by the attorney-client privilege.

COMMENTS

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in connection with the proceedings of a tribunal, such as a court or an administrative agency acting in an adjudicative capacity. It applies not only when the lawyer appears before the tribunal, but also when the lawyer participates in activities conducted pursuant to the tribunal's authority, such as pre-trial discovery in a civil matter.

[2] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty to refrain from assisting a client to perpetrate a fraud upon the tribunal. 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

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare RPC 3.1. However, an assertion purporting

to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in [RPCule 1.2\(d\)](#) not to counsel a client to commit, or assist the client in committing a fraud, applies in litigation. Regarding compliance with [RPCule 1.2\(d\)](#), see the Comment to that Rule and also Comments [1] and [7] to [RPCule 8.4](#).

Misleading Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

***Ex Parte* Proceedings**

[5] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an *ex parte* proceeding, such as an application for a temporary restraining order or one conducted pursuant to [RPCule 1.7\(c\)](#), there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. As provided in paragraph (a)(3), the lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Refusing to Offer or Use False Evidence

[6] 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. The lawyer must similarly refuse to offer a client's testimony that the lawyer knows to be false, except that paragraph (b) permits the lawyer to allow a criminal defendant to testify by way of narrative if the lawyer's request to withdraw, as required by paragraph (f), is denied. Paragraph (c) precludes a lawyer from affirming the validity of, or otherwise using, any evidence the lawyer knows to be false, including the narrative testimony of a criminal defendant.

[7] As provided in paragraph (d), a lawyer has authority to refuse to offer or use testimony or other proof that the lawyer believes is untrustworthy. 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 or use the testimony of such a client because the lawyer reasonably believes the testimony to be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

Wrongdoing in Adjudicative Proceedings by Clients and Others

[8] A lawyer who is representing a client in an adjudicative proceeding and comes to know prior to the completion of the proceeding that the client has perpetrated a fraud or committed perjury or another offense against the administration of justice, or intends to do so before the end of the proceeding, is in a difficult position in which the lawyer must strike a professionally responsible balance between the lawyer's duties of loyalty and confidentiality owed to the client and the equally important duty of the lawyer to avoid assisting the client with the consummation of the fraud or perjury. In all such cases, paragraph (e) requires the lawyer to advise the client to desist from or to rectify the crime or fraud and inform the client of the consequences of a failure to do so. The hard questions come in those rare cases in which the client refuses to reveal the misconduct and prohibits the lawyer from doing so.

[9] Paragraph (f) sets forth the lawyer's responsibilities in situations in which the lawyer's client is implicated in the misconduct. In these situations, the Rules do not permit the lawyer to report the client's offense. Confidentiality under [RPCule](#) 1.6 prevails over the lawyer's duty of candor to the tribunal. Only if the client is implicated in misconduct by or toward a juror or a member of the jury pool does the lawyer's duty of candor to the tribunal prevail over confidentiality. See paragraph (i).

[10] Although the lawyer may not reveal the client's misconduct, the lawyer must not voluntarily continue to represent the client, for to do so without disclosure of the misconduct would assist the client to consummate the offense. The Rule, therefore, requires the lawyer to seek permission of the tribunal to withdraw from the representation of the client. To increase the likelihood that the tribunal will permit the lawyer to withdraw, the lawyer is also required to inform the tribunal that the request for permission to withdraw is required by the Rules of Professional Conduct. This statement also serves to advise the tribunal that something is amiss without providing the tribunal with any of the information related to the representation that is protected by [RPCule](#) 1.6. These Rules, therefore, are intended to preserve confidentiality while requiring the lawyer to act so as not to assist the client with the consummation of the fraud. This reflects a judgment that the legal system will be best served by rules that encourage clients to confide in their lawyers who in turn will advise them to rectify the fraud. Many, if not most, clients will abide by their lawyer's advice, particularly if the lawyer spells out the consequences of failing to do so. At the same time, our legal system and profession cannot permit lawyers to assist clients who refuse to follow their advice and insist on consummating an ongoing fraud.

[11] Once the lawyer has made a request for permission to withdraw, the tribunal may

grant or deny the request to withdraw without further inquiry or may seek more information from the lawyers about the reasons for the lawyer's request. If the judge seeks more information, the lawyer must resist disclosure of information protected by [RPCule 1.6](#), but only to the extent that the lawyer may do so in compliance with [RPCule 3.1](#). If the lawyer cannot make a non-frivolous argument that the information sought by the tribunal is protected by the attorney-client privilege, the lawyer must respond truthfully to the inquiry. If, however, there is a non-frivolous argument that the information sought is privileged, paragraph (h) requires the lawyer to invoke the privilege. Whether to seek an interlocutory appeal from an adverse decision with respect to the claim of privilege is governed by [RPCules 1.2](#) and [3.1](#).

[12] If a lawyer is required to seek permission from a tribunal to withdraw from the representation of a client in either a civil or criminal proceeding because the client has refused to rectify a perjury or fraud, it is ultimately the responsibility of the tribunal to determine whether the lawyer will be permitted to withdraw from the representation. In a criminal proceeding, however, a decision to permit the lawyer's withdrawal may implicate the constitutional rights of the accused and may even have the effect of precluding further prosecution of the client. Notwithstanding this possibility, the lawyer must seek permission to withdraw, leaving it to the prosecutor to object to the request and to the tribunal to ultimately determine whether withdrawal is permitted. If permission to withdraw is not granted, the lawyer must continue to represent the client, but cannot assist the client in consummating the fraud or perjury by directly or indirectly using the perjured testimony or false evidence during the current or any subsequent stage of the proceeding. A defense lawyer who complies with these rules acts professionally without regard to the effect of the lawyer's compliance on the outcome of the proceeding.

False Documentary or Tangible Evidence

[13] If a lawyer comes to know that tangible items or documents that the lawyer has previously offered into evidence have been altered or falsified, paragraph (g) requires that the lawyer withdraw or disaffirm the evidence, but does not otherwise permit disclosure of information protected by [RPCule 1.6](#). Because disaffirmance, like withdrawal, can be accomplished without disclosure of information protected by [RPCule 1.6](#), it is required when necessary for the lawyer to avoid assisting a fraud on the tribunal.

Crimes or Frauds by Persons Other than the Client

[14] Paragraph (h) applies if the lawyer comes to know that a person other than the client has engaged in misconduct in connection with the proceeding. Upon learning prior to the completion of the proceeding that such misconduct has occurred, the lawyer is required by paragraph (e) to promptly reveal the offense to the tribunal. The client's interest in protecting the wrongdoer is not sufficiently important as to override the lawyer's duty of candor to the court and to take affirmative steps to prevent the administration of justice from being tainted by perjury, fraud, or other improper conduct.

Misconduct By or Toward Jurors or Members of Jury Pool

[15] Because jury tampering undermines the institutional mechanism that our adversary system of justice uses to determine the truth or falsity of testimony or evidence, paragraph (i) requires a lawyer who learns prior to the completion of the proceeding that there has been misconduct by or directed toward a juror or prospective juror must reveal the misconduct and the identity of the perpetrator to the tribunal, even if so doing requires disclosure of information protected by ~~RPC~~ Rule 1.6. Paragraph (i) does not require that the lawyer seek permission to withdraw from the further representation of the client in the proceeding, but in cases in which the client is implicated in the jury tampering, the lawyer's continued representation of the client may violate ~~RPC~~ Rule 1.7. ~~RPC~~ Rule 1.16(a)(1) would then require the lawyer to seek permission to withdraw from the case.

Crime or Fraud Discovered After Conclusion of Proceeding

[16] In cases in which the lawyer learns of the client's misconduct after the termination of the proceeding in which the misconduct occurred, the lawyer is prohibited from reporting the client's misconduct to the tribunal. Even though the lawyer may have innocently assisted the client to perpetrate the offense, the lawyer should treat this information as the lawyer would treat information with respect to any past crime a client might have committed. The client's offense will be deemed completed as of the conclusion of the proceeding. An offense that occurs at an earlier stage in the proceeding will be deemed an ongoing offense until the final stage of the proceeding is completed. 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 an appeal has passed.

Constitutional Requirements

[17] These Rules apply to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. The obligation of the advocate under these Rules is subordinate to any such constitutional requirement.

DEFINITIONAL CROSS-REFERENCES

- ~~“Consult” and “Consultation”~~ See ~~RPC~~ 1.0(e)
- “Fraud” and “Fraudulent” See ~~RPC~~ 1.0(ed)
- “Knowingly,” “Known,” and “Knows” See ~~RPC~~ 1.0(f)
- “Material” See ~~RPC~~ 1.0(eg)
- “Reasonably Believes” See ~~RPC~~ 1.0(ji)
- “Tribunal” See ~~RPC~~ 1.0(m)

RULE 3.4 : FAIRNESS TO ~~THE~~ OPPOSING PARTY AND COUNSEL

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; or
- (b) falsify evidence, counsel or assist a witness to offer false or misleading testimony; or
- (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; or
- (d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or
- (e) in trial,
 - (1) allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence; or
 - (2) assert personal knowledge of facts in issue except when testifying as a witness; or
 - (3) 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) request or assist any person to take action that will render the person unavailable to appear as a witness by way of deposition or at trial; or
- (h) offer an inducement to a witness that is prohibited by law; or pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. A lawyer may advance, guarantee, or acquiesce in

the payment of:

- (1) expenses reasonably incurred by a witness in attending or testifying;
- (2) reasonable compensation to a witness for that witness's loss of time in attending or testifying; or
- (3) a reasonable fee for the professional services of an expert witness.

COMMENTS

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. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or ~~a proceeding the~~one whose commencement ~~of which~~ can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] Although paragraph (f) broadly prohibits lawyers from taking extrajudicial action to impede informal fact-gathering, it does permit the lawyer to request that the lawyer's client, and relatives, employees, or agents of the client, refrain from voluntarily giving information to another party. This principle follows because such relatives and employees will normally identify their interests with those of the client. See also RPC 4.2

[4] With regard to paragraph (h), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

DEFINITIONAL CROSS-REFERENCES

This committee draft is for discussion purposes only and does not represent the view of the Tennessee Bar Association or its Board of Governors or House of Delegates.

“Knowingly” See RPC 1.0(f)

“Material” See RPC 1.0(~~o~~g)

“Reasonable” and “Reasonably” See RPC 1.0(~~h~~i)

“Reasonably Believes” See RPC 1.0(~~i~~j)

“Tribunal” See RPC 1.0(m)

RULE 3.5 : IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

- (a) seek to influence a judge, juror, ~~a member of the jury pool,~~prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with ~~a judge, juror, or a member of the jury pool, prior to or~~such a person during ~~the~~ proceeding, ~~except as permitted~~ unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after ~~completion~~discharge of the ~~juror's term of service if~~ jury if:
 - (1) ~~the communication is prohibited by law, or is calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service~~ or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) ~~conduct a vexatious or harassing investigation of a juror or a member of the jury pool; or~~(e) engage in conduct intended to disrupt a ~~proceeding before or conducted pursuant to the authority of a~~ tribunal.

COMMENTS

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law ~~or by state or local rules of procedure~~. Others are specified in the Tennessee Code of Judicial Conduct, with which an advocate should be familiar. ~~For example, a lawyer shall not give or lend anything of value to a judge, judicial officer, or employee of a tribunal, except as permitted by Section (C)(4) of Canon 5 of the Code of Judicial Conduct. A lawyer, however, may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section (B)(2) of Canon 7 of the Code of Judicial Conduct.~~ A lawyer is required to avoid contributing to a violation of such provisions.

~~[2] Paragraph (b) does not prohibit communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel. Oral communication is permitted upon adequate notice to opposing counsel and parties who are not represented by counsel.~~

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[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. Unless such a communication is otherwise prohibited by law or court order, paragraph (b) of this Rule would not prohibit a lawyer from communicating with a judge on the merits of the cause in writing if the lawyer promptly delivers a copy of the writing to opposing counsel and to parties who are not represented by counsel because that would not be an ex parte communication.

[3] Paragraph (b) also does not prohibit a lawyer from communicating with a judge in an *ex parte* hearing to establish the absence of a conflict of interest under ~~RPC~~ Rule 1.7(c). In such proceedings, the lawyer is of course bound by the duty of candor in ~~RPC~~ Rule 3.3(a)(3).

[4] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication. —[4]—A communication with or an investigation of the spouse, child, parent, or sibling of a juror or prospective juror ~~a member of the jury pool~~ will be deemed a communication with or an investigation of the juror or prospective juror.

[5] 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 ~~more effectively by using~~ by patient firmness ~~no less effectively~~ than ~~using~~ by belligerence or theatrics.

~~[6] Paragraph (e) prohibits a lawyer from engaging in conduct intended to disrupt a deposition as well as a trial. The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See RPC 1.0(m).~~

DEFINITIONAL CROSS-REFERENCES

~~“Reasonably” See RPC 1.0(i)~~

~~“Known” See RPC 1.0(f)~~

~~“Tribunal” See RPC 1.0(m)~~

RULE 3.6 : TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

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

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

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

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

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

(7) in a criminal case, in addition to subparagraphs (1) through (6):

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

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

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

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

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

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

COMMENTS

Comment

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

[2] Special rules of confidentiality may validly govern proceedings ~~involving juveniles in juvenile~~, domestic relations, and mental ~~disabilities~~disability proceedings, and perhaps other types of litigation. ~~RPC~~rule 3.4(c) requires compliance with such ~~R~~rules.

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

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

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to ~~the following matters~~:

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

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

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

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

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

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

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

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

DEFINITIONAL CROSS-REFERENCES

“Firm” See RPC 1.0(cd)

“Knows” See RPC 1.0(f)

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“Materially” See RPC 1.0(~~o~~g)
“Reasonable” See RPC 1.0(~~h~~i)
“Reasonably Should Know” See RPC 1.0(~~j~~k)
“Substantial” See RPC 1.0(*l*)

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RULE ~~rule~~ 3.7 : LAWYER AS ~~A~~-WITNESS

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

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

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

COMMENTS

Comment

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

Advocate-Witness Rule

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

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, ~~then~~ the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is

required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The ~~principle of imputed disqualification~~ conflict of interest principles stated in ~~Rule~~ RPCs 1.7, 1.9 and 1.10 ~~has~~ have no application to this aspect of the problem.

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

Conflict of Interest

~~[5]—Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule~~ [6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with RPCs 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. This problem can arise irrespective of the representation involves a conflict of interest that requires compliance with RPC 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by RPC 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved.—See Comment [19] to RPC 1.7. If a lawyer who is a member of a firm may not act as both an advocate and a witness by reason of If there is a conflict of interest, Rule 1.10 disqualifies the firm also. the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See RPC 1.7. See RPC 1.0(b) for the definition of "confirmed in writing" and RPC 1.0(e) for the definition of "informed consent."

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

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DEFINITIONAL CROSS-REFERENCES

“Firm” See RPC 1.0(~~c~~)

“Substantial” See RPC 1.0(*l*)

RULE 3.8 : SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal ~~matter:(a)~~case shall:

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

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

(c) shall not advise an unrepresented accused to waive important pretrial rights;~~and~~

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

(e) shall:

~~(1) — exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6; and~~

~~(2) — discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6; and~~(f) shall not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a client~~past~~ or ~~former~~present client unless the prosecutor reasonably believes:

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

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

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

(f) ~~shall: (1)~~except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, shall refrain from making extrajudicial comments that have a substantial likelihood of heightening

public condemnation of the accused and exercise reasonable care to prevent employees of the prosecutor's office from making an extrajudicial statement that the prosecutor would be prohibited from making under ~~RPC~~rule 3.6 or this Rule; and ~~(2)~~ discourage investigators, law enforcement personnel, and other persons assisting or associated with the prosecutor in a criminal matter from making an extrajudicial statement that the prosecutor would be prohibited from making under ~~RPC~~rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit;

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

COMMENTS

Comment

[1] A prosecutor has the responsibility of a minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost. See State v. Superior Oil, Inc., 875 S.W.2d 658, 661 (Tenn. 1994). For example, "prosecutors are expected to be impartial in the sense that charging decisions should be based upon the evidence, without discrimination or bias for or against any groups or individuals. Yet, at the same time, they are expected to prosecute criminal offenses with zeal and vigor within the bounds of the law and professional conduct." See State v. Culbreath, 30 S.W.3d 309, 314 (Tenn. 2000). A knowing disregard of obligations or a systematic abuse of prosecutorial discretion could constitute a violation of ~~RPC~~rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not advise an unrepresented accused to waive the right to a preliminary hearing or other important pretrial rights. Paragraph (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and ~~the privilege against self-incrimination~~silence.

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

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

the client-lawyer relationship.

[5] ~~See Paragraph (f) supplements RPC rule 3.6 for the rules governing extrajudicial statements by prosecutors and other lawyers participating in the investigation or litigation of a matter, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with RPC 3.6(b) or 3.6(c).~~

[6] When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor of the jurisdiction where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to disclose the evidence to the court and, absent court-authorized delay, to the defendant within a reasonable period of time, as circumstances dictate. Consistent with the objectives of RPCs 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

[7] Under paragraph (h), once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

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

DEFINITIONAL CROSS-REFERENCES

“Known” and “Knows” See RPC 1.0(f)

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“Material” See RPC 1.0(o)

“Reasonable” See RPC 1.0(h)

“Reasonably Believes” See RPC 1.0(j)

“Substantial” See RPC 1.0(l)

“Tribunal” See RPC 1.0(m)

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RULE 3.9 : ADVOCATE IN NON-ADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a ~~non-adjudicative~~nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a)(1), (a)(2), (b), (c), and (d); RPC 3.4(a), (b), and (c); RPC 3.5(a), (b), and (e); and RPC 4.1.

COMMENTS

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues, and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body ~~should~~must deal with ~~the tribunal~~it honestly and in conformity with the applicable rules of procedure. See RPCs 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before ~~non-~~nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, ~~except for the fact that lawyers need not secure the permission of a legislative body or administrative agency to withdraw from the representation of a client in a non-adjudicative matter and that certain of the rules governing the conduct of lawyers in adjudicative matters are not pertinent to non-adjudicative matters~~ legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with a proceeding of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; ~~representation in such a transaction~~ or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by RPC 4.1 through 4.4.

~~—— [4] —— See Rule 4.1 for the duties of a lawyer who comes to know that the lawyer's client or a witness whose testimony is presented by the lawyer has testified falsely or otherwise presented false evidence in a non-adjudicative proceeding conducted by a legislative body or administrative agency.~~

DEFINITIONAL CROSS-REFERENCES

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None.

CHAPTER 4
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS ~~AND CANDOR~~ IN STATEMENTS TO OTHERS

(a) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

(b) If, in the course of representing a client in a non-adjudicative matter, a lawyer knows that the client intends to perpetrate a crime or fraud, the lawyer shall promptly advise the client to refrain from doing so and shall discuss ~~consult~~ with the client ~~about~~ the consequences of the client's conduct. If after such discuss~~consultat~~ion, the lawyer knows that the client still intends to engage in the wrongful conduct, the lawyer shall:

(1) withdraw from the representation of the client in the matter; and

(2) give notice of the withdrawal to any person who the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct. The lawyer shall also give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and which the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

(c) If a lawyer who is representing or has represented a client in a non-adjudicative matter comes to know, prior to the conclusion of the matter, that the client has, during the course of the lawyer's representation of the client, perpetrated a crime or fraud, the lawyer shall promptly advise the client to rectify the crime or fraud and discuss ~~consult~~ with the client ~~about~~ the consequences of the client's failure to do so. If the client refuses or is unable to rectify the crime or fraud, the lawyer shall:

(1) if currently representing the client in the matter, withdraw from the representation and give notice of the withdrawal to any person whom the lawyer knows is aware of the lawyer's representation of the client in the matter and whose financial or property interests are likely to be injured by the client's criminal or fraudulent conduct; and

(2) give notice to any such person of the lawyer's disaffirmance of any written statements, opinions, or other material prepared by the lawyer on behalf of the client and that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud.

~~COMMENTS~~

Comment

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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 ~~or law~~. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. ~~A misrepresentation can also occur by a failure to act.~~ Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see RPC 8.4.

Statements of Fact

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

Crime or Fraud by Client

[3] Paragraphs (b) and (c) provide guidance for lawyers who discover that a client intends to or is engaging in criminal or fraudulent conduct, and in some cases may even have used the lawyer's services to assist them commit the crime or fraud. To avoid assisting the client with the crime or fraud, the lawyer must advise the client to refrain from or to rectify the consequences of the criminal or fraudulent act. If the client refuses or is unable to do so, the lawyer must withdraw from the representation of the client in the matter. Additionally, this Rule mandates limited disclosures—notice of withdrawal or disaffirmance of written work product—in circumstances in which such disclosure is necessary for the lawyer to prevent the client from using the lawyer's services in furtherance of the crime or fraud. To this limited extent, then, this Rule overrides the lawyer's duties in RPCules 1.6, 1.8(b), and 1.9(c) prohibiting disclosure or use to the disadvantage of the client of information relating to the representation. Other than the disclosure mandated by this Rule, however, the lawyer must not reveal information relating to the representation unless permitted to do so by RPCule 1.6.

[4] If a lawyer learns that a client intends to commit a crime or fraud under circumstances in which the lawyer will not assist the offense by remaining silent, paragraph (b) requires remonstrance with the client against the crime or fraud and requires withdrawal if the client does not desist from the course of conduct in question. Although the lawyer is not

required to reveal the client's intended or ongoing fraud, the lawyer is required to communicate the fact that he or she has withdrawn from the representation of the client to any person who the lawyer reasonably believes knows of the lawyer's involvement in the matter and whose financial or property interests are likely to be damaged by the client's intended or ongoing misconduct. This communication is necessary to fully distance the lawyer from the client's misconduct. If the client's intended conduct is a crime, full disclosure of the crime is permitted by [RPC rule 1.6\(b\)](#), but such disclosure is not required by paragraph (b) of this Rule.

[5] In some cases, a lawyer will learn about a client's crime or fraud after he or she has innocently prepared and submitted statements, opinions, or other materials to third parties who will be adversely affected if the client persists with his or her misconduct. If the lawyer was misled by the client, some of these statements, opinions or materials may be false or misleading. Even though accurate, they may be necessary for the accomplishment of the client's crime or fraud. This presents the lawyer with a dilemma. Without the consent of the client, the lawyer may not correct the statements, opinions, or materials. That would violate the prohibition against revealing information related to the representation of the client. Yet to do nothing would allow the client to use the lawyer's work in the client's ongoing effort to consummate the fraud. To resolve this dilemma, paragraphs (b) and (c) do not require disclosure of the crime or fraud but only requires that the lawyer effectively disengage from the crime or fraud by giving notice to affected persons of the lawyer's disaffirmance of the lawyer's work product that the lawyer reasonably believes may be used by the client in furtherance of the crime or fraud. [See RPC 1.6\(b\)\(1\) and \(2\) for the circumstances in which the lawyer is permitted to reveal information for the purposes of preventing the client's crime or fraud, and RPC 1.6\(b\)\(3\) for the circumstances in which a lawyer may reveal a client's crime or fraud for the purpose of preventing, rectifying or mitigating its consequences. See RPC 1.6\(c\)\(1\) for the circumstances in which the lawyer is required to reveal information for the purpose of preventing reasonably certain death or substantial bodily harm.](#)

[6] This Rule does not apply if the lawyer learns of the client's crime or fraud after the lawyer's representation in the matter is concluded. In such circumstances, the lawyer must comply with [RPC rules 1.6, 1.8\(b\), and 1.9\(c\)](#) and may not make any disclosures concerning the client's crime or fraud unless permitted or required to do so by those Rules. [See, e.g., RPC 1.6\(3\) \(permitting disclosure to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services\), RPC 1.6 \(b\)\(4\) \(permitting disclosures to secure legal advice about compliance with these Rules\); RPC 1.6\(b\)\(5\) \(permitting disclosures to establish a defense to an allegation of misconduct\); and RPC 1.6\(c\)\(1\) \(requiring disclosure to prevent reasonably certain death or substantial bodily harm\).](#)

DEFINITIONAL CROSS-REFERENCES

Discussion Draft
Amendments to Tennessee Rules of Professional Conduct
TBA Ethics Committee
May 27, 2008

~~“Consult” and “Consultation” See RPC 1.0(e)~~

“Fraud” and Fraudulent” See RPC 1.0([de](#))

“Knowingly” and “Knows” See RPC 1.0(f)

“Material” See RPC 1.0([og](#))

“Reasonably Believes” See RPC 1.0([ij](#))

This committee draft is for discussion purposes only and does not represent the view of the Tennessee Bar Association or its Board of Governors or House of Delegates.

Rule 4.2 : COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL

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

COMMENTS

Comment

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

[2] This Rule applies to communications with any person, ~~whether or not a party to a formal adjudicative proceeding, contract, or negotiation,~~ who is represented by counsel concerning the matter to which the communication relates.

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

[5] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the ~~subject matter of the~~ representation. For example, the existence of a controversy between a government agency and a private party, or between two ~~private parties~~ organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude ~~a lawyer from communicating with a person who seeks a second opinion about a matter in which the person is represented by another lawyer. Also, parties~~ communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See RPC 8.4(a). Parties to a matter may communicate directly with each other.—, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[6] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, by

applicable judicial precedent, or by court order. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances. [7] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

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

[37] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter. [4] If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Consent of the organization's lawyer is not required for communication with a former agent or employee. See RPCule 4.4 regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work-product of the organization's lawyer. In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See RPC 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See RPC 1.0(f).

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

DEFINITIONAL CROSS-REFERENCES

“Knows” See RPC 1.0(f)

RULE 4.3 : DEALING WITH AN UNREPRESENTED PERSON

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

COMMENTS

Comment

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

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

DEFINITIONAL CROSS-REFERENCES

"Knows" See RPC 1.0(f)

"Reasonable" See RPC 1.0(ih)

"Reasonably Should Know" See RPC 1.0(kj)

RULE ~~4.1~~ 4.4 : RESPECT FOR THE RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not:

(~~a~~1) 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; or

(~~b~~2) threaten to present a criminal or lawyer disciplinary charge, ~~or to offer or to agree to refrain from filing such a charge,~~ for the purpose of obtaining an advantage in a civil matter.

(b) A lawyer who receives information relating to the representation of the lawyer's client that the lawyer knows or reasonably should know is protected by RPC 1.6 (including information protected by the attorney-client privilege, or the work-product rule) and has been disclosed to the lawyer inadvertently or by a person not authorized to disclose such information to the lawyer, shall

(1) immediately terminate review or use of the information;

(2) notify the person, or the person's lawyer if communication with the person is prohibited by RPC 4.2, of the inadvertent or unauthorized disclosure; and

(3) abide by that person or lawyer's instructions with respect to disposition of written information or refrain from using the written information until obtaining a definitive ruling on the proper disposition from a court with appropriate jurisdiction.

COMMENT
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. For example, a lawyer may not secretly record a conversation or the activities of another person if doing so would violate state or federal law specifically prohibiting such recording. Otherwise, this Rule does not prohibit secret recording so long as the lawyer has a substantial purpose other than to embarrass or burden the persons being recorded. It would be a violation of RPC 4.1 or RPC 8.4(c), however, if the lawyer stated falsely or affirmatively misled another to believe that a conversation or an activity was not being recorded. By itself, however, secret taping does not violate either RPC 8.4(c) (prohibition against dishonest or deceitful conduct) or RPC 8.4(d) (prohibition against conduct prejudicial to the administration of justice.)

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[2] The duties imposed by paragraph (b) on lawyers who know or who reasonably should know that they have received information protected by RPC 1.6 that was disclosed to them inadvertently or by a person not authorized to disclose the information to them reflect the importance of client-lawyer confidentiality in the jurisprudence of this state and the judgment that lawyers, in their dealings with other lawyer and their clients, should take the steps that are required by this Rule in the interest of protecting client-lawyer confidentiality even if it would be to the advantage of their clients to do otherwise.

[3] This Rule, however, does not prohibit the receiving lawyer from seeking a definitive court ruling as to the proper disposition of such information, including a ruling regarding whether the disclosure effects a waiver of the attorney-client privilege or work-product rule. In making any disclosure to a court to obtain a ruling regarding disposition of the information, any disclosure of the information should be made in a manner that limits access to the information to the tribunal, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

DEFINITIONAL CROSS-REFERENCES

“Knows” and “Knowingly” See RPC 1.0(f)

“Reasonably should know” See RPC 1.0(j)

“Substantial” See RPC 1.0(l)

“Written” See RPC 1.0(n)

CHAPTER 5
LAW FIRMS, LEGAL DEPARTMENTS, AND LEGAL
SERVICE ORGANIZATIONS

RULE 5.1: RESPONSIBILITIES OF A PARTNER, MANAGER, ~~ING-LAWYER,~~
AND/OR SUPERVISORY LAWYERS

(a) A partner in a law firm_u and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm_u shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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

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

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

(2) the lawyer: ~~(i)~~ is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, ~~is serving as co-counsel with the other lawyer in the matter, or is sharing fees from the matter with the other lawyer;~~ and ~~(ii)~~ knows of the conduct at a time when its consequences can be avoided or mitigated_; but fails to take reasonable remedial action.

Comment

~~COMMENTS~~

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See RPC 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

~~[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a law firm. See RPC 1.0(d) (defining law firm to include not only a private law firm, but also a legal department of a corporation, government agency, or other organization, including a legal services organization). Each partner in a law partnership, or their counterparts in firms organized as professional corporations, professional limited liability companies, or~~

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~~professional limited liability partnerships, will be deemed to possess managerial authority for all aspects of the firm's practice. A law firm or other organization of lawyers described in this Rule may, however, agree that the managerial authority for the conduct of the firm or organization will be centralized in some but not all of the partners or managing lawyers. In such a case, only the partners or managing lawyers possessing such managerial authority will be subject to the duty imposed by paragraph (a). On the other hand, however, paragraph (a) may be applicable when a lawyer in a firm or other organization of lawyers described in this Rule, whether or not a partner or a managing lawyer, is assigned intermediate level managerial responsibilities for a department or an office within the firm. Because many lawyers do not practice in traditional law firms, but rather practice law in legal departments of business firms, legal services organizations, or in legal departments of governmental agencies, this Rule also applies to lawyers possessing managerial authority in such organizations.~~

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised.

~~[3] [2] The Other~~ measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the ~~organization's~~ firm's structure and the nature of its practice. In a small ~~law firm or legal department, for example of experienced lawyers,~~ informal supervision and ~~occasional admonition~~ periodic review of compliance with the required systems ordinarily ~~might be sufficient.~~ will suffice. In ~~a large firms or legal departments, however,~~ or in practice situations in which ~~intensely~~ difficult ethical problems frequently arise, more elaborate ~~procedures~~ measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential ~~referrals~~ referral of ethical problems directly to a designated senior partner or special committee. See RPC 5.2. Firms ~~and legal departments,~~ whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm ~~or organization~~ can influence the conduct of all its members and ~~a lawyer having authority over the work of another~~ the partners may not assume that ~~the conduct of a subordinate lawyer~~ all lawyers associated with the firm will inevitably conform to the Rules.

~~[3] Paragraph (b) applies to lawyers, without regard to their status in a firm or other organization of lawyers described in this Rule, who assume direct supervisory responsibility for the oversight of the work of another lawyer.~~

[4] Paragraph (c)(1) expresses a general principle of personal responsibility for acts of another. See also RPC 8.4(a).

~~[5] Paragraph (c)(2) specifies the circumstances in which one lawyer will be held accountable for the professional misconduct of another lawyer because he or she knows the other~~

~~lawyer has engaged in professional misconduct and fails to take reasonable action to prevent or mitigate the harm caused by the professional misconduct.~~

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has ~~such~~ supervisory authority in particular circumstances is a question of fact. Partners ~~of a private firm and lawyers with comparable authority~~ have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily ~~has direct authority over~~ also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of ~~the partner's~~ that lawyer's involvement and the seriousness of the misconduct. ~~The A~~ supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. ~~If, for example, a partner in a law firm~~ Thus, if a supervising lawyer knows that ~~another lawyer in the firm~~ a subordinate misrepresented a matter to an opposing party in a negotiation, the ~~partner~~ supervisor as well as the subordinate has a duty to correct the resulting misapprehension. ~~Such would also be the case if a lawyer who was associated with another lawyer as a direct supervisor, co-counsel, or as a party to a fee sharing agreement learned that the other lawyer had engaged in misconduct in connection with the representation.~~ This duty is in addition to the lawyer's RPCule 8.3(a) duty to report professional misconduct to the Office of Disciplinary Counsel. The obligation to take reasonable remedial action, however, does not require the lawyer to take any action that would violate these Rules, e.g., disclosing information related to the representation of a client in violation of RPCule 1.6. Nor does the duty to mitigate harm require the lawyer to compensate a person for losses suffered by virtue of the misconduct the lawyer knows has occurred.

[6] Professional misconduct by a lawyer ~~in a firm or other organization of lawyers described in this Rule, or a lawyer who is working under the direct~~ under supervision ~~of another lawyer,~~ could reveal a violation of ~~paragraphs (a) or paragraph~~ (b) on the part of ~~the partner or the supervisory lawyer even though it does not entail a violation of paragraph (c) by the partner, the managing lawyer, or supervisory lawyer~~ because there was no direction, ratification, or knowledge of the violation.

[7] Apart from this Rule and RPCule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, ~~or another lawyer with whom the lawyer is associated in connection with the representation of a client.~~ or subordinate. Whether a lawyer may be held liable civilly or criminally ~~liable~~ for another lawyer's conduct is a question of law beyond the scope of these Rules. This Rule is only intended to provide a basis for professional discipline and is not intended to alter the legal rights and responsibilities of partners, or supervisory lawyers, ~~co-counsel, or parties to fee sharing agreements~~ with respect to the conduct of other lawyers with whom they are associated.

[8] The duties imposed on managing and supervising lawyers by this Rule do not

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alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct.

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0([cd](#))

“Knows” See RPC 1.0(f)

“Partner” See RPC 1.0([gh](#))

“Reasonable” See RPC 1.0([hi](#))

Rule 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENTS

Comment

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

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

DEFINITIONAL CROSS-REFERENCES

“Reasonable” See RPC 1.0(h)

RULE 5.3 : RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with ~~these Rules;~~ the professional obligations of the lawyer;

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

(c) a lawyer shall be responsible for ~~the~~ conduct of a nonlawyer ~~if the conduct that~~ would be a violation of ~~these~~ the Rules of Professional Conduct if engaged in by a lawyer, ~~and~~ if:

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

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

COMMENT

Comment

[1] Lawyers generally employ nonlawyers' 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~~ must give such ~~employees~~ assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers' assistants should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to RPC 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules

[of Professional Conduct if engaged in by a lawyer.](#)

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0([cd](#))

“Knows” See RPC 1.0(f)

“Partner” See RPC 1.0([gh](#))

“Reasonable” See RPC 1.0([hi](#))

RULE 5.4 : PROFESSIONAL INDEPENDENCE OF A LAWYER

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
 - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;
 - (4) a lawyer may share a court-awarded fee with a client represented in the matter ~~for which the fee was awarded~~ or with a non-profit organization that employed ~~or~~ retained or recommended employment of the lawyer in the matter ~~for which the fee was awarded~~;
 - (5) a lawyer who is a full-time employee of a client may share a legal fee with the client to the extent necessary to reimburse the client for the actual cost to the client of permitting the lawyer to represent another client while continuing in the full-time employ of the client with whom the fee will be shared; and
 - (6) a lawyer may pay to a registered non-profit intermediary organization a referral fee calculated by reference to a reasonable percentage of the fee paid to the lawyer by the client referred to the lawyer by the intermediary organization.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation, ~~or professional limited liability company~~ or other association authorized to practice law for a profit, if :
- (1) ~~(1)~~ a nonlawyer ~~owns~~ owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or ownership interest of the

lawyer for a reasonable time during administration;~~or~~

(2) ~~is a member of the governing board or an~~ nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

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

COMMENTS

Comment

[1] The provisions of this Rule ~~largely~~ express ~~the~~ traditional limitations on sharing fees with and the co-ownership of law practices by nonlawyers. These limitations are to protect the ~~independence of the lawyer's professional judgment. The Rule recognizes several exceptions to the general prohibition against fee splitting with nonlawyers. These are situations in which there is little risk of harm resulting from lay attempts to interfere with the independent professional judgment of the lawyer.~~ 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 ~~must~~should not interfere with the lawyer's professional judgment. ~~See also RPC 1.8(f).~~

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also RPC 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0(cd)

“Partner” See RPC 1.0(gh)

“Reasonable” See RPC 1.0(hi)

THIS PAGE IS INTENTIONALLY LEFT BLANK AS A PLACEHOLDER FOR RPC 5.5. THE COMMITTEE'S PROPOSED REVISIONS TO RPC 5.5 HAVING BEEN MADE SEPARATELY AND THOSE REVISIONS, AND THE FILING OF A PETITION WITH THE TENNESSEE SUPREME COURT SEEKING ADOPTION OF THOSE REVISIONS, HAVING ALREADY BEEN APPROVED BY THE TBA.

RULE5.6: RESTRICTIONS ON ~~THE~~ RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership ~~or, shareholders, operating,~~ employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except ~~with respect to~~ an agreement concerning benefits upon retirement; or

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

~~COMMENTS~~

Comment

[1] An agreement restricting the right of ~~a lawyer's~~ their professional autonomy, but ~~it~~ 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 or organizational employer.

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

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to RPC ~~1e~~ 1.17.

DEFINITIONAL CROSS-REFERENCES

None.

RULE ~~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) ~~by a separate~~ 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 ~~of the separate entity~~ 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.

COMMENTS

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] ~~RPC~~ 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., RPC 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 ~~Rule 5.7~~ 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 ~~RPC~~ 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 ~~RPCule~~ 5.3, that of nonlawyer employees in the distinct entity ~~which~~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 conflicts of interest—~~generally~~ RPCules 1.7 through 1.11, ~~but~~ especially ~~RPCules~~ 1.7(~~ba~~)(2) and 1.8(a), (b), and (f)—, and to ~~adhere~~ scrupulously adhere to the requirements of ~~RPCule~~ 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with ~~RPCules~~ 7.1 through 7.3, 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.

[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. See also RPC 8.4 (Misconduct).

DEFINITIONAL CROSS-REFERENCES

“Knows” See RPC 1.0(f)

“Reasonable” and “Reasonably” See RPC 1.0(ih)

CHAPTER 6 PUBLIC SERVICE

RULE ~~6.1~~ 6.1 : **PRO BONO PUBLICO** ~~REPRESENTATION SERVICE~~

A lawyer should render pro bono publico legal services. In fulfilling this responsibility, the lawyer should:

- (a) provide a substantial portion of such services without fee or expectation of fee to:
 - (1) persons of limited means; or
 - (2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- (b) provide any additional services through:
 - (1) delivery of legal services at no fee or at a substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
 - (2) delivery of legal services at a substantially reduced fee to persons of limited means; or
 - (3) participation in activities for improving the law, the legal system, or the legal profession.
- (c) In addition to providing pro bono publico legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

COMMENTS

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The actual amount of pro bono legal service a lawyer provides is left to the sound professional judgment of each lawyer, but every lawyer should render a reasonable amount of

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pro bono legal service each year. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeals.

[2] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (a)(2) ~~are~~ include those who qualify financially for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, abused women's centers, and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (a)(2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means. In some cases, a fee paid by the government to an appointed lawyer will be so low relative to what would have been a reasonable fee for the amount and quality of work performed – as in post-conviction death penalty cases – that the lawyer should be credited for the purpose of this Rule as having rendered the services without fee. This would also be the case when a lawyer is appointed as counsel in a criminal matter, the fee paid the lawyer is capped at a certain amount, and the lawyer expends significant time working on the case after the capped amount has been exceeded.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraph (a), the commitment can also be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a), (b)(1), and (b)(2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraphs (b)(3) and (c).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural, and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system, or the legal profession. A few examples of the many activities that fall within this paragraph are serving on bar association committees; serving on boards of pro bono or legal services programs; taking part in Law Day activities; acting as a continuing legal education instructor; serving as a mediator or an arbitrator; and engaging in legislative lobbying to improve the law, the legal system, or the profession.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] [Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.](#)

[12] Because this Rule states an aspiration rather than a mandatory ethical duty, it is not intended to be enforced through disciplinary process.

DEFINITIONAL CROSS-REFERENCES

“Substantial” and “Substantially” See RPC 1.0(*l*)

RULE 6.2 : ACCEPTING ~~COURT~~ APPOINTMENTS

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

- (a) representing the client is likely to result in a violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

~~COMMENTS~~

Comment

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

Appointed Counsel

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

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and ~~the lawyer~~ is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

DEFINITIONAL CROSS-REFERENCES

“Tribunal” See RPC 1.0(m)

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Discussion Draft
Amendments to Tennessee Rules of Professional Conduct
TBA Ethics Committee
May 27, 2008

~~“Unreasonable” See RPC 1.0(n)~~

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RULE 6.3 : MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

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

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

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

COMMENTS

Comment

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

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

DEFINITIONAL CROSS-REFERENCES

“Knowingly” See RPC 1.0(f)

“Law Firm” See RPC 1.0(cd)

“Material” See RPC 1.0(og)

RULE 6.4 : LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

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

COMMENT

Comment

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

DEFINITIONAL CROSS-REFERENCES

“Knows” See RPC 1.0(f)

“Materially” See RPC 1.0(~~og~~)

**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 RPCs 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 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., RPCs 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See RPC 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 RPCs 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with RPCs 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with RPC 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by RPCs 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that RPC 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 RPC 1.10 when the lawyer knows that the lawyer's firm is disqualified by RPCs 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, RPCs 1.7, 1.9(a), and 1.10 become applicable.

DEFINITIONAL CROSS-REFERENCE

“Knows” See RPC 1.0(f)

CHAPTER 7 INFORMATION ABOUT LEGAL SERVICES

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer, ~~the lawyer's services, the lawyer's charges for fees or costs, or the law as relates to the services the lawyer will provide.~~ or the lawyer's services. A communication is false or misleading if it: ~~(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or (b) is likely to create an unjustified expectation about results the lawyer can achieve or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or (c) compares the lawyer's services or fees with other lawyers' services or fees, unless the comparison can be factually substantiated.~~

COMMENT

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by RPC 7.2 and solicitations directed to specific recipients permitted by RPC 7.3. Whatever means are used to make known a lawyer's services, statements about them ~~should be truthful. The prohibition in paragraph (b) of statements that may create an "unjustified expectation" would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the~~ must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

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

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

[5] A lawyer may advertise the fact that a subjective characterization or description has been conferred upon her by an organization as long as the organization has made inquiry into the lawyer's fitness and does not issue or confer such designations indiscriminately or for a price.

DEFINITIONAL CROSS-REFERENCES

~~“Consult” and “Consultation” See RPC 1.0(e)~~

“Material” and “Materially” See RPC 1.0(~~o~~g)

~~“Reasonable” See RPC 1.0(i)~~

RULE 7.2 : ~~ADVERTISING AND OTHER COMMUNICATIONS NOT DIRECTED TO SPECIFICALLY IDENTIFIED RECIPIENTS~~

(a) Subject to the requirements of paragraphs (b) through ~~(d)-(e)~~ below and ~~RPC~~ules 7.1, ~~7.3~~, 7.4, and 7.5, a lawyer may advertise ~~professional services or seek referrals through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, world wide web site, or other forms of communication not directed to specifically identified recipients.~~ services through written, recorded, or electronic communication, including public media.

(b) ~~Within three days after the publication, distribution, or dispatch of an advertisement or a communication not directed to a specifically identified recipient, the lawyer shall file a copy of the advertisement or communication with the Board of Professional Responsibility, provided, however, that such filing is not required for any communication that only includes the name, address, and profession of the lawyer or that has been exempted from the filing requirement by the Board of Professional Responsibility.~~ A copy or recording of each advertisement shall be retained by the lawyer for two years after its last dissemination along with a record of when and where the advertisement appeared.

~~(1) If communications that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by filing a single copy of the communication.~~

~~(2) If a communication that has previously been filed with the Board is changed in any material respect, notice of the changes shall be filed with the Board within three days after its publication, distribution, or dispatch.~~

(c) A lawyer shall not give anything of value to a person for recommending or publicizing the lawyer's services except that a lawyer may pay for the following:

(1) the reasonable costs of advertisements ~~or other communications~~ permitted by this Rule, ~~Rule 7.3, or Rule 7.5;~~

(2) the usual charges of a registered intermediary organization as permitted by ~~RPC~~ule 7.6;

(3) a sponsorship fee or a contribution to a charitable or other non-profit organization in return for which the lawyer will be given publicity as a lawyer;

(4) a law practice in accordance with ~~RPC~~ule 1.17.

(d) Except for communications by registered intermediary organizations, any ~~communication~~ advertisement ~~subject to this Rule or Rule 7.3(b)~~ shall include the name and

office address of at least one lawyer or law firm assuming responsibility for the communication.

COMMENTS

Comment

[1] This Rule governs general advertising through public media and other communications that are not directed to specifically identified individuals. The Rule encompasses all possible media through which such communications may be directed to the public, including print, broadcasting, and computer-driven technology. Communications that are directed to specifically identified recipients are governed by RPCule 7.3.

[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~~Further, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services is significant ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers shall not contain false or entails the risk of practices that are misleading communications about the lawyer or the lawyer's services or overreaching.

[3] Among other things, ~~T~~his 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 had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against “undignified” advertising. Television is now one of the most powerful media for providing the public with information, and 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.~~

~~[45]~~ Neither this Rule nor RPCule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

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[56] Paragraph (b) requires that a lawyer ~~file~~ retain a copy or recording of any advertisement ~~or other communication governed by this Rule with the Board of Professional Responsibility within three days after publication, distribution, or dispatch~~ for two years after its last dissemination along with a record of when and where the advertisement appeared. If advertisements that are similar in all material respects are published or displayed more than once or distributed to more than one person, the lawyer may comply with this requirement by retaining a single copy of the advertisement for two years after the last of the materially-similar advertisements are disseminated. A lawyer may comply with the ~~filing~~ requirement of paragraph (b) by complying with guidelines that may be adopted by the Board of Professional Responsibility concerning certain types of advertisements, including ~~appropriate methods by which a lawyer may provide the Board with notice of communications made by way of~~ web sites, e-mail, or other electronic forms of communication or of changes to such communications. ~~This Rule does not require that communications be subject to review prior to dissemination, although a lawyer is free to request such a review from the Board. This Rule provides the Board an opportunity to monitor lawyer communications to the public while not placing any sort of prior restraint on publication.~~

Paying Others to Recommend a Lawyer

[67] A lawyer is allowed to pay for advertising permitted by this Rule and for the purchase of a law practice in accordance with the provisions of ~~RPCule~~ RPCule 1.17, but otherwise is not permitted to pay another person for channeling professional work to the lawyer. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[7] A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See RPC 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

DEFINITIONAL CROSS-REFERENCES

“Law Firm” See RPC 1.0(~~c~~d)

~~“Material” See~~ RPC 1.0(~~g~~)

“Reasonable” See RPC 1.0(~~h~~i)

“Written” See RPC 1.0(~~n~~)

RULE 7.3: SOLICITATION OF POTENTIAL CLIENTS AND OTHER COMMUNICATIONS DIRECTED TO SPECIFICALLY IDENTIFIED RECIPIENTS

(a) ~~If a significant motive for the solicitation is the lawyer's pecuniary gain, a~~ lawyer shall not ~~solicit professional employment by in~~ by in-person, live telephone, or real-time electronic contact ~~from a prospective client who has not initiated the contact with the lawyer and with whom the lawyer has no~~ solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

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

(3) has initiated a contact with the lawyer.

(b) A lawyer shall not solicit professional employment ~~by in~~ from a potential client by written, recorded or electronic communication or by in-person, ~~live~~ telephone, or real-time electronic contact, ~~or by a writing, recording, telegram, facsimile, computer transmission or other mode of communication directed to a specifically identified recipient who has not initiated the contact with the lawyer even when not otherwise prohibited by paragraph (a), if:~~

(1) the ~~person solicited~~ potential client has made known to the lawyer a desire not to be ~~contacted~~ solicited by the lawyer; or

(2) the ~~communication constitutes overreaching, coercion, duress, harassment, undue influence, intimidation, or fraud; or~~ solicitation involves coercion, duress, fraud, harassment, intimidation, overreaching, or undue influence; or

(3) a significant motive for the solicitation is the lawyer's pecuniary gain and the communication concerns an action for personal injury, worker's compensation, wrongful death, or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a member of that person's family, unless the accident or disaster occurred more than thirty (30) days prior to the mailing or transmission of the communication or the lawyer has a family or prior professional relationship with the person solicited.

(c) If a significant motive for the solicitation is the lawyer's pecuniary gain, a lawyer shall not send ~~or dispatch a communication~~ a written, recorded, or electronic communication soliciting professional employment from a specifically identified recipient who ~~has not initiated a contact with the lawyer~~ is not a person specified in paragraphs (a)(1) or (a)(2) or (a)(3) and with

~~whom the lawyer has no family or prior professional relationship~~, unless the communication complies with the following requirements:

(1) The words "Advertising Material" appear on the outside of the envelope, if any, and at the beginning and ending of any recorded or electronic communication. ~~Each communication, including envelopes and self-mailing brochures or pamphlets, shall include the words "THIS IS AN ADVERTISEMENT" as follows:~~

~~(i)a) In written communications sent by mail, telegraph, facsimile, or computer transmission, the required wording shall appear in conspicuous print size on the outside envelope, if any, and at the beginning and end of the written material. If the written communication is a self-mailing brochure or pamphlet, the required wording shall appear on the address panel of the brochure or pamphlet.~~

~~(i)b) In video communications, the required wording shall appear conspicuously in the communication for at least five seconds at the beginning and five seconds at the end of the communication and the required wording of the audio portion of the video communication shall be presented as required in subsection (c)(1)(c) below.~~

~~(i)c) In audio communications, the required wording shall be presented at both the beginning and end of the communication in a tone, volume, clarity and speed of delivery at least equivalent to the clearest quality tone, volume, clarity and speed used elsewhere in the communication.~~

(2) A lawyer shall not state or imply that a communication otherwise permitted by these rules has been approved by the Tennessee Supreme Court or the Board of Professional Responsibility.

(3) If a contract for representation is mailed with the communication, the top of each page of the contract shall be marked "SAMPLE" and the words "DO NOT SIGN" shall appear on the client signature line.

(4) Written communications shall not be in the form of or include legal pleadings or other formal legal documents.

(5) Communications delivered to prospective clients shall be sent only by regular U.S. mail and not by registered, certified, or other forms of restricted delivery, or by express delivery or courier.

(6) Any communication seeking employment by a specific prospective client in a specific matter shall comply with the following additional requirements:

(i) The communication shall disclose how the lawyer obtained the information prompting the communication;

(ii) The subject matter of the proposed representation shall not be disclosed on the outside of the envelope (or self-mailing brochure) in which the communication is delivered; and

(iii) The first sentence of the communication shall state, "IF YOU HAVE ALREADY HIRED OR RETAINED A LAWYER IN THIS MATTER, PLEASE DISREGARD THIS MESSAGE."

(7) A copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule shall be retained by the lawyer for two years after its last dissemination along with a record of when, and to whom, it was sent. ~~filed with the Board of Professional Responsibility within three days after the dispatch of the communication. At the same time, the lawyer dispatching the communication shall also file the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by filing a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent. If the lawyer periodically sends the identical communication to additional persons, lists of the additional names and addresses shall be filed with the Board of Professional Responsibility no less frequently than monthly.~~

(d) Unless the contents thereof include a solicitation of employment, ~~subject matter of the communication is restricted to matters of general legal interest or to an~~ a lawyer need not comply with the requirements of paragraph (c) above when sending announcements of an association or affiliation with another lawyer that complies with the requirements of RPCule 7.5, ~~a lawyer who sends~~ newsletters, brochures, and other similar communications ~~to persons who have not requested the communication or with whom the lawyer has no family or prior professional relationship shall comply with the requirements of paragraph (c) above.~~

COMMENTS

Comment

[1] There is a potential for abuse inherent in direct in-person ~~or,~~ live telephone, or real-time electronic contact by a lawyer with a potential prospective client known to need legal services. These forms of contact between a lawyer and a ~~specifically targeted recipient~~ potential client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The potential prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the

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lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching. The restrictions set forth in this Rule, however, do not apply to efforts by a lawyer to get hired as an in-house counsel by a potential client.

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

[3] The use of general advertising and written~~and~~, or electronic communications to transmit information from a~~—~~lawyer to a~~—~~specifically identified recipient potential client, rather than direct in-person~~or~~, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. ~~The contents of communications permitted under this Rule are permanently recorded and filed with the Board of Professional Responsibility.~~ The contents of direct in-person~~or~~, live telephone, or real-time electronic conversations between a lawyer and a potential prospective client can be disputed and ~~are~~may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a family, close personal, or prior ~~personal or~~ professional relationship, or wherein situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the ~~prohibitions~~general prohibition in ~~RPC~~rule 7.3(a) and the requirements of RPC 7.3(~~b~~)(~~3~~c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information which is false or misleading within the meaning of ~~RPC~~rule 7.1, which involves coercion, duress, fraud, or harassment, intimidation, overreaching, or undue influence ~~within the meaning of Rule 7.3(b)(2)~~, which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer ~~within the meaning of Rule 7.3(b)(2)~~, or which occurs within thirty (30) days after an accident or disaster involving the

individual or a member of the individual's family, is prohibited by RPC 7.3(b). Moreover, if after sending a letter or other communication to a client as permitted by RPCule 7.2 the lawyer receives no response, any further effort to communicate with the potential prospective client may violate the provisions of RPCule 7.3(b)(1). Communications directed to specifically identified recipients must be identified as advertisements, may need to be marked with other disclaimers, and cannot be formatted or delivered in such a manner as to mislead the recipient about the nature of the communication.

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties if the lawyer's purpose is to inform such entities of the lawyer's willingness to cooperate with the plan in compliance with RPCule 7.6. This form of communication is not directed to a potential prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become potential prospective clients of the lawyer. Under these circumstances, the activity ~~that~~which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to, and serve the same purpose as, advertising permitted under RPCule 7.2.

[7] The requirements in RPCule 7.3(c) that certain communications be marked as advertisements and contain other disclaimers do not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. Nor do those requirements apply to gGeneral announcements by lawyers, including changes in personnel or office location, newsletters, brochures, and other similar communications which do not contain a ~~constitute communications solicitation~~ing of professional employment ~~from a client known to be in need of legal services within the meaning of this Rule.~~

~~[8] Rule 7.3 is not intended to apply to communications such as general interest newsletters or announcements of association or affiliation that comply with Rule 7.5. Other types of newsletters, brochures, and similar communications sent to specifically identified recipients must comply with Rule 7.3.~~Paragraph (c)(6) requires that a lawyer retain a copy of each written, audio, video, or electronically transmitted communication sent to a specific recipient under this Rule for two years after its last dissemination along with a record of the name of the person contacted and the person's address, telephone number, or telecommunication address to which the communication was sent. If communications identical in content are sent to two or more persons, the lawyer may comply with this requirement by retaining a single copy of the communication together with a list of the names and addresses of the persons to whom the communications were sent.

DEFINITIONAL CROSS-REFERENCES

"Fraud" See RPC 1.0(de)

"Known" See RPC 1.0(f)

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Discussion Draft
Amendments to Tennessee Rules of Professional Conduct
TBA Ethics Committee
May 27, 2008

~~“Material” See RPC 1.0(g)~~
“Written” See RPC 1.0(n)

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**RULE 7.4 : COMMUNICATION OF FIELDS OF PRACTICE
AND SPECIALIZATION**

Subject to the requirements of RPCules 7.1, 7.2, and 7.3,

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) Except as permitted by paragraphs (c) and (d), a lawyer shall not state that the lawyer is a specialist, specializes, or is certified or recognized as a specialist in a particular field of law.
- (c) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.
- (d) A lawyer who has been certified as a specialist in a field of law by the Tennessee Commission on Continuing Legal Education and Specialization may state that the lawyer “is certified as a specialist in [field of law] by the Tennessee Commission on C.L.E. and Specialization.” A lawyer so certified may also state that the lawyer is certified as a specialist in that field of law by an organization recognized or accredited by the Tennessee Commission on Continuing Legal Education and Specialization as complying with its requirements, provided the statement is made in the following format: “[Lawyer] is certified as a specialist in [field of law] by [organization].”

COMMENTS

Comment

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

[2] However, a lawyer may not communicate that the lawyer is a “specialist,” practices a “specialty,” “specializes in” a particular field, or that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office, as reflected in paragraph (c).

[3] Paragraph (d) permits a lawyer to communicate that he or she is a specialist or has been certified or recognized as a specialist when the lawyer has been so certified or recognized by the Tennessee Commission on Continuing Legal Education and Specialization. The certification procedures are designed to require that the lawyer demonstrate higher degree of specialized ability and experience than is suggested by general licensure to practice law. This

paragraph also permits the lawyer to state that he or she is certified by other professional organizations, provided that such organizations have been accredited by the Commission as complying with its requirements to issue such certification.

DEFINITIONAL CROSS-REFERENCES

“Substantially” See RPC 1.0(*l*)

RULE 7.5 : FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 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 ~~if it does~~ is not otherwise ~~violate~~ in violation of RPC 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.

COMMENTS

Comment

[1] A firm may be designated by the names of all or some of its members, by the names of deceased or retired members where there has been a continuing succession in the firm's identity, or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. 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 not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased or retired partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven ~~to be~~ a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] Paragraph (c) does not require a change in a law firm's name or letterhead when a member of the firm interrupts his or her practice to serve, for example, as an elected member of the Tennessee General Assembly so long as the lawyer reasonably expects to resume active and regular practice with the firm at the end of the legislative session. Such a hiatus from practice is not for a substantial period of time. If, however, a lawyer were to curtail his or her practice and enter public service for a longer or indefinite period of time, the lawyer's firm would have to alter its name and letterhead.

[3] 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.

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0(~~c~~d)
“Substantial” See RPC 1.0(*l*)

RULE 7.6: INTERMEDIARY ORGANIZATIONS

(a) An intermediary organization is a lawyer-advertising cooperative, lawyer referral service, prepaid legal insurance provider, or a similar organization the business or activities of which include the referral of its customers, members, or beneficiaries to lawyers for the performance of fee-generating legal services or the payment for or provision of legal services to the organization's customers, members, or beneficiaries in matters for which the organization does not bear ultimate responsibility. A tribunal appointing or assigning lawyers to represent parties before the tribunal or a government agency performing such functions on behalf of a tribunal is not an intermediary organization under this Rule.

(b) A lawyer shall not seek or accept a referral of a client, or compensation for representing a client, from an intermediary organization if the lawyer knows or reasonably should know that:

(1) the organization:

(i) is owned or controlled by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm; or

(ii) is engaged in the unauthorized practice of law; or

(iii) engages in marketing activities that are false or misleading or are otherwise prohibited by the Board of Professional Responsibility; or

(iv) has not registered with the Board of Professional Responsibility and complied with all requirements imposed by the Board; or

(2) the lawyer will be unable to represent the client in compliance with these Rules.

COMMENTS

Comment

[1] For there to be equal access to justice, there must be equal access to lawyers. For there to be equal access to lawyers, potential clients must be able to find lawyers and have the economic resources needed to pay the lawyers a reasonable fee for their services. In an effort to assist prospective clients to find and be able to retain competent lawyers, lawyers and nonlawyers alike have formed a variety of organizations designed to bring clients and lawyers together and to provide a vehicle through which the lawyers can be fairly compensated and the clients can afford the services they need. Some of these intermediary organizations operate as charities. Others operate as businesses. Because they ultimately bear the liability of their insureds, liability insurance companies that pay for or otherwise provide lawyers to defend their

insureds are not intermediary organizations within the meaning of this Rule. Because the concerns arising from the referral of fee-generating business to lawyers are not implicated by the referral of a matter for which the lawyer does not expect to be paid a fee, the referral of such matters is exempted from this Rule. Similarly, the process by which tribunals or court agencies appoint or assign lawyers to represent parties should carry with it appropriate safeguards outside of this Rule, and these activities are likewise exempted from this Rule.

[2] The requirements set forth in paragraph (b) are intended to protect the clients who are represented by lawyers to whom they have been referred or assigned by an intermediary organization. It is the responsibility of each lawyer who would participate in the activities of an intermediary organization to act reasonably to ascertain that the organization meets the standards set forth in paragraph (b). Normally it will be sufficient for the lawyer to ascertain that the organization is registered with the Board of Professional Responsibility and to review the materials the organization has filed with the Board in compliance with the Board's reporting requirements. If, however, by virtue of his or her participation in the activities of an intermediary organization, a lawyer comes to know that the organization does not meet the standards set forth in paragraph (b), the lawyer shall terminate his or her participation in the activities of the organization and should so advise the Board of Professional Responsibility.

DEFINITIONAL CROSS-REFERENCES

“Firm” and “Law Firm” See RPC 1.0(~~cd~~)

“Knows” See RPC 1.0(f)

“Reasonably Should Know” See RPC 1.0(~~jk~~)

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 ~~of material fact~~ known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

COMMENTS

Comment

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

[2] This Rule is subject to the provisions of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including RPC 1.6 and, in some cases, RPC 3.3.

[4] The duties owed by lawyers with respect to communications with disciplinary authorities apply to judicial disciplinary authorities as well as lawyer disciplinary authorities.

DEFINITIONAL CROSS-REFERENCES

“Knowingly” or “Known” See RPC 1.0(f)

“Material” See RPC 1.0(~~o~~g)

Rule 8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the following persons:

- (1) a judge;
- (2) an adjudicatory officer or public legal officer; or
- (3) 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.

COMMENTS

Comment

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

[2] When a lawyer seeks judicial office, the lawyer is bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized and to responsibly speak out when necessary to prevent or rectify injustice or to promote needed improvements in the judicial system.

DEFINITIONAL CROSS-REFERENCES

“Knows” See RPC 1.0(f)

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 Disciplinary Counsel of the Board of Professional Responsibility.

(b) A lawyer ~~having knowledge~~who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Disciplinary Counsel of the Court of the Judiciary.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6 or ~~of~~ information gained by a lawyer or judge while serving as a member of a lawyer assistance program approved by the Supreme Court of Tennessee or by the Board of Professional Responsibility ~~to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.~~

COMMENTS

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 RPC 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[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. Similar considerations apply to the reporting of judicial misconduct. ~~However, nothing in this Rule prohibits a lawyer from reporting other professional misconduct even when the lawyer is not under a mandatory duty to do so.~~

[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~~Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for ~~the confidentiality of such information~~an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such ~~programs~~a program. Conversely, without such ~~confidentiality~~an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. ~~The Rule therefore exempts the lawyer from the reporting requirements of paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use.~~ The extent to which information received by a lawyer or judge participating in an approved lawyers assistance program must be kept confidential is governed not by these rules, but by the rules of the program or other law. See, e.g., Tenn. Code Ann. §§ 23-4-104 and -105; Tenn. Sup. Ct. R. 33.10.

DEFINITIONAL CROSS-REFERENCES

“Substantial” See RPC 1.0(l)

RULE ~~rule~~ 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) ~~attempt to, or~~ state or imply an ability to influence a tribunal or a governmental agency or official on grounds unrelated to the merits of, or the procedures governing, the matter under consideration;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) knowingly fail to comply with a final court order entered in a proceeding in which the lawyer is a party, unless the lawyer is unable to comply with the order or is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

COMMENTS

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

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

involving violence, dishonesty ~~or~~, breach of trust, or serious interference with the administration of justice are in that category. Although under certain circumstances a single offense reflecting adversely on a lawyer's fitness to practice—such as a minor assault—may not be sufficiently serious to warrant discipline, a pattern of repeated offenses, even ones that are of minor significance when considered separately, can indicate indifference to legal obligation.

[23] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status, ~~may violate~~violates paragraph (d) ~~if~~when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d).

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

[45] Paragraph (c) prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Such conduct reflects adversely on the lawyer's fitness to practice law. In some circumstances, however, prosecutors are authorized by law to use, or to direct investigative agents to use, investigative techniques that might be regarded as deceitful. This Rule does not prohibit such conduct.

[56] The lawful secret or surreptitious recording of a conversation or the actions of another for the purpose of obtaining or preserving evidence does not, by itself, constitute conduct involving deceit or dishonesty. *See* ~~RPC~~Rule 4.4.

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

[78] Paragraph (f) precludes a lawyer from assisting a judge or judicial officer in conduct that is a violation of the rules of judicial conduct. A lawyer cannot, for example, make a gift, bequest, favor, or loan to a judge, or a member's of the judge's family who resides in the judge's household, unless the judge would be permitted to accept, or acquiesce in the acceptance of such a gift, favor, bequest, or loan in accordance with Canon 4, Section D(5) of the Code of Judicial Conduct.

[89] In both their professional and personal activities, lawyers have special obligations to demonstrate respect for the law and legal institutions. Normally, a lawyer who knowingly fails to obey a court order demonstrates ~~a~~ disrespect for the law that is prejudicial to the

administration of justice. Failure to comply with a court order is not a disciplinary offense, however, when it does not evidence disrespect for the law either because the lawyer is unable to comply with the order or the lawyer is seeking in good faith to determine the validity, scope, meaning, or application of the law upon which the order is based.

DEFINITIONAL CROSS-REFERENCES

“Fraud” See RPC 1.0(ed)

“Knowingly” See RPC 1.0(f)

“Tribunal” See RPC 1.0(m)

THIS PAGE IS INTENTIONALLY LEFT BLANK AS A PLACEHOLDER FOR RPC 8.5. THE COMMITTEE'S PROPOSED REVISIONS TO RPC 8.5 HAVING BEEN MADE SEPARATELY AND THOSE REVISIONS, AND THE FILING OF A PETITION WITH THE TENNESSEE SUPREME COURT SEEKING ADOPTION OF THOSE REVISIONS, HAVING ALREADY BEEN APPROVED BY THE TBA.

TBA Ethics Cte Proposed Rules revisions (May 27 2008 Draft).doc

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