

ORIGINAL

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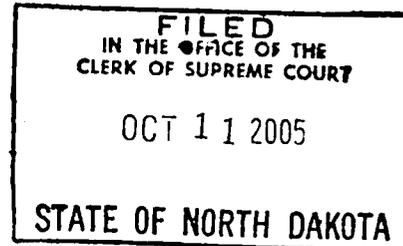
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October 10, 2005

Chief Justice Gerald Vandewall
North Dakota Supreme Court
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530



Dear Chief Justice Vandewalle:

On behalf of the Joint Committee on Attorney Standards, I am pleased to submit the enclosed recommendations for amendment of the North Dakota Rules of Professional Conduct. At the Court's request, JCAS completed a comprehensive review of the North Dakota Rules after the American Bar Association adopted changes to the Model Rules in 2002 and 2003. The ABA's actions, as you know, were based on consideration of extensive work of the Ethics 2000 (E2K) Commission.

These recommendations result from work of many individuals. Professor Randy Lee was, of course, instrumental to the committee's work until his death earlier this year. JCAS dedicates its work to his memory.

Throughout the rules review process, M. James Ganje provided staff support to JCAS, and his work was outstanding. His organization and attention to detail made the review process run much more smoothly than it otherwise would have. On behalf of all of the members of JCAS, I thank Mr. Ganje for his dedication to this project.

Other members of JCAS currently include Hon. Daniel J. Crothers, Hon. Karen Kosanda Braaten, Clare Carlson, Elaine Fremling, Jean Hannig, David J. Hogue, Dianna L. Kindseth, Petra H. Mandigo, Ryn Pitts, Timothy A. Priebe, Sandi Tabor, Robert J. Udland, and Patrick J. Ward. Others who were part of JCAS during its work on this project included Dr. Gregory Post, Ron Reichert, Michael J. Williams, Barbara Cichy, Annetta Sutton, and Dr. Richard Olafson. As JCAS chair, I thank each committee member, past and present, for their contributions.

JCAS began its work on this project in late 2002. Pursuant to Administrative Rule 38, in July 2005 JCAS submitted its proposals to the State Bar Association Board of Governors for review and comment. Three members of JCAS attended a special meeting of the Board in July, and, following that meeting, the Board advised JCAS of its position on the recommendations.

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After receiving the Board's comments, JCAS met in September, and considered each of the Board's comments. Based on those comments, JCAS made some changes in its recommendations, but JCAS does not recommend all of the changes which the Board suggested.

JCAS recommends many amendments in many rules and comments. Many of the recommendations are not for substantive revisions, but would adopt format changes to follow the Model Rules. JCAS endeavored to follow Model Rules numbering and format, even when not recommending that the substance of a model rule be adopted in North Dakota.

Early in its deliberations, JCAS had considerable discussion about the Model Rules use of "informed consent" rather than "consent after consultation," and about the Model Rules requirements that client consent for some matters be confirmed in writing. JCAS was concerned that, if "informed consent" language was incorporated into the rules, informed consent concepts from the medical field might be interpreted to be a part of the rules. In the committee's opinion, that interpretation would not be appropriate. JCAS therefore recommends that North Dakota retain the "consent after consultation" language rather than adopting the "informed consent" language of the Model Rules.

JCAS does, however, recommend that, in certain circumstances, client consent be in writing (either in a document signed by the client or in a lawyer's written transmittal confirming oral consent). JCAS recommends written consent to provide better protection to the public, and to provide clear guidance to practicing lawyers. As the non-lawyer members of the committee reminded us, a writing requirement would make our rules more consistent with those of some other professions.

In addition to recommending that "consent in writing" be included in a number of the rules, the committee's primary recommendations include the following:

Revision of **Rule 1.6**, to expand the circumstances under which lawyers are required to disclose confidential information to prevent death or substantial bodily harm, and to permit disclosure of confidential information in order to seek legal advice about compliance with the rules;

Revision of **Rule 1.10** to provide that conflicts resulting from a lawyer's personal interests not be imputed to members of the lawyer's firm, and to allow for screening to address imputed disqualification under certain circumstances;

Revision of **Rule 1.13**, which addresses a lawyer's disclosure of confidential information to prevent likely substantial injury to an organizational client;

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Revision of **Rule 1.14** to provide additional avenues of action to a lawyer whose client might have limited capacity for decision-making, including allowing a lawyer to seek assistance from other professionals, or seek appointment of a guardian ad litem, guardian or conservator for a client;

Adoption of **Rule 1.18**, to describe lawyers' duties to potential clients;

Revision of **Rule 3.3** to specify that, if a lawyer comes to learn that he or she has offered false testimony of a client, the lawyer may not use or argue that false testimony;

Adoption of **Rule 4.5** to guide lawyers who receive inadvertent transmissions of documents;

Revision of **Rules 5.1, 5.2, and 5.3** concerning the responsibilities of lawyers who are partners in a law firm or who have comparable managerial authority within a law firm; and

Revision of **Rule 8.4** to add certain acts that can form the basis for discipline under the rules.

A more detailed summary of the recommendations follows, along with the detailed proposals for amendment. Members of JCAS will be available at any hearing scheduled on these proposals, to provide more detail about the proposals, and to address questions members of the Court may have.

My second term on the Joint Committee will conclude at the end of 2005. Thank you for allowing me to be a part of the committee during this important time period.

Sincerely,



Alice R. Senechal, Chair
Joint Committee on Attorney Standards

pc: Bill Neumann
M. James Ganje

SUMMARY OF PROPOSED RULE AMENDMENTS

The proposed amendments to the North Dakota Rules of Professional Conduct, proposed repeal of certain existing rules, and proposed new rules as submitted by the Joint Committee on Attorney Standards are briefly summarized below.

PREAMBLE

The current Preamble is the same as the Model Rule Preamble before recent Ethics 2000 amendments. The Joint Committee proposes changes to the Preamble to follow the current Model Rule Preamble. The more notable changes are summarized. The reference in Comment [2] to intermediary is deleted as a consequence of the proposed repeal of Rule 2.2 relating to lawyers serving as intermediaries. New Comment [3] discusses the lawyer's role as third-party neutral, which is addressed by proposed changes to Rule 1.12 and by proposed new Rule 2.3. The new Comment also reminds lawyers that there are other rules that apply to lawyers when they are not active in the practice of law and to practicing lawyers when they are acting in a nonprofessional capacity.

SCOPE

There are substantial similarities between the current Scope section and the Model Rule Scope section. The Joint Committee proposes several changes to reflect Ethics 2000 revisions to the Model Rule Scope.

The proposed change in Comment [1] clarifies what is meant by "professional discretion". The additional language in Comment [2] reflects additions in various Comments which are considered helpful to practicing lawyers, particularly where obligations imposed by different laws may be more onerous than those imposed by the Rules. The reference to Rule 1.18 is included in Comment [3] to draw attention to the fact that there are duties under the Rules that attach before the formation of the lawyer-client relationship. Proposed changes in Comment [4] discuss the relationship of rule compliance or violation to causes of action and determining breaches of standards of conduct.

RULE 1 SERIES

PROPOSED RULE 1.0 TERMINOLOGY

The Joint Committee proposes following the Model Rule approach in setting out in a separate Rule regularly used important terms and their definitions. The proposed changes incorporate several Model Rule definitions into existing definitions that follow the Model Rule.

A definition of "consent in writing" is provided which is based on the Model Rule definition of "confirmed in writing". The Model Rule definition is linked to the central role played in the Model Rules of the concept of "informed consent", which the Joint Committee declined to follow. The Model Rules uniformly replaced "consent after consultation" with "gives informed consent". The informed consent requirement was accompanied by a requirement that the consent be confirmed in writing. While the Model Rule drafter's explanation of the shift to informed consent suggests no substantive change was intended, the Joint Committee concluded there was a risk that the informed consent concept applied in medical malpractice litigation may be imported into matters governed by the Rules. Consequently, the Joint Committee elected alternatively to adopt a writing requirement in certain circumstances with respect to consent and consultation by the client.

Proposed changes to "firm" or "law firm" follow the proposed changes to the Comment to Rule 1.10. The reference to "other association authorized to practice law" is added in the definition to encompass lawyers practicing in limited liability entities. The reference in Comment [3] of this new Terminology rule to "including government" clarifies that legal departments of governmental entities are included within the definition of "firm".

The Joint Committee proposes adding a definition of "jurisdiction" in paragraph (f) for purposes of assisting in addressing multijurisdictional practice issues.

The definition of "matter", as set out in current Rule 1.7, is relocated with slight modifications to paragraph (i) and limited in application to Rules 1.7 through 1.12.

A definition of "screened" is included, as it is in the Model Rule, for purposes of Rules 1.11, 1.12, and 1.18. The concept prevents the imputation of conflicts of interest in certain situations when the personally disqualified lawyer is "screened" from any participation in the matter.

Given the various writing requirements in the Rules, paragraph (q) defines "writing" and "written" and includes tangible and electronic records.

The Joint Committee proposes following the Model Rule, with differences related to those noted above, in incorporating Comment provisions regarding definitions of consent in writing, firm, fraud, and screened.

RULE 1.1 COMPETENCE

The Joint Committee does not propose any changes to the black-letter Rule as the Rule and the Model Rule are the same.

The Joint Committee proposes minor changes to the Comment to incorporate Model Rule Comment language.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

The current Rule is the same as the Model Rule before recent Ethics 2000 revisions. The Joint Committee proposes changes to the black-letter Rule, including the title, which would follow the current Model Rule.

Proposed changes to paragraph (a) concerning objectives of representation relocate the phrase "subject to paragraphs (c) and (d)" to clarify that all of the actions a lawyer may take under paragraph (a) are subject to the restrictions under paragraph (d) and some of them may be subject to the limitation in paragraph (c). The reference to Rule 1.14 is included to reflect that the lawyer's duty to communicate with the client should be addressed in that rule, rather than Rule 1.2. The changes also clarify that a lawyer need not always consult in order to acquire authority to act for the client, but may take action as impliedly authorized to carry out the representation.

Proposed changes to paragraph (c), in substituting "scope" for "objectives" regarding representation reflect that only the client can limit the client's objectives, while the scope of representation may be limited by the lawyer.

Paragraph (e) is deleted as it is relocated to Rule 1.4(a)(5).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 1.3 DILIGENCE

The current rule and the Model Rule are identical. The Joint Committee does not propose any changes to the black-letter Rule.

The current Comment is the same as the Model Rule Comment before recent Ethics 2000 revisions. The Joint Committee proposes changes to the Comment to follow the current Model Rule Comment.

RULE 1.4 COMMUNICATION

The Joint Committee proposes changes to the black-letter rule to follow the Model Rule with the exception of retaining the current Rule's direction that a lawyer shall "make reasonable efforts" to keep the client reasonably informed [paragraph (a)(3)].

The Joint Committee proposes only minor changes to Comment [3] to include reference to a person with limited capacity, rather than suffering from mental disability. The "limited capacity" reference is derived from proposed changes to Rule 1.14.

RULE 1.5 FEES

The Joint Committee proposes changes to the black-letter Rule to follow, in part, the Model Rule.

The proposed change to paragraph (a) shifts the focus from requiring a reasonable fee to prohibiting an unreasonable fee. The change also prohibits unreasonable amounts for expenses.

Proposed changes to paragraph (b) follow the Model Rule in including expenses for which the client will be responsible as a matter that must be communicated to the client. Fee and expense information should preferably be communicated in writing.

Proposed changes to paragraph (c) require that a contingent fee agreement must be signed by the client and must identify any expenses for which the client may be liable, whether or not the client is the prevailing party. Language is also added requiring an itemization of expenses.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment. Notable changes are summarized. New Comment [1] introduces paragraph (a) and explains that the factors set out in the paragraph are not exclusive and that lawyers may properly charge for services performed or incurred in-house. New Comment [3] confirms that contingent fees are subject to the reasonableness standard of paragraph (a). It refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. Proposed changes to Comment [4] replace the "special scrutiny" provision concerning fees paid in property with a cross-reference to the requirements of Rule 1.8(a), which addresses business transactions with a client when a fee is to be paid in property.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

The Joint Committee proposes changes to the black-letter Rule to incorporate most of the current Model Rule regarding disclosure of information relating to the representation of a client.

Proposed changes to paragraph (a) prohibit disclosure of information unless the client consents, disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by new paragraph (b) or permitted by new paragraph (c). Current paragraphs (b) and (c) are relocated to paragraph (a).

Proposed paragraph (b) retains the current required disclosure of information. The provision follows the Model Rule language, however, of disclosure if considered reasonably necessary to prevent reasonably certain, rather than imminent, death or substantial bodily harm.

New paragraph (c)(1) departs from the current Rule in permitting disclosure to prevent the commission of a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another. In following the Model Rule, the changes delete the current language regarding criminal or fraudulent acts that are reasonably believed to likely result in non-imminent death or substantial bodily harm. This disclosure, however, is generally addressed

in new paragraph (b). New paragraph (c)(2) permits disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another, a ground for disclosure currently addressed in part by paragraph (f). New paragraph (c)(3) permits disclosure to secure legal advice about the lawyer's compliance with the Rules.

The Joint Committee proposes several changes to the Comment to follow the Model Rule Comment as the proposed black-letter changes also follow the Model Rule, with the noted exception regarding mandatory disclosure. Comment [6] explains application of the mandatory disclosure provision. Language is also included to aid in determining when death or substantial bodily harm is "reasonably certain" to occur.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

The Joint Committee proposes relatively minor changes to the black-letter Rule. A writing requirement is added to paragraphs (c)(2) and (d) regarding, respectively, client consent concerning representation of a client if representation may be adversely affected by competing interests and client consent to use of information to the disadvantage of the client. Paragraph (e) regarding the definition of "matter" is deleted and relocated to new Rule 1.0.

The Joint Committee proposes several changes to the Comment to incorporate Model Rule Comment provisions considered useful in assessing conflict situations. The changes to the Comment are intended to clearly describe how a conflict is analyzed. For purposes of applying the Rule, Comment [3] provides an explanation of what constitutes an adverse effect that would preclude representation of a client. Comment [4] clearly articulates the steps a lawyer should take in resolving a conflict of interest problem. Comments [11] and [12] offer specific explanations concerning the role and obligations of government lawyers. The balance of the proposed changes to the Comment reflect the Model Rule Comment or adaptations of the those Comment provisions to further explain the application of the current black-letter rule, as modified.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

The Joint Committee proposes changes to the black-letter Rule to incorporate certain Model Rule provisions and to generally follow the Model Rule structure. Significant portions of the current Rule are retained.

In keeping with the Joint Committee's conclusion not to follow the Model Rule's informed consent approach, a writing requirement is included at several points in the Rule: paragraph (a)(2), paragraph (b), and paragraph (g). The Joint Committee declined to propose a writing requirement for client consent under paragraph (f), which governs accepting compensation for representing a client from someone other than the client.

Proposed changes to paragraph (c) incorporate the Model Rule's definition of related persons for purposes of the prohibition against a lawyer preparing an instrument giving the lawyer or a person related to the lawyer a substantial gift from the client.

Paragraph (h) is modified to generally follow the Model Rule structure and to incorporate the reference to "potential claims" in paragraph (h)(2). The additional language clarifies that the Rule applies even when the client has not actually asserted a claim. The opening sentences of current paragraph (i) are relocated to paragraph (h)(1) and the remainder of paragraph (i) is deleted to follow the Model Rule.

New paragraph (i) generally prohibiting the acquiring of a proprietary interest in the cause of action is added to follow the Model Rule with the exception of including a reference to Rule 1.5 in paragraph (i)(2). The Rule reference is considered more useful than the Model Rule's general reference to a "reasonable" contingent fee.

Current paragraph (j) regarding the practice of law by a part-time prosecutor or judge is retained and relocated to paragraph (k).

New paragraph (j) incorporates the Model Rule provision generally prohibiting sexual relations with a client.

The Joint Committee proposes several changes to conform the Comment to the current Model Rule Comment. Comment [20] is retained in that it is related to new paragraph (k), a provision unique to the current Rule in addressing the practice of law by part-time prosecutors or judges.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

The Joint Committee proposes limited changes to the black-letter Rule.

Paragraph (b) is modified to include a writing requirement for a former client's consent to representation in a substantially related matter in which the person's interests are adverse to those of the former client.

Paragraph (c) is modified to permit a lawyer's use of information relating to the representation if the information has become generally known. This provision is relocated from Rule 1.6(h).

The Joint Committee proposes changes to the Comment to generally align the Comment with the Model Rule Comment.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

The Joint Committee proposes two notable changes to the black-letter Rule.

Paragraph (a) is modified to incorporate the Model Rule language providing an exception from imputed conflicts based on personal interest. The language would eliminate imputation in the case of conflicts between a lawyer's own personal interest and the interest of a client. The Joint Committee also proposes adding a definition of "personal interest" that is adapted from the definition of personal interest set out in *The Law and Ethics of Lawyering*, 4th edition (p. 426), by Geoffrey Hazard.

Paragraph (b) is amended to more clearly articulate circumstances under which lawyers in a firm may represent a client if another lawyer in the firm is prohibited under Rule 1.9 from representing the client.

Paragraph (c)(3) is modified to include a reference to "has had access to" material information with respect to the prohibition against a firm representing a person if any lawyer in the firm has information protected by Rule 1.6. The proposed change responds to the impact of *Heringer v. Haskell*, 536 N.W.2d 362 (N.D.1995), which concluded that the disqualification under paragraph (c)(3) applied to situations in which a lawyer who has left a firm not only had information protected by the Rule, but also had access to the information. The language added to paragraph (c)(3) would explicitly address this situation.

Paragraph (d) is modified to include a writing requirement through which a client may consent to waive disqualification from representation if the representation does not involve a claim by one client against another client represented by the same firm in the same litigation or other proceeding.

The Joint Committee proposes changes to the Comment to conform to the black-letter Rule changes. Additionally, Comment [5] is added to complement the personal interest provisions included in paragraph (a). Comment [9] is modified to reflect the change to paragraph (c)(3). The definition of "matter" is deleted as it is now addressed in Rule 1.0.

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule.

The proposed change to paragraph (a)(1) clarifies that a former government lawyer is subject to Rule 1.9(c) regarding confidentiality of information relating to the former representation of a government client. Paragraph (a)(2) requires consent from the government agency before a former government lawyer may represent a client in connection with a matter in which the lawyer participated as a public officer or employee.

Proposed changes to paragraph (b) clarify that conflicts under paragraph (a), including former client conflicts, are not imputed to other associated lawyers when the individual lawyer is properly screened and written notice is promptly given to the appropriate government agency.

Proposed changes to paragraph (c) generally preclude representation of a private client with adverse interests to a person about whom a lawyer has received confidential government information while a public officer or employee. A definition of "confidential government information" is provided. A screening provision is also included.

Proposed changes to paragraph (d) address situations in which a private lawyer moves to government employment. The language provides that a lawyer serving as a current public officer or employee is subject to Rules 1.7 and 1.9 and cannot participate in a matter in which the lawyer participated while in private practice, unless the government agency consents. Limitations are placed on the lawyer's ability to negotiate private employment with any person involved as a party or lawyer in a matter in which the lawyer participated. A definition of "matter" is included in paragraph (e).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR, ADJUDICATIVE OFFICER, THIRD-PARTY NEUTRAL, AND LAW CLERK

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule, with one exception, in broadening application to include arbitrators, mediators, and third-party neutrals.

The proposed changes extend the listing of affected positions to paragraph (b), while the Model Rule does not. Paragraph (a) incorporates a writing requirement for party consent to representation. The changes to paragraph (c)(1) and (2) regarding timely screening and notice reflect the Model Rule. Paragraph (d) is retained unchanged as it is the same as the Model Rule provision.

The Joint Committee proposes changes to the Comment to conform to the Model Rule. Comment [2] explains the expanded application of paragraph (a) to arbitrators, mediators, and third-party neutrals. Comment [3] discusses the rationale for imputing the conflicts of a personally disqualified lawyer unless there is compliance with paragraph (c). Comment [4] addresses the requirements imposed by paragraph (c) and cross-references the definition of screening in Rule 1.0. Comment [5] discusses requirements imposed under paragraph (c)(2).

RULE 1.13 ORGANIZATION AS CLIENT

The Joint Committee proposes changes to the black-letter Rule to incorporate post-Ethics 2000 changes to the Model Rule and, as a result, align the current Rule with the Model Rule. The Rule is intended to guide lawyers in the proper handling of their role in the lawyer-client relationship when the client is an entity, rather than a person. The post-Ethics 2000 changes to the Model Rule

were in response to the Sarbanes-Oxley Act enacted in 2002 which imposed greater obligations on lawyers to report certain violations of their corporate clients. These "up the ladder" reporting requirements or considerations are addressed in the Comment to the current Rule.

The proposed changes to paragraph (b) incorporate in the black-letter Rule the Model Rule's requirement that a lawyer report an employer's misconduct "up the ladder".

Language added to paragraph (c) also permits a lawyer to reveal information relating to representation of the organization if the highest authority in the organization does not address a violation of law or an obligation to the organization.

Proposed changes to paragraph (d) provide an exception to the permitted revelation under paragraph (c). Changes to paragraph (e) require the lawyer to take reasonable steps to inform the highest authority in the organization if the lawyer reasonably believes the lawyer has been discharged for actions taken under paragraph (b) or (c).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 1.14 CLIENT WITH LIMITED CAPACITY

The Joint Committee proposes changes to the black-letter Rule to substitute the Model Rule, with one exception. The Model Rule refers to clients with "diminished capacity". The Joint Committee concluded "limited capacity" is a more appropriate reference since the focus of the rule is representation of clients whose decision-making capacity is limited in such a way that the lawyer may be required to seek some form of assistance for the client. Additionally, "diminished capacity" has a settled criminal law meaning and application that is inapt in the context of the Rule's purpose.

The Joint Committee proposes changes to the Comment to conform to the Model Rule Comment, with changed references to "limited capacity".

RULE 1.15 SAFEKEEPING PROPERTY

Paragraphs (a) through (e) of the current Rule are essentially similar to the Model Rule before recent Ethics 2000 revisions. The Joint Committee proposes changes to the black-letter provisions to follow the Model Rule as modified by the Ethics 2000 changes.

New paragraph (b) permits a lawyer to deposit funds in a trust account for the purpose of paying bank service charges. Language is also added concerning deposit of funds for fees associated with credit card payments or wire transfer fees.

New paragraph (c) provides guidance to lawyers on how to handle advance deposits of fees and expenses.

Proposed changes to paragraph (e) clarify that conflicting claims to funds in a trust account may involve third parties and provide that funds not in dispute may not be held while the dispute is resolved.

New paragraphs (f) through (i) retain the current Rule's provisions pertaining to IOLTA.

The Joint Committee proposes changes to the Comment to conform to the Model Rule Comment, with the exception of new Comment [6] which directs lawyers to the IOLTA Committee for guidance regarding the administration of trust accounts.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

The Joint Committee proposes limited changes to the black-letter Rule. The current Rule is, in substantial part, similar to the Model Rule.

The reference in paragraph (b) to withdrawal without adverse effect is relocated to subparagraph (1).

Paragraph (b)(4) is modified to permit withdrawal from representation if the lawyer has a fundamental disagreement with the objectives sought by the client.

Paragraph (c) is modified to require refunding any advance payment for an expense that has not been incurred.

In light of the limited proposed changes to the current Rule, the Joint Committee proposes limited changes to the Comment based on the Model Rule Comment. Comment [1] includes language addressing the question of when a representation is completed and cross-referencing other Rules, including those in which services are limited or intended to be short-term in nature. Language added to Comment [3] further explains the obligation of a lawyer to continue representation if withdrawal is denied. Proposed language in Comment [4] includes references to Rules 1.6 and 3.3 regarding any exchange with the court requesting an explanation for the lawyer's request to withdraw. Language added to Comment [8] tracks the proposed change to paragraph (b)(4). Proposed language in Comment [10] directs lawyers to Rule 1.19 regarding disposition of files and papers in the event of withdrawal from representation.

RULE 1.17 SALE OF A LAW PRACTICE

The current Rule is substantially similar to the Model Rule and the Joint Committee does not propose any changes to the black-letter Rule.

The Joint Committee proposes changes to the Comment to incorporate language from the Model Rule Comment that is not inconsistent with the current Rule.

RULE 1.18 DUTIES TO POTENTIAL CLIENT (New Rule)

The current Rule mirrors Rule 1.13 except that it pertains to government entities, rather than organizations, as clients. There is no counterpart to current rule 1.18 in the Model Rules. The Joint Committee proposes that current Rule 1.18 be replaced with Model Rule 1.18 in its entirety, with some noted modifications. The subject of the Model Rule is duties to "prospective clients". The Joint Committee proposes replacing that reference throughout with "potential client" to avoid confusion with the use of "prospective client" in Rule 7.3, which is explained in Comment [1].

Paragraphs (b), (c), and (d) are modified from the Model Rule to refer to receipt, use, or revelation of "significantly harmful" information, rather than "disqualifying" information as used in the Model Rule. This change resulted from concerns expressed by the SBAND Board of Governors regarding the use of the disqualifying reference. Paragraph (c) was also modified from its Model Rule construction to delete a screening requirement concerning permissible representation if the lawyer has received significantly harmful information regarding a client.

RULE 2 SERIES

RULE 2.1 ADVISER

The Joint Committee does not propose any changes to the black-letter rule as the North Dakota Rule and the Model Rule are identical.

The Joint Committee proposes only minor changes to the Comment: essentially grammatical changes in Comment [2] and the addition in Comment [5] of language regarding offering a client information about other forms of dispute resolution that may be alternatives to litigation. The additional language reflects the Model Rule Comment.

RULE 2.2 INTERMEDIARY

In keeping with the Model Rule approach, the Joint Committee proposes the repeal of current Rule 2.2. Issues concerning common representation are discussed in the Comment to Rule 1.7 - the approach followed by the Model Rule.

NEW RULE 2.2 EVALUATION FOR USE BY THIRD PERSONS

In light of the proposed repeal of Rule 2.2, the Joint Committee proposes that current Rule 2.3 be renumbered as Rule 2.2. Additionally, the Joint Committee proposes changes to paragraph (a) that are essentially structural in nature, and changes to paragraph (b) which clarify when a lawyer may not provide an evaluation of a matter without client consent. These changes reflect the Model Rule. The Joint Committee also proposes including a writing requirement with respect to the client's consent after consultation to the evaluation.

The Joint Committee proposes minor changes to the Comment, all reflective of the Model Rule Comment. Language is added to Comment [1] regarding implied authorization for performance of an evaluation and language is added to Comment [5] explaining the prohibition against making a false statement of material fact or law in providing an evaluation.

PROPOSED NEW RULE 2.3 LAWYER SERVING AS THIRD-PARTY NEUTRAL

The Joint Committee proposes the adoption of new Rule 2.3, which is set out in the Model Rules as Rule 2.4. New Rule 2.3, in reflecting the Model Rule, is designed to promote understanding of the lawyer-neutral's role by parties to dispute resolution. The Rule defines "third-party neutral" in paragraph (a) and in paragraph (b) informs the parties of the nature of the lawyer's role.

The various paragraphs of the proposed Comment describe dispute-resolution processes, describe the role of a third-party neutral, refer to other law and ethics codes that may apply, explain the purpose of the advisory in paragraph (b), and draw attention to conflict issues that may arise and which are governed by Rule 1.12.

RULE 3 SERIES

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

The current rule and the Model Rule are nearly identical. The Joint Committee proposes only the addition in the black-letter rule of a reference to "in law and fact", which would reflect the Model Rule. This change only makes explicit the requirement that a claim must have a non-frivolous basis in law and fact. The Joint Committee also proposes adding a reference to "commitment" as the civil counterpart to incarceration and regarding which a lawyer may defend to the extent necessary to ensure every element of the case is established.

The Joint Committee proposes changes to the Comment which would result in the Comment fully reflecting, with one exception, the Model Rule Comment. Comment [4], which is contained in the current Comment, is retained as additional guidance for lawyers concerning other rules and statutes pertaining to lawyer duties.

RULE 3.2 EXPEDITING LITIGATION

The Joint Committee does not propose any changes to the black-letter rule. The current Rule and the Model Rule are identical.

The Joint Committee proposes retention of Comment [1] as useful explanation of the Rule's purpose. Proposed changes to Comment [2] reflect the Model Rule Comment.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

The Rule governs a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The Joint Committee proposes a number of changes to the black-letter rule to follow the Model Rule approach regarding candor toward the tribunal. However, the Joint Committee proposes no change to provisions upon which the current Rule and Model Rule differ most significantly. Under the current Rule [paragraph (d)], if a lawyer has offered testimony from a client and later learns the testimony is false, and the lawyer fails to convince the client to consent to disclosure, the lawyer must attempt to withdraw without disclosure. If withdrawal is refused by the court, the lawyer must continue in the representation. The Model Rule, on the other hand, provides that if false testimony from anyone, including the client, is offered the lawyer is required to take reasonable remedial measures, including, if necessary, disclosure. The current Rule's approach reflects the Supreme Court's early decision in *Grievance Comm'n v. Malloy*, 248 N.W.2d 43 (N.D.1976). The Joint Committee discussed at length whether to follow the Model Rule exclusively and abandon the *Malloy* approach. The Joint Committee concluded that while nearly all of the proposed changes to the Rule would reflect the Model Rule, the *Malloy* approach should be retained. The relevant language is included in proposed paragraph (a)(3). The Joint Committee also proposes additional language in paragraph (a)(3) to provide that a lawyer may not use or argue the client's false testimony. The remainder of the proposed changes, additions and deletions, to the black-letter Rule reflect the Model Rule.

In light of the proposed changes to the black-letter Rule, the Joint Committee proposes numerous changes to the Comment which reflect long-existing Model Rule Comment language in some areas, but most changes reflect revisions to the Model Rule Comment made as part of the ABA's Ethics 2000 review. Language specific to the *Malloy* approach is contained in Comment [10].

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

Current Rule 3.4 is identical to the Model Rule except for additional language in paragraph (a) of the Model Rule regarding a prohibition against a lawyer counseling or assisting another person in committing an act otherwise prohibited by paragraph (a). This subject matter is addressed in Rule 8.4(a). The Joint Committee, therefore, does not propose any changes to the black-letter rule.

The Joint Committee proposes minor changes to Comments [1] and [2], which will conform the Comment to the Model Rule Comment.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

The Joint Committee proposes changes to the black-letter rule to follow the Model Rule. The prohibition against *ex parte* communications in current paragraph (a) is relocated to paragraph (b), with the retention from paragraph (b) of the reference to communicating about a "pending or

impending proceeding". Paragraph (c) describes situations in which communication with a juror or prospective juror are prohibited.

The Joint Committee proposes additional language for the Comment regarding the Rule's *ex parte* provision (Comment[2]), communication with a juror or prospective juror (Comment [3]), and the duty to refrain from disruptive conduct (Comment [5]). These changes reflect the Model Rule Comment.

RULE 3.6 TRIAL PUBLICITY

The Joint Committee proposes changes that would align the black-letter Rule with the Model Rule. Paragraph (a) is modified to provide that the assessment of the likelihood that an extrajudicial statement will be disseminated by public means is judged from the perspective of a reasonable lawyer ("lawyer knows or reasonably should know") rather than a reasonable "person". Paragraph (a) is additionally modified to prohibit an extrajudicial statement if the lawyer knows or reasonably should know the statement has a "substantial likelihood" of materially prejudicing the proceeding. The current Rule's prohibition hinges on whether the statement will create a "serious and imminent threat" of material prejudice. Proposed paragraphs (b) and (c) are from the Model Rule and set out the kinds of extrajudicial statements a lawyer is permitted to make during a trial. Paragraph (d), also from the Model Rule, extends the prohibition under paragraph (a) to lawyers associated in a firm or government agency with the affected lawyer.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 3.7 LAWYER AS WITNESS

The Joint Committee proposes essentially minor changes to the black-letter Rule to reflect the Model Rule.

The Joint Committee proposes changes to the Comment that retain some current language that is not inconsistent with the Model Rule Comment, but otherwise incorporate language from the Model Rule Comment. In Comments [2], [3], and [4] references to the tribunal are included to clarify that the prohibition in paragraph (a) of the Rule is for the protection of the tribunal as well as the parties. New Comment [5] explains why paragraph (b) of the Rule permits a lawyer to act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness barring any conflicts of interest. Proposed changes to Comment [6] include language to alert lawyers to the kinds of conflicts that may arise. New Comment [7] discusses various disqualifications that may result if the lawyer-witness is precluded from serving as an advocate under applicable rules.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The Joint Committee proposes changes to the black-letter Rule which, with one exception, will align the Rule with the Model Rule. The Joint Committee concluded the current requirement

in paragraph (d) that the prosecutor disclose information "at the earliest practical time" is preferable to the Model Rule's direction to make "timely" disclosure. Paragraph (e), from the Model Rule, articulates circumstances in which a prosecutor is permitted to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence. Proposed changes to paragraph (f) generally prohibit the prosecutor from making extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused.

The Joint Committee proposes changes to the Comment to reflect the Model Rule Comment.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDING

The Joint Committee proposes minor changes to the black-letter Rule to reflect the Model Rule. Language unique to the current Rule concerning *ex parte* communications with members of a legislative body is retained.

The Joint Committee proposes changes to the Comment to reflect the Model Rule Comment.

RULE 4 SERIES

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

The Joint Committee proposes no changes to Rule 4.1. The current Rule prohibits, as does the Model Rule, knowing falsehood in a statement made by a lawyer to a third person while the lawyer is representing a client. However, the Model Rule also prohibits the failure to disclose a material fact. The Joint Committee concluded materiality should not be, as it is not now, a factor in the prohibition against knowingly making a false statement of fact or law.

In light of no changes being proposed for the black-letter Rule, the Joint Committee proposes only minor additions to the Comment. Language is added further explaining that misrepresentation can also result from partially true but misleading statements or omissions. Language is also added concerning application of Rule 8.4 to statements by a lawyer other than in the course of representing a client. These additions reflect Model Rule Comment language but are consistent with the current black-letter Rule.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

The Joint Committee proposes only minor changes to the black-letter Rule to reflect the Model Rule.

The Joint Committee proposes several changes to the Comment to reflect the Model Rule Comment. Particularly, Comment [1] states the purpose of the Rule and emphasizes the Rule

contributes to the proper functioning of the legal system by protecting clients represented by a lawyer. Language in Comment [2] clarifies that the Rule does not preclude communicating with a represented person seeking a second opinion. Changes to Comment [3] clarify that communications authorized by law may include constitutionally protected communications with the government. The added language also emphasizes the extra obligation imposed when communicating with an accused in a criminal matter. Comment [4] explains two circumstances in which a lawyer may seek a court order authorizing a communication: where it is uncertain the communication is permitted by the rule, and where the communication is prohibited but there are exceptional circumstances. Comment [6] is modified to more clearly identify the constituents of a represented organization with whom a lawyer may not communicate without consent of the organization's lawyer. New Comment [8] makes clear that the Rule's protections may not be waived by the client. The Comment additionally reminds lawyers that they must terminate communication once it is learned the person is represented by counsel in a matter to which the communication relates.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

The current Rule is the same as the first two sentences of the Model Rule. The Joint Committee proposes the addition of the last sentence from the Model Rule. The added language prohibits the giving of legal advice to an unrepresented person if the lawyer knows or reasonably should know there is a possibility of there being a conflict between the lawyer's client and the unrepresented person.

As the black-letter Rule, with the added language, would follow the Model Rule, the Joint Committee proposes revisions to the Comment to also follow the Model Rule Comment. Language in Comment [1] is deleted as the general substance has been elevated to the black-letter Rule. Language is added to Comment [1] to indicate that, in order to avoid misunderstanding, the lawyer will typically need to explain that the lawyer's client has interests opposed to those of the unrepresented person. Comment [2] is added to give guidance regarding what constitutes impermissible advice-giving.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

The Joint Committee proposes the minor addition of a reference to delay in the black-letter Rule, which would follow the Model Rule.

The Joint Committee proposes a minor change to the Comment which also follows the Model Rule Comment.

PROPOSED NEW RULE 4.5 INADVERTENT TRANSMISSION

The Joint Committee proposes new Rule 4.5 governing circumstances in which a lawyer receives documents relating to representation of the lawyer's client which have been inadvertently sent. The new Rule is based in part on paragraph (b) of Model Rule 4.4. Particularly, the opening

language of paragraph (a). and subparagraph (1). of the new Rule restate paragraph (b) of Model Rule 4.4. The Joint Committee concluded the Model Rule provision provided insufficient guidance with respect to what constitutes an inadvertently sent document and what the lawyer should do upon receiving the document. The Joint Committee also concluded provisions on inadvertent transmissions would be better placed in a separate rule than as part of Rule 4.4. In addition to promptly notifying the sender as required by paragraph (a)(1), the lawyer would be required by paragraph (a)(2) to comply within a reasonable time with a request for return of the document, provided the request is accompanied by a promise of reimbursement of any out-of-pocket expenses. Paragraph (b) defines an inadvertently sent document as one the sending of which was a deliberate though mistaken act or resulted from the ignorance, negligence, or inattention of the sender or sender's agent. Paragraph (d) shelters the lawyer receiving the inadvertently sent document from alleged violations of Rule 1.2 or 1.4 if the lawyer does not communicate to or consult with the client about the receipt or return of the document.

Comments [1] and [2], with some modifications, are based upon the related Comment language in Model Rule 4.4.

RULE 5 SERIES

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY ATTORNEYS (Title from Model Rule)

Rule 5.1 governs a lawyer's responsibilities for the actions of other lawyers in a law firm. The general approach under the current Rule is that every lawyer in the firm has some responsibility or potential responsibility for actions of other lawyers. The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule, which places the responsibility on lawyers who are partners or who are in a similar supervisory or managerial role. Proposed changes to paragraph (a) reflect this change in focus. Proposed changes to paragraph (c) further identify those circumstances under which a lawyer is otherwise responsible for another lawyer's violation of the rules.

The Joint Committee proposes several changes to the Comment to incorporate language from and delete language inconsistent with the Model Rule Comment.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

In light of the proposed changes to Rule 5.1, the Joint Committee proposes the addition of paragraph (b) to black-letter Rule to follow the Model Rule. The added language provides that a subordinate lawyer does not violate the rules if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. The proposed change would result in the black-letter Rule being fully the same as the Model Rule.

The Joint Committee proposes changes to the Comment to incorporate language from and delete language inconsistent with the Model Rule Comment.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

Consistent with the proposed changes to Rules 5.1 and 5.2, the Joint Committee proposes changes to the black-letter Rule to require that lawyers with managerial authority within a firm make reasonable efforts to ensure that nonlawyers act in a manner compatible with the rules. Language similar to that added in Rule 5.1(c) is added to paragraph (c) to further identify circumstances in which a lawyer is responsible for the conduct of a nonlawyer.

The Joint Committee does not propose any changes to Comment [1], which is the same as the Model Rule Comment provision. Comment [2] is added from the Model Rule Comment and distinguishes the responsibility to create a system to ensure rule compliance [paragraph (a)] from the supervisory responsibility governed by paragraph (b) and the personal responsibility addressed in paragraph (c). The Joint Committee proposes only minor changes to the remainder of the Comment.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule. Paragraph (a)(4) is added to allow a lawyer to share fees with a non-profit organization that employs or retains the lawyer. Language is added to paragraph (d)(2) to describe an additional situation in which a lawyer must not practice with or in the form of a professional corporation when a nonlawyer is involved. The language is more general in expression and expands the prohibition to include nonlawyers who occupy positions with responsibilities similar to those of corporate directors or officers.

The Joint Committee proposes the addition of Comment [2] to follow the Model Rule Comment. Comment [1] is the same as Model Rule Comment [1].

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

The Joint Committee does not propose any changes to the Rule, which was recently amended as part of the multijurisdictional practice rule changes.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

The Joint Committee proposes minor changes to the black-letter Rule to conform the Rule to the Model Rule. Language is added to paragraph (a) to include additional kinds of agreements that are prohibited under the rule, i.e., shareholders, operating, and other similar kinds of agreements. The reference in paragraph (b) to "controversy between private parties" is changed to "client controversy". This latter change clarifies that the Rule applies to settlements not only between private parties but also, for example, between a private party and the government. The reference to

"retirement" is changed to "such termination" to encompass, as the Rule generally does, different kinds of terminations.

The Joint Committee proposes changes to Comment [1] in accordance with the Model Rule Comment. Replacing "partners and associates" with "lawyers" recognizes that lawyers associate together in organizations other than traditional law firm partnerships.

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

The current Rule and the Model Rule are nearly identical and the Joint Committee proposes minor changes to fully follow the Model Rule.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment. Language added to Comment [1] clarifies that a lawyer can provide law-related services in circumstances that are distinct from the lawyer's provision of legal services. Language added to Comment [2] clarifies that paragraph (a)(2) of the Rule applies in all cases in which provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), regardless of whether the law-related services are provided directly by the lawyer, the lawyer's firm, or by a separate entity controlled by the lawyer or law firm.

RULE 6 SERIES

RULE 6.1 PRO BONO PUBLICO SERVICES

The Joint Committee does not propose any changes to the black-letter Rule. The Joint Committee reviewed several issues regarding the Rule and its Model Rule counterpart and concluded that, in light of the current practice and the history of the Rule, changes are not warranted.

The Joint Committee does propose a minor change adding Comment [4], from the Model Rule Comment, to emphasize that law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services.

RULE 6.2 APPOINTMENT BY A TRIBUNAL

The Joint Committee proposes only minor structural changes to the black-letter Rule. There are no proposed changes to the Comment language.

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

The current Rule and the Model Rule are identical except for the references to "action" in Model Rule paragraphs (a) and (b), which the Joint Committee proposes adding to the current Rule.

The Joint Committee does not propose any changes to the Comment language.

RULE 6.4 REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

The Joint Committee does not propose any changes to the Rule or Comment language.

RULE 8 SERIES

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

The current Rule and the Model Rule are identical. The Joint Committee does not propose and changes to the Rule.

The Joint Committee proposes a minor change to Comments [1] and [3] to fully follow the Model Rule Comment.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

The Joint Committee does not propose any changes to the language of the Rule or Comment.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

The Joint Committee proposes minor changes to paragraphs (a) and (b) to substitute "who knows" for "having knowledge", which follows the Model Rule construction.

The Joint Committee proposes changes to the Comment to include language from and delete language inconsistent with the Model Rule Comment.

RULE 8.4 MISCONDUCT

The Joint Committee proposes adding paragraphs (b) and (c) from the Model Rule which address, as forms of misconduct, criminal acts that adversely reflect on the lawyer's honesty, trustworthiness, or fitness and conduct that involves dishonesty, fraud, deceit, or misrepresentation. New language from the Model Rule is also added to paragraph (e) additionally identifying as misconduct stating or implying an ability to achieve results that violate the rules or other law. To clarify the scope of paragraph (c), language is also added describing the identified conduct as reflecting on the lawyer's fitness as a lawyer

The Joint Committee proposes adding Comment [1] and changing Comment [2] in conformance with the Model Rule Comment. Comment [3], also in the Model Rule Comment, more

fully explains paragraph (f) regarding manifesting bias or prejudice as a form of misconduct. Comment [4] is changed for readability.

RULE 8.5 JURISDICTION

The Joint Committee does not propose any changes to the language of the Rule or Comment, which was recently reviewed and slightly amended as part of the multijurisdictional practice rule revision.

PREAMBLE

The current Preamble is the same as the Model Rule Preamble before recent Ethics 2000 amendments. The Joint Committee proposes changes to the Preamble to follow the current Model Rule Preamble. The more notable changes are summarized. The reference in Comment [2] to intermediary is deleted as a consequence of the proposed repeal of Rule 2.2 relating to lawyers serving as intermediaries. New Comment [3] discusses the lawyer's role as third-party neutral, which is addressed by proposed changes to Rule 1.12 and by proposed new Rule 2.3. The new Comment also reminds lawyers that there are other rules that apply to lawyers when they are not active in the practice of law and to practicing lawyers when they are acting in a nonprofessional capacity.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

10 [3] In addition to these representational functions, a lawyer may serve as a third-party neutral,
11 a nonrepresentation role helping the parties to resolve a dispute or other matter. Some of these Rules
12 apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and
13 2.3. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to
14 practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer
15 who commits fraud in the conduct of a business is subject to discipline for engaging in conduct
16 involving dishonesty, fraud, deceit, misrepresentation. See Rule 8.4

17 [4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer
18 should maintain communication with a client concerning the representation. A lawyer should keep
19 in confidence information relating to representation of a client except so far as disclosure is required
20 or permitted by the these Rules of Professional Conduct or other law.

21 [5] A lawyer's conduct should conform to the requirements of the law, both in professional
22 service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's
23 procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should
24 demonstrate respect for the legal system and for those who serve it, including judges, other lawyers

1 and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official
2 action, it is also a lawyer's duty to uphold legal process.

3 [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal
4 system, the administration of justice and the quality of service rendered by the legal profession. As
5 a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for
6 clients, employ that knowledge in reform of the law and work to strengthen legal education. In
7 addition, a lawyer should further the public's understanding of and confidence in the rule of law and
8 the justice system because legal institutions in a constitutional democracy depend on popular
9 participation and support to maintain their authority. A lawyer should be mindful of deficiencies in
10 the administration of justice and of the fact that the poor, and sometimes persons who are not poor,
11 cannot afford adequate legal assistance, and. Therefore, all lawyers should ~~therefore~~ devote
12 professional time and resources and use civic influence in their behalf to ensure equal access to our
13 system of justice for all those who because of economic or social barriers cannot afford or secure
14 adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and
15 should help the bar regulate itself in the public interest.

16 [7] Many of a lawyer's professional responsibilities are prescribed in ~~the~~ these Rules of
17 Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided
18 by personal conscience and the approbation of professional peers. A lawyer should strive to attain
19 the highest level of skill, to improve the law and the legal profession and to exemplify the legal
20 profession's ideals of public service.

21 [8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and
22 a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer
23 can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.
24 So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest
25 because people are more likely to seek legal advice, and thereby heed their legal obligations, when
26 they know their communications will be private.

1 [9] In the nature of law practice, however, conflicting responsibilities are encountered.
2 Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients,
3 to the legal system and to the lawyer's own interest in remaining an upright ethical person while
4 earning a satisfactory living. ~~The~~ These Rules of Professional Conduct often prescribe terms for
5 resolving such conflicts. Within the framework of these Rules, however, many difficult issues of
6 professional discretion can arise. Such issues must be resolved through the exercise of sensitive
7 professional and moral judgment guided by the basic principles underlying the Rules. These principles
8 include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within
9 the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all
10 persons involved in the legal system.

11 [10] The legal profession is largely self-governing. Although other professions also have been
12 granted powers of self-government, the legal profession is unique in this respect because of the close
13 relationship between the profession and the processes of government and law enforcement. This
14 connection is manifested in the fact that ultimate authority over the legal profession is vested largely
15 in the courts.

16 [11] To the extent that lawyers meet the obligations of their professional calling, the occasion
17 for government regulation is obviated. Self-regulation also helps maintain the legal profession's
18 independence from government domination. An independent legal profession is an important force
19 in preserving government under law, for abuse of legal authority is more readily challenged by a
20 profession whose members are not dependent on government for the right to practice.

21 [12] The legal profession's relative autonomy carries with it special responsibilities of
22 self-government. The profession has a responsibility to assure that its regulations are conceived in
23 the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every
24 lawyer is responsible for observance of ~~the~~ these Rules of Professional Conduct. A lawyer should
25 also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises
26 the independence of the profession and the public interest which it serves.

1 [13] Lawyers play a vital role in the preservation of society. The fulfillment of this role
2 requires an understanding by lawyers of their relationship to our legal system. ~~The~~ These Rules of
3 ~~Professional Conduct~~, when properly applied, serve to define that relationship.

4 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
5 Committee on 01/10/86; Minutes of the Joint Committee on Attorney Standards on 09/24/04,
6 06/14/05.

SCOPE

There are substantial similarities between the current Scope section and the Model Rule Scope section. The Joint Committee proposes several changes to reflect Ethics 2000 revisions to the Model Rule Scope.

The proposed change in Comment [1] clarifies what is meant by "professional discretion". The additional language in Comment [2] reflects additions in various Comments which are considered helpful to practicing lawyers, particularly where obligations imposed by different laws may be more onerous than those imposed by the Rules. The reference to Rule 1.18 is included in Comment [3] to draw attention to the fact that there are duties under the Rules that attach before the formation of the lawyer-client relationship. Proposed changes in Comment [4] discuss the relationship of rule compliance or violation to causes of action and determining breaches of standards of conduct.

SCOPE

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

11 [2] The Rules presuppose a larger legal context shaping the lawyer's role. That context
12 includes court rules and statutes relating to matters of licensure, laws defining special obligations of
13 lawyers and substantive and procedural law in general. The comments are sometimes used to alert
14 lawyers to their responsibilities under such other law. Compliance with the Rules, as with all law in
15 an open society depends primarily upon understanding and voluntary compliance, secondarily upon
16 reinforcement by peer and public opinion and finally, when necessary, upon enforcement through
17 disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations
18 that should inform a lawyer, for no worthwhile human activity can be completely defined by legal
19 rules. The Rules simply provide a framework for the ethical practice of law.

20 [3] Furthermore, for purposes of determining the lawyer's authority and responsibility,
21 principles of substantive law external to these Rules determine whether a client-lawyer relationship
22 exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has
23 requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some
24 duties, such as that of confidentiality under Rule 1.6, that ~~may~~ attach when the lawyer agrees to
25 consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a

1 client-lawyer relationship exists for any specific purpose can depend on the circumstances and may
2 be a question of fact.

3 [4] Violation of a rule should not itself give rise to a cause of action against a lawyer nor
4 should it create a presumption in such a case that a legal duty has been breached. The Rules are
5 designed only to provide guidance to lawyers and to provide a structure for regulating conduct
6 through disciplinary agencies; ~~they are not designed to be a basis for civil liability.~~ Nevertheless, since
7 the rules do establish standards of conduct for lawyers, a lawyer's violation of a rule may be evidence
8 of breach of the applicable standard of conduct. Failure to comply with an obligation or prohibition
9 imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that
10 disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances
11 as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often
12 has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose
13 that ~~whether or not~~ imposition of discipline should be imposed for a violation, and the severity of a
14 sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation,
15 extenuating factors and whether there have been previous violations.

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

1 [5] The Comment accompanying each Rule explains and illustrates the meaning and purpose
2 of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are
3 intended as guides to interpretation, but the text of each Rule is authoritative.

4 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
5 Committee on 01/10/86; Minutes of the Joint Committee on Attorney Standards on 09/24/04,
6 06/14/05.

RULE 1.0 TERMINOLOGY

The Joint Committee proposes following the Model Rule approach in setting out in a separate Rule regularly used important terms and their definitions. The proposed changes incorporate several Model Rule definitions into existing definitions that follow the Model Rule.

A definition of "consent in writing" is provided which is based on the Model Rule definition of "confirmed in writing". The Model Rule definition is linked to the central role played in the Model Rules of the concept of "informed consent", which the Joint Committee declined to follow. The Model Rules uniformly replaced "consent after consultation" with "gives informed consent". The informed consent requirement was accompanied by a requirement that the consent be confirmed in writing. While the Model Rule drafter's explanation of the shift to informed consent suggests no substantive change was intended, the Joint Committee concluded there was a risk that the informed consent concept applied in medical malpractice litigation may be imported into matters governed by the Rules. Consequently, the Joint Committee elected alternatively to adopt a writing requirement in certain circumstances with respect to consent and consultation by the client.

Proposed changes to "firm" or "law firm" follow the proposed changes to the Comment to Rule 1.10. The reference to "other association authorized to practice law" is added in the definition to encompass lawyers practicing in limited liability entities. The reference in Comment [3] of this new Terminology rule to "including government" clarifies that legal departments of governmental entities are included within the definition of "firm".

The Joint Committee proposes adding a definition of "jurisdiction" in paragraph (f) for purposes of assisting in addressing multijurisdictional practice issues.

The definition of "matter", as set out in current Rule 1.7, is relocated with slight modifications to paragraph (i) and limited in application to Rules 1.7 through 1.12.

A definition of "screened" is included, as it is in the Model Rule, for purposes of Rules 1.11, 1.12, and 1.18. The concept prevents the imputation of conflicts of interest in certain situations when the personally disqualified lawyer is "screened" from any participation in the matter.

Given the various writing requirements in the Rules, paragraph (q) defines "writing" and "written" and includes tangible and electronic records.

The Joint Committee proposes following the Model Rule, with differences related to those noted above, in incorporating Comment provisions regarding definitions of consent in writing, firm, fraud, and screened.

Proposed Rule

RULE 1.0 - TERMS TERMINOLOGY

1 ~~Certain terms used in these Rules have special significance. This section is intended to~~
2 ~~provide guidance in the interpretation of these terms. The section does not provide precise~~
3 ~~definitions, and the words included here may vary in meaning within the context of a particular Rule.~~
4 ~~Unless the context dictates otherwise, however, the meaning suggested by this section should be~~
5 ~~applied.~~

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

8 (b) "Consent in writing", when used with reference to the consent of a person, denotes
9 consent that is given in writing by the person or oral consent promptly confirmed in writing by the
10 lawyer.

11 (c) "Consult" or "consultation" denotes communication of information reasonably sufficient
12 to permit the client to appreciate the significance of the matter in question.

13 (d) "Firm" or "law firm" denotes a lawyer or lawyers in a ~~private firm~~, law partnership,
14 professional corporation, sole proprietorship or other association authorized to practice law; or
15 lawyers employed in a legal services organization or the legal department of a corporation or other
16 organization ~~and lawyers employed in a legal services organization. See Comment, Rule 1.10.~~

17 (e) "Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely
18 negligent misrepresentation or negligent failure to apprise another of relevant information.

19 (f) "Jurisdiction" means this state, another state of the United States, the District of Columbia,
20 Puerto Rico, or a territory or possession of the United States.

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

3 (h) "Legal Assistant" (or paralegal) means a person who assists lawyers in the delivery of legal
4 services, and who through formal education, training, or experience, has knowledge and expertise
5 regarding the legal system and substantive and procedural law which qualifies the person to do work
6 of a legal nature under the direct supervision of a licensed lawyer.

7 (i) "Matter", for purposes of Rules 1.7 through 1.12, includes any judicial or other proceeding,
8 application, request for a ruling or other determination, contract claim, controversy, investigation,
9 charge, accusation, arrest, or other transaction.

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

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

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

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

19 (n) "Screened" denotes the isolation of a lawyer from any participation in a matter through
20 the timely imposition of a firm's procedures that are reasonably adequate under the circumstances to
21 protect information that the isolated lawyer is obligated to protect under these Rules or other law.

1 [2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the
2 specific facts. For example, two practitioners who share office space and occasionally consult or assist
3 each other ordinarily would not be regarded as constituting a firm. However, if they present
4 themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm,
5 they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement
6 between associated lawyers are relevant in determining whether they are a firm, as is the fact that they
7 have mutual access to information concerning the clients they serve. Furthermore, it is relevant in
8 doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers
9 could be regarded as a firm for purposes of the Rule that the same lawyer should not represent
10 opposing parties in litigation, while the same group of lawyers might not be regarded as a firm for
11 purposes of the rule that information acquired by one lawyer is attributed to another.

12 [3] With respect to the law department of an organization, including the government, there
13 is ordinarily no question that the members of the department constitute a firm within the meaning of
14 these Rules. There can be uncertainty, however, as to the identity of the client. For example, it may
15 not be clear whether the law department of a corporation represents a subsidiary or an affiliated
16 corporation, as well as the corporation by which the members of the department are directly
17 employed. A similar question can arise concerning an unincorporated association and its local
18 affiliates.

1 [4] Similar questions can also arise with respect to lawyers in legal aid and legal services
2 organizations. Depending upon the structure of the organization, the entire organization or different
3 components of it may constitute a firm or firms for purposes of these Rules.

4 Fraud

5 [5] When used in these Rules, the terms "fraud" or "fraudulent" do not include merely
6 negligent misrepresentation or negligent failure to apprise another of relevant information. For
7 purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the
8 misrepresentation or failure to inform in order for the misrepresentation or failure to inform to
9 constitute fraud.

10 Screened

11 [6] This definition applies to situations where screening of a personally disqualified lawyer is
12 permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12, and 1.18.

13 [7] The purpose of screening is to assure the affected parties that confidential information
14 known by the personally disqualified lawyer remains protected. The personally disqualified lawyer
15 should acknowledge the obligation not to communicate with any of the other lawyers in the firm with
16 respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be
17 informed that the screening is in place and that they may not communicate with the personally
18 disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for
19 the particular matter will depend on the circumstances. To implement, reinforce and remind all

1 affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such
2 procedures as a written undertaking by the screened lawyer to avoid any communication with other
3 firm personnel and any contact with any firm files or other materials relating to the matter, written
4 notice and instructions to all other firm personnel forbidding any communication with the screened
5 lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials
6 relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm
7 personnel.

8 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
9 Committee on 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney Standards
10 Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 09/24/04, 03/18/05, 06/14/05, 09/09/05.

RULE 1.1 COMPETENCE

The Joint Committee does not propose any changes to the black-letter Rule as the Rule and the Model Rule are the same.

The Joint Committee proposes minor changes to the Comment to incorporate Model Rule Comment language.

RULE 1.1 COMPETENCE

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

4 COMMENT

5 Legal Knowledge and Skill

6 [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular
7 matter, relevant factors include the relative complexity and specialized nature of the matter, the
8 lawyer's general experience, the lawyer's training and experience in the field in question, the
9 preparation and study the lawyer is able to give the matter and whether it is feasible to refer the
10 matter to, or associate or consult with, a lawyer of established competence in the field in question.

11 [2] A lawyer need not necessarily have special training or prior experience to handle legal
12 problems of a type ~~with which the lawyer is unfamiliar~~ to the lawyer. A newly admitted lawyer can
13 be as competent as a practitioner with long experience. Some important legal skills, such as the
14 analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal ~~problems~~
15 representations. Perhaps the most fundamental legal skill consists of determining what kind of legal
16 problems a situation may involve, a skill that necessarily transcends any particular specialized
17 knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary
18 study. Competent representation can also be provided through the association of a lawyer of
19 established competence in the field in question.

20 [3] In an emergency, a lawyer may give advice or assistance in a matter in which the lawyer
21 does not have the skill ordinarily required to competently represent the client without violating these
22 Rules. ~~What~~ The definition of an emergency is depends upon all of the circumstances ~~which~~
23 ~~surround~~ surrounding the request for advice or assistance and the lawyer's decision to accept
24 representation of the lawyer to give it. Relevant circumstances include, but are not limited to: (a)

1 the client's past relationship with the lawyer; ~~(b) whether the practicality, considering the means of~~
2 ~~the client to referral to or consultation or association refer to, consult with or associate with~~ another
3 lawyer; ~~would be impractical taking into account the means of the client;~~; (c) the matter upon which
4 advice is requested; and (d) the time and location of the contact with the lawyer; (e) whether the
5 lawyer has been ~~requested~~ asked to render immediate services; and (f) whether the lawyer
6 reasonably determined that legal services were immediately required. Even in an emergency,
7 however, assistance should be limited to that reasonably necessary in the circumstances, for ill
8 considered action under emergency conditions can jeopardize the client's interest. ~~A lawyer should~~
9 ~~understand that this Rule, while containing~~ Providing representation in an emergency does exception
10 ~~to the general rule of competence, may not limit the lawyer's liability to a client for malpractice~~
11 ~~should it prove that the lawyer's advice damaged the client.~~ See Rule 1.8(f)(h).

12 [4] A lawyer may accept representation where the requisite level of competence can be
13 achieved by reasonable preparation.

14 [5] To maintain the requisite knowledge and skill, a lawyer must keep abreast of changes in
15 the law and its practice, engage in continuing study and education and comply with all continuing
16 legal education requirements.

17 **Thoroughness and Preparation**

18 [6] Competent handling of a particular matter includes inquiry into and analysis of the factual
19 and legal elements of the problem, and use of methods and procedures meeting the standards of
20 competent practitioners. It also includes adequate preparation. The required attention and
21 preparation are determined in part by what is at stake; major litigation and complex transactions
22 ordinarily require more ~~elaborate~~ extensive treatment than matters of lesser consequence. An
23 agreement between the lawyer and the client regarding the scope of the representation may limit the
24 matters for which the lawyer is responsible. See Rule 1.2(c).

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney
2 Standards Committee on 09/29/83, 09/20/85 and 01/31/86; Minutes of the Joint Committee on
3 Attorney Standards on 11/19/04, 06/14/05.

RULE 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

The current Rule is the same as the Model Rule before recent Ethics 2000 revisions. The Joint Committee proposes changes to the black-letter Rule, including the title, which would follow the current Model Rule.

Proposed changes to paragraph (a) concerning objectives of representation relocate the phrase "subject to paragraphs (c) and (d)" to clarify that all of the actions a lawyer may take under paragraph (a) are subject to the restrictions under paragraph (d) and some of them may be subject to the limitation in paragraph (c). The reference to Rule 1.14 is included to reflect that the lawyer's duty to communicate with the client should be addressed in that rule, rather than Rule 1.2. The changes also clarify that a lawyer need not always consult in order to acquire authority to act for the client, but may take action as impliedly authorized to carry out the representation.

Proposed changes to paragraph (c), in substituting "scope" for "objectives" regarding representation reflect that only the client can limit the client's objectives, while the scope of representation may be limited by the lawyer.

Paragraph (e) is deleted as it is relocated to Rule 1.4(a)(5).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

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

1 (a) ~~Subject to paragraphs (c) and (d),~~ a lawyer shall abide by a client's decisions concerning
2 the objectives of representation, ~~subject to paragraphs (c), (d) and (e),~~ and, where appropriate as
3 required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
4 A lawyer may take such action on behalf of the client as impliedly authorized to carry out the
5 representation. A lawyer shall abide by a client's decision whether to ~~accept an offer or settlement~~
6 ~~of settle~~ a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation
7 with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will
8 testify.

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

11 (c) A lawyer may limit the ~~objectives~~ scope of the representation if the client consents in
12 writing after consultation.

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

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

Comment

Scope of Representation

1 ~~[1] Both lawyer and client have authority and responsibility in the objectives and means of~~
2 ~~representation. The Paragraph (a) confers upon the client has the ultimate authority to determine the~~
3 ~~purposes to be served by legal representation, within the limits imposed by law and the lawyer's~~
4 ~~professional obligations. Within those limits, a client also has a right to consult with the lawyer~~
5 ~~about the means to be used in pursuing those objectives. However, where many routine matters are~~
6 ~~involved, a system of limited or occasional consultation may be arranged with the client permitting~~
7 ~~the lawyer to choose the means to be used in pursuing objectives without specific consultation with~~
8 ~~the client. Practical exigency may permit a lawyer to reasonably interpret a client's prior decisions~~
9 ~~concerning the objectives of any representation to authorize the lawyer to act for a client without~~
10 ~~prior consultation. A lawyer is not required to pursue objectives or employ means simply because~~
11 ~~a client may wish that the lawyer do so. In the event the lawyer is unable to abide by a client's~~
12 ~~decisions concerning the objectives of representation or the means by which they are to be pursued,~~
13 ~~the lawyer shall terminate the representation pursuant to Rule 1.16. A clear distinction between~~
14 ~~objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship~~
15 ~~partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for~~
16 ~~technical and legal tactical issues, but it is appropriate to defer to the client regarding such questions~~
17 ~~as the expense to be incurred and concern for third persons who might be adversely affected. The~~
18 ~~decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by~~
19 ~~the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such~~
20 ~~decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer~~
21 ~~shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly~~
22 ~~authorized to carry out the representation.~~

23 [2] On occasion, however, a lawyer and a client may disagree about the means to be used to
24 accomplish the client's objectives. Clients generally defer to the special knowledge and skill of their
25 lawyer with respect to the means to be used to accomplish their objectives, particularly with respect
26 to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such
27 questions as the expense to be incurred and concern for third persons who might be adversely
28 affected. The lawyer should consult with the client and seek a mutually acceptable resolution of any

1 disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the
2 client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client
3 may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(4).

4 [3] At the outset of a representation, the client may authorize the lawyer to take specific
5 action on the client's behalf without further consultation. Absent a material change in circumstances
6 and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may,
7 however, revoke such authority at any time.

8 [4] In a case in which the client appears to ~~be suffering mental disability~~ have limited
9 capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

10 **Independence From Client's Views or Activities**

11 [5] Legal representation should not be denied to people who are unable to afford legal
12 services, or whose cause is controversial or the subject of popular disapproval. By the same token,
13 representing a client does not constitute approval of the client's views or activities.

14 ~~Services Limited in Objectives or Means~~ Agreements Limiting Scope of Representation

15 [6] The ~~objectives or~~ scope of services to be provided by a lawyer may be limited by
16 agreement with the client or by the terms under which the lawyer's services are made available to the
17 client. ~~For example, a retainer may be for a specifically defined purpose. Representation provided~~
18 ~~through a legal aid agency may be subject to limitations on the types of cases the agency handles.~~
19 When a lawyer has been retained by an insurer to represent an insured, for example, the
20 representation may be limited to matters related to the insurance coverage. The A limited
21 representation may be appropriate because the client has limited objectives for the representation.
22 In addition, terms upon which representation is undertaken may exclude specific ~~objectives or~~ means
23 that might otherwise be used to accomplish the client's objectives. Such limitations may exclude

1 ~~objectives or means~~ actions that the client thinks are too costly or that the lawyer regards as
2 repugnant or imprudent.

3 [7] ~~An agreement concerning the scope of representation must accord with these Rules and~~
4 ~~other law. Thus, the client may not be asked to agree to representation so limited in scope as to~~
5 ~~violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle~~
6 ~~litigation that the lawyer might wish to continue. Although an agreement for a limited representation~~
7 ~~does not exempt a lawyer from the duty to provide competent representation, the limitation is a~~
8 ~~factor to be considered when determining the legal knowledge, skill, thoroughness and preparation~~
9 ~~reasonably necessary for the representation. See Rule 1.1.~~

10 [8] All agreements concerning a lawyer's representation of a client must accord with these
11 Rules and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

12 **Criminal, or Fraudulent, and Prohibited Transactions**

13 [9] ~~A Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to~~
14 ~~commit a crime or fraud. The prohibition, however, does not preclude the lawyer is required to give~~
15 ~~from giving an honest opinion about the actual consequences that appear likely to result from a~~
16 ~~client's conduct. The Nor does the fact that a client uses advice in a course of action that is criminal~~
17 ~~or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer~~
18 ~~may not knowingly assist a client in criminal or fraudulent conduct.~~ There is a critical distinction
19 between presenting an analysis of legal aspects of questionable conduct and recommending the
20 means by which a crime or fraud might be committed with impunity.

21 [10] When the client's course of action has already begun and is continuing, the lawyer's
22 responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing,
23 except where required or permitted in by Rule 1.6. ~~However, the~~ The lawyer is required to avoid
24 ~~furthering the purpose assisting the client, for example, by drafting or delivering documents that the~~
25 ~~lawyer knows are fraudulent or by suggesting how it the wrongdoing might be concealed.~~ A lawyer

1 may not continue assisting a client in conduct that the lawyer originally ~~supposes is supposed~~ was
2 legally proper but then discovers is criminal or fraudulent. ~~Withdrawal~~ The lawyer must, therefore,
3 withdraw from the representation; therefore, may be required of the client in the matter. See Rule
4 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer
5 to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the
6 like. See Rule 4.1.

7 [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in
8 dealings with the beneficiary.

9 [12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction.
10 Hence, a lawyer ~~should~~ must not participate in a ~~sham~~ transaction; ~~for example, a transaction to~~
11 ~~effectuate criminal or fraudulent~~ escape avoidance of tax liability. Paragraph (d) does not preclude
12 undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise.
13 The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute
14 or regulation may require a course of action involving disobedience of the statute or regulation or
15 of the interpretation placed upon it by governmental authorities.

16 [13] If a lawyer comes to know or reasonably should know that a client expects assistance
17 not permitted by these Rules or other law or if the lawyer intends to act contrary to the client's
18 instructions, the lawyer must consult with the client regarding the limitations on the lawyer's
19 conduct. See Rule 1.4(a)(5).

20 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
21 Committee as amended 10/21/83, 02/03/84, 03/16/84, 05/23/84 ~~and~~, 06/27/84; Minutes of the Joint
22 Committee on Attorney Standards on 11/15/02, 02/28/03, 09/25/03, 11/19/04.

RULE 1.3 DILIGENCE

The current rule and the Model Rule are identical. The Joint Committee does not propose any changes to the black-letter Rule.

The current Comment is the same as the Model Rule Comment before recent Ethics 2000 revisions. The Joint Committee proposes changes to the Comment to follow the current Model Rule Comment.

RULE 1.3 DILIGENCE

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

Comment

[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~~ A lawyer is not bound, however, to press for every advantage that might be realized for a client. ~~A~~ For example, a lawyer ~~has~~ may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. ~~A lawyer's workload should be controlled so that each matter can be handled adequately. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.~~

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

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

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served

1 a client over a substantial period in a variety of matters, the client sometimes may assume that the
2 lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.
3 Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer,
4 preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the
5 client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial
6 or administrative proceeding that produced a result adverse to the client ~~but has not been specifically~~
7 ~~instructed concerning pursuit of an~~ and the lawyer and client have not agreed that the lawyer will
8 handle the matter on appeal, the lawyer ~~should advise~~ must consult with the client ~~of about~~ the
9 possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether
10 the lawyer is obligated to prosecute the appeal for the client depends on the scope of the
11 representation the lawyer has agreed to provide to the client. See Rule 1.2.
12

13 [5] To prevent neglect of client matters in the event of a sole practitioner's death or disability,
14 the duty of diligence may require that each sole practitioner prepare a plan, in conformity with
15 applicable rules, that designates another competent lawyer to review client files, notify each client
16 of the lawyer's death or disability, and determine whether there is a need for immediate protective
17 action. Cf. Rule 6.4, N.D.R. Lawyer Discipl.
18

19 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney
20 Standards Committee as amended on 10/21/83; Minutes of the Joint Committee on Attorney
21 Standards on 11/15/02, 11/19/04, 06/14/05.

RULE 1.4 COMMUNICATION

The Joint Committee proposes changes to the black-letter rule to follow the Model Rule with the exception of retaining the current Rule's direction that a lawyer shall "make reasonable efforts" to keep the client reasonably informed [paragraph (a)(3)].

The Joint Committee proposes only minor changes to Comment [3] to include reference to a person with limited capacity, rather than suffering from mental disability. The "limited capacity" reference is derived from proposed changes to Rule 1.14.

RULE 1.4 COMMUNICATION

1 (a) A lawyer shall ~~make reasonable efforts to keep a client reasonably informed about the~~
2 ~~status of a matter. A lawyer shall promptly comply with a client's reasonable requests for~~
3 ~~information.~~

4 (1) promptly inform the client of any decision or circumstance with respect to
5 which the client's consent is required by these Rules;

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

8 (3) make reasonable efforts to keep the client reasonably informed about the
9 status of a matter;

10 (4) promptly comply with the client's reasonable requests for information; and

11 (5) consult with the client about any relevant information on the lawyer's conduct
12 when the lawyer knows that the client expects assistance not permitted by these Rules
13 or other law.

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

Comment

Explaining Matters to a Client

18 [1] The client should have sufficient information to participate intelligently in decisions
19 concerning the representation to the extent the client is willing and able to do so. For example, a

1 lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter,
2 inform the client of communications from another party and take other reasonable steps that permit
3 the client to make a decision regarding a serious offer from another party. A lawyer who receives
4 from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a
5 criminal case should promptly inform the client of its substance unless prior discussions with the client
6 have left it clear that the proposal will be unacceptable. Even when a client delegates authority to the
7 lawyer, the client should be kept advised of the status of the matter.

8 [2] Adequacy of communication depends in part on the kind of advice or assistance involved.
9 For example, in negotiations where there is time to explain a proposal, the lawyer should review all
10 important provisions with the client before proceeding to an agreement. In litigation a lawyer should
11 explain the general strategy and prospects of success and ordinarily should consult the client on
12 tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected
13 to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill
14 reasonable client expectations for information.

15 [3] Ordinarily, the information to be provided is that appropriate for a client who is a
16 comprehending and responsible adult. However, fully informing the client according to this standard
17 may be impracticable, for example, when the client is a child minor or a person with ~~suffers from~~
18 ~~mental disability~~ limited capacity. See Rule 1.14. When the client is an organization or group, it is
19 often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily,
20 the lawyer should address communications to the appropriate authority in the organization. See Rule
21 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be
22 arranged with the client. Practical exigency may also require a lawyer to act for a client without prior
23 communication as to that action.

24 **Withholding or Delaying Transmission of Information**

25 [4] When a lawyer reasonably believes the disclosure of certain information to a client would

1 have a high probability of resulting in substantial harm to a client or others, the lawyer may withhold
2 or delay the transmission of the information, but only to the extent reasonably necessary to avoid the
3 harm. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining
4 psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold or delay the
5 transmission of information to serve the lawyer's own interest or convenience. Rules or court orders
6 governing litigation may provide that information supplied to a lawyer may not be disclosed to the
7 client. Rule 3.4(c) directs compliance with such rules or orders.

8 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
9 Committee as amended 10/21/83 and 02/03/84; Minutes of the Joint Committee on Attorney
10 Standards on 11/15/02; 11/19/04, 06/14/05.

RULE 1.5 FEES

The Joint Committee proposes changes to the black-letter Rule to follow, in part, the Model Rule.

The proposed change to paragraph (a) shifts the focus from requiring a reasonable fee to prohibiting an unreasonable fee. The change also prohibits unreasonable amounts for expenses.

Proposed changes to paragraph (b) follow the Model Rule in including expenses for which the client will be responsible as a matter that must be communicated to the client. Fee and expense information should preferably be communicated in writing.

Proposed changes to paragraph (c) require that a contingent fee agreement must be signed by the client and must identify any expenses for which the client may be liable, whether or not the client is the prevailing party. Language is also added requiring an itemization of expenses.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment. Notable changes are summarized. New Comment [1] introduces paragraph (a) and explains that the factors set out in the paragraph are not exclusive and that lawyers may properly charge for services performed or incurred in-house. New Comment [3] confirms that contingent fees are subject to the reasonableness standard of paragraph (a). It refers to applicable law, which may impose limitations on contingent fees or require a lawyer to offer clients an alternative basis for the fee. Proposed changes to Comment [4] replace the "special scrutiny" provision concerning fees paid in property with a cross-reference to the requirements of Rule 1.8(a), which addresses business transactions with a client when a fee is to be paid in property.

RULE 1.5 FEES

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

4 (1) the time and labor required, the novelty and difficulty of the questions involved, and
5 the skill requisite to perform the legal service properly;

6 (2) the likelihood, if apparent to the client, that the acceptance of the particular
7 employment will preclude other employment by the lawyer;

8 (3) the fee customarily charged in the locality for similar legal services;

9 (4) the amount involved and the results obtained;

10 (5) the time limitations imposed by the client or by the circumstances;

11 (6) the nature and length of the professional relationship with the client;

12 (7) the experience, reputation, and ability of the lawyer or lawyers performing the
13 services; and

14 (8) whether the fee is fixed or contingent.

15 (b) When the lawyer has not regularly represented the client, the basis, rate, or amount of
16 the fee and expenses for which the client will be responsible shall be communicated to the client,
17 preferably in writing, before or within a reasonable time after commencing the representation.

1 (c) A fee may be contingent on the outcome of the matter for which the service is rendered,
2 except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent
3 fee agreement shall be in a writing signed by the client and shall state the method by which the fee is
4 to be determined, including the percentage or percentages that shall accrue to the lawyer in the event
5 of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and
6 whether such expenses are to be deducted before or after the contingent fee is calculated. The
7 agreement must identify any expenses for which the client will be liable whether or not the client is
8 the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client
9 with a written statement stating the outcome of the matter and, if there is a recovery, showing the
10 remittance to the client and the method of its determination, including itemization of expenses.

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

12 (1) any fee in a domestic relations matter, the payment or amount of which is contingent
13 upon the securing of a divorce or upon the amount of alimony or support, or property
14 settlement in lieu thereof; or

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

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

17 (1) ~~The~~ the division of fee is in proportion to the services performed by each lawyer or
18 each lawyer, by written agreement, assumes joint responsibility for the representation;

19 (2) ~~After~~ after consultation, the client ~~does not object~~ consents in writing to the
20 participation of all the lawyers involved; and

21 (3) ~~The~~ the total fee is reasonable.

1 (f) A lawyer may charge for work performed by a legal assistant.

2 (g) A lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the
3 referral of legal business. A lawyer may compensate a legal assistant based on the quantity and
4 quality of the legal assistant's work and value of that work to a law practice. The legal assistant's
5 compensation may not be contingent, by advance agreement, upon the outcome of a case or upon the
6 profitability of the lawyer's practice.

7 **Comment**

8 **Reasonableness of Fee and Expenses**

9 [1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances.
10 The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each
11 instance. Paragraph (a) also requires that expenses for which the client will be charged be reasonable.
12 A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or
13 for other expenses incurred in-house, such as telephone charges, either by charging a reasonable
14 amount to which the client has agreed in advance or by charging an amount that reasonably reflects
15 the cost incurred by the lawyer.

16 **Basis, Rate or Amount of Fee**

17 ~~[2] When the lawyer has regularly represented a client, they ordinarily~~ Ordinarily, when the
18 lawyer has regularly represented a client, they will have evolved an understanding concerning the
19 basis or rate of the fee. In a new ~~client-lawyer~~ lawyer-client relationship, however, an understanding
20 as to the ~~fee~~ fees and expenses must ~~should~~ be promptly established. ~~It is not necessary to recite all~~
21 ~~the factors that underlie the basis of the fee, but only those that are directly involved in its~~
22 ~~computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed~~
23 ~~amount or an estimated amount, or to identify the factors that may be taken into account in finally~~
24 ~~fixing the fee. When developments occur during the representation that render an earlier estimate~~

1 ~~substantially inaccurate, a revised estimate should be provided to the client.~~ Generally, it is desirable
2 to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee
3 arrangements that states the general nature of the legal services to be provided, the basis, rate or total
4 amount of the fee and whether and to what extent the client will be responsible for any costs,
5 expenses or disbursements in the course of the representation. A written statement concerning the
6 fee terms of the engagement reduces the possibility of misunderstanding. The written statement may
7 be a copy of the lawyer's customary fee schedule or a simple memorandum setting forth the basis, rate
8 or amount of the fee.

9 [3] Contingent fees, like any other fees, are subject to the reasonableness standard of
10 paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or
11 whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that
12 are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such
13 as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis
14 for the fee. Applicable law also may apply to situations other than a contingent fee, for example,
15 government regulations regarding fees in certain tax matters.

16 **Terms of Payment**

17 [4] A lawyer may require advance payment of a fee, but is obliged to return any unearned
18 portion. See Rule 1.16(e). A lawyer may accept property in payment for services, such as an
19 ownership interest in an enterprise, providing this does not create a conflict of interest. However,
20 a fee paid in property instead of money may be subject to ~~special scrutiny because it involves~~
21 ~~questions concerning both the value of the services and the lawyer's special knowledge of the value~~
22 ~~of the property~~ the requirements of Rule 1.8(a) because such fees often have the essential qualities
23 of a business transaction with the client.

24 [5] An agreement may not be made whose terms might induce the lawyer improperly to curtail
25 services for the client or perform them in a way contrary to the client's interest. For example, a lawyer

1 should not enter into an agreement whereby services are to be provided only up to a stated amount
2 when it is foreseeable that more extensive services probably will be required, unless the situation is
3 adequately explained to the client. Otherwise, the client might have to bargain for further assistance
4 in the midst of a proceeding or transaction. However, it is proper to define the extent of services in
5 light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on
6 hourly charges by using wasteful procedures. ~~When there is doubt whether a contingent fee is~~
7 ~~consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee~~
8 ~~and explain their implications. Applicable law may impose limitations on contingent fees, such as a~~
9 ~~ceiling on the percentage.~~

10 Contingent Fees

11 [6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations
12 matter when payment is contingent upon the securing of a divorce or upon the amount of alimony
13 or support or property settlement to be obtained. This provision does not preclude a contract for a
14 contingent fee for legal representation in connection with the recovery of post-judgment balances due
15 under support, alimony or other financial orders because such contracts do not implicate the same
16 policy concerns. Contingent fee agreements must be in a writing signed by the client and must
17 otherwise comply with paragraph (c) of this Rule.

18 **Division of Fee**

19 [7] A division of fee is a single billing to a client covering the fee of two or more lawyers who
20 are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter
21 in which neither alone could serve the client as well, and most often is used when the fee is contingent
22 and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers
23 to divide a fee on either the basis of the proportion of services they render or by agreement between
24 the participating lawyers if all assume responsibility for the representation as a whole and the client
25 is consulted and does not object. It does not require disclosure to the client of the share that each

1 lawyer is to receive. A lawyer should refer a matter only to a lawyer whom the referring lawyer
2 reasonably believes is competent to handle the matter. See Rule 1.1.

3 [8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for
4 work done when lawyers were previously associated in a law firm.

5 **Disputes Over Fees**

6 [9] If there is a fee dispute, a lawyer should consider submitting to ~~the~~ an established
7 arbitration procedure ~~established by the bar~~. Law may prescribe a procedure for determining a
8 lawyer's fee. for example, in representation of an executor or administrator, a class or a person
9 entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and
10 a lawyer representing another party concerned with the fee should comply with the prescribed
11 procedure.

12 **Fees for the Services of Legal Assistants**

13 [10] In cases involving fixed fees or contingent fees, the total fees are agreed upon in advance
14 and there should be no separate charge for legal assistant services. In matters charged on the basis
15 of "fee for service" or "charge by the hour", a lawyer may include separate charges for work
16 performed by legal assistants or otherwise include legal assistant hours in calculating the amount of
17 fees to be charged. ~~In *Missouri v. Jenkins*, 491 US 274 (1989), the Court held in setting a~~
18 ~~reasonable lawyer's fee under 28 U.S.C. § 1988 that it was~~ It may be appropriate to include a charge
19 ~~for legal assistant services, and that it was appropriate~~ to value such services at "market rates" rather
20 than "actual costs" to the lawyer.

21 [11] ~~In such instances, the~~ The lawyer should disclose to the client, either at the outset of the
22 representation or at the point during the representation when the lawyer determines a legal assistant

1 should be used, that the lawyer proposes to use a legal assistant and obtain the client's agreement to
2 any separate charges for legal assistant services.

3 [12] A lawyer may not split fees with a legal assistant, whether characterized as splitting of
4 contingent fees, "forwarding" fees or other sharing of legal fees. ~~Furthermore, a legal assistant may~~
5 ~~not be compensated on a contingent basis for a particular case or paid for "signing up" clients for a~~
6 ~~legal practice.~~ The linchpin of the prohibition is the lawyer's obligation is to pay the legal assistant
7 ~~regardless of the outcome of the case~~ according to the employment agreement . There is no general
8 prohibition against a lawyer ~~who enjoys a particularly profitable period~~ recognizing the contribution
9 of the legal assistant ~~to that profitability~~ with a discretionary bonus. Likewise, a lawyer ~~engaged in~~
10 ~~a particularly profitable speciality of legal practice~~ is not prohibited from compensating the a legal
11 assistant who aids materially in ~~that a practice more handsomely than the~~ with compensation greater
12 than that generally awarded paid to legal assistants in the geographic area working in less lucrative
13 law practices.

14 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
15 Committee on 02/03/84, 03/16/84, 05/23/84, 06/27/84 and 07/27/84; Minutes of Joint Committee
16 on Attorney Standards Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 11/15/02, 11/19/04,
17 06/14/05.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

The Joint Committee proposes changes to the black-letter Rule to incorporate most of the current Model Rule regarding disclosure of information relating to the representation of a client.

Proposed changes to paragraph (a) prohibit disclosure of information unless the client consents, disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by new paragraph (b) or permitted by new paragraph (c). Current paragraphs (b) and (c) are relocated to paragraph (a).

Proposed paragraph (b) retains the current required disclosure of information. The provision follows the Model Rule language, however, of disclosure if considered reasonably necessary to prevent reasonably certain, rather than imminent, death or substantial bodily harm.

New paragraph (c)(1) departs from the current Rule in permitting disclosure to prevent the commission of a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another. In following the Model Rule, the changes delete the current language regarding criminal or fraudulent acts that are reasonably believed to likely result in non-imminent death or substantial bodily harm. This disclosure, however, is generally addressed in new paragraph (b). New paragraph (c)(2) permits disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another, a ground for disclosure currently addressed in part by paragraph (f). New paragraph (c)(3) permits disclosure to secure legal advice about the lawyer's compliance with the Rules.

The Joint Committee proposes several changes to the Comment to follow the Model Rule Comment as the proposed black-letter changes also follow the Model Rule, with the noted exception regarding mandatory disclosure. Comment [6] explains application of the mandatory disclosure provision. Language is also included to aid in determining when death or substantial bodily harm is "reasonably certain" to occur.

RULE 1.6 CONFIDENTIALITY OF INFORMATION

1 ~~(a) A lawyer shall not reveal, or use to the disadvantage of a client,~~ information relating to
2 the representation of the client unless ~~required or permitted to do so by this rule~~ the client consents,
3 the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is
4 required by paragraph (b) or permitted by paragraph (c). The duty of confidentiality continues after
5 the lawyer-client relationship has terminated. ~~When such information is authorized by this rule to be~~
6 ~~revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes~~
7 ~~necessary to the purpose.~~ Such revelation or use is:

8 ~~(a) (b)~~ A lawyer is required to reveal information relating to the representation of a client to
9 the extent the lawyer believes reasonably necessary to prevent ~~the client from committing an act that~~
10 ~~the lawyer believes is likely to result in imminent~~ reasonably certain death or imminent substantial
11 bodily harm;

12 ~~(c)~~ A lawyer may reveal information relating to the representation of a client to the extent the
13 lawyer reasonably believes necessary:

14 ~~(b)~~ permitted when the client consents after consultation;

15 ~~(c)~~ permitted when impliedly authorized in order to carry out the representation;

16 ~~(d)~~ ~~(1)~~ permitted to the extent the lawyer reasonably believes necessary to prevent the
17 client from committing a criminal crime or fraudulent act fraud that the lawyer
18 reasonably believes is likely to result in non-imminent death, non-imminent substantial
19 bodily harm, or substantial injury or harm to the financial interests or property of
20 another is reasonably certain to result in substantial injury to the financial interests or
21 property of another and in furtherance of which the client has used or is using the
22 lawyer's services;

1 (2) to prevent, mitigate, or rectify substantial injury to the financial interests or
2 property of another that is reasonably certain to result or has resulted from the client's
3 commission of crime or fraud in the furtherance of which the client has used the
4 lawyer's services;

5 (3) to secure legal advice about the lawyer's compliance with these Rules;

6 ~~(e) (4) permitted to the extent the lawyer reasonably believes necessary~~ to establish
7 a claim or defense on behalf of the lawyer in a controversy between the lawyer and
8 the client, to establish a defense to a criminal charge or civil claim against the lawyer
9 based upon conduct in which the client was involved, or to respond to allegations in
10 any proceeding concerning the lawyer's representation of the client; or

11 ~~(f) permitted, except as limited by Rule 3.3(c), to prevent or to rectify the consequences of~~
12 ~~a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used~~
13 ~~without the lawyer's knowledge;~~

14 ~~(g) (5) permitted to comply with other law or a court order; and,~~

15 ~~(h) permitted when information has become generally known.~~

16 Comment

17 ~~The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the~~
18 ~~client not only facilitates the full development of facts essential to proper representation of the client~~
19 ~~but also encourages people to seek early legal assistance. Almost without exception, clients come~~
20 ~~to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations,~~
21 ~~deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow~~
22 ~~the advice given, and the law is upheld. In order to foster the continued willingness of clients to seek~~

1 ~~early counsel, to reveal freely to counsel all facts, and thus to assure that most conduct will be lawful;~~
2 ~~the law recognizes that the client's confidences must be protected from disclosure or improper use.~~

3 [1] This Rule governs the disclosure by a lawyer of information relating to the representation
4 of a client during and after the lawyer's representation of the client. See Rule 1.18 for the lawyer's
5 duties with respect to information provided to the lawyer by a potential client and Rules 1.8(b) and
6 1.9(c) for the lawyer's duties with respect to the use of such information to the disadvantage of clients
7 and former clients.

8 [2] A fundamental principle in the client-lawyer relationship is that the lawyer maintain
9 confidentiality of information relating to the representation must not reveal information relating to
10 the representation without the client's consent. While it is not a requirement, it is a preferable practice
11 to obtain the client's consent in writing when consent is given. This contributes to the trust that is
12 the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal
13 assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally
14 damaging subject matter. The lawyer needs this information to represent the client effectively and,
15 if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients
16 come to lawyers in order to determine their rights and what is, in the complex of laws and regulations,
17 deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow
18 the advice given, and the law is upheld.

19 [3] This principle of lawyer-client confidentiality is also given effect in by related law, such
20 as the attorney-client privilege, and the work product doctrine and the rule of confidentiality
21 established in professional ethics. The attorney-client privilege and work-product doctrine applies
22 apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise
23 required to produce evidence concerning a client. The rule of client-lawyer lawyer-client
24 confidentiality applies in situations other than those where evidence is sought from the lawyer through
25 compulsion of law. The confidentiality This rule applies not merely to matters communicated in
26 confidence by the client but also to all information relating to the representation, whatever its source.
27 A lawyer may not disclose or use to the disadvantage of a client such information except as
28 authorized or required or permitted by these Rules or other law. See also Scope.

1 [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a
2 client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal
3 protected information but could reasonably lead to the discovery of such information by a third
4 person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible
5 so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of
6 the client or the situation involved.

7 **Impliedly Authorized Disclosure**

8 [5] ~~Except to the extent that the client's instructions or special circumstances limit that~~
9 authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in
10 carrying out the representation. ~~For example, a lawyer may disclose information in litigation by~~
11 admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that
12 facilitates a satisfactory conclusion. Specific instructions from the client or special circumstances may
13 limit the lawyer's implied authority to make disclosures. ~~In some situations, for example, a lawyer may~~
14 be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that
15 facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's
16 practice, disclose to each other information relating to a client of the firm, unless the client has
17 instructed that particular information be confined to specified lawyers.

18 **Disclosure Adverse to Client**

19 ~~To the extent a client is aware that there are circumstances in which a lawyer is required or permitted~~
20 ~~to disclose the client's intentions, the client will be inhibited from revealing facts which would enable~~
21 ~~the lawyer to counsel against, and perhaps therefore effectively prevent, a course of action which~~
22 ~~would violate the rights of others. The public is thus better protected if full and open communication~~
23 ~~by the client is encouraged than if it is inhibited. The general rule of confidentiality is accepted~~
24 ~~because it provides that encouragement. In some circumstances, however, important as the principle~~
25 ~~of confidentiality is, it must give way to other interests, there are situations in which a lawyer must~~

1 reveal information relating to representation of the client, and other situations in which a lawyer must
2 be free to reveal such information.

3 ~~A lawyer is required to reveal information the lawyer believes necessary to prevent the client from~~
4 ~~committing an act the lawyer believes is likely to result in imminent death or imminent substantial~~
5 ~~bodily harm. This requirement exists even though the lawyer can never be certain of the client's~~
6 ~~intentions.~~

7 ~~A lawyer must have discretion to reveal information the lawyer reasonably believes necessary to~~
8 ~~prevent the client from committing criminal or fraudulent acts the lawyer reasonably believes are~~
9 ~~likely eventually to lead to the loss of another's life or to substantial bodily harm to another, or are~~
10 ~~likely to harm substantially the financial interests or property of another. Similarly there must be~~
11 ~~freedom to comply with law or an order of a court, to establish a claim or defense on the lawyer's~~
12 ~~behalf in disputes between the lawyer and the client, to establish a defense to allegations against the~~
13 ~~lawyer based on conduct involving the client, to permit the lawyer to respond in any proceeding~~
14 ~~concerning the lawyer's representation of the client, or to prevent or to rectify the consequences of~~
15 ~~a client's criminal or fraudulent act which the lawyer's services had furthered without the lawyer's~~
16 ~~knowledge.~~

17 ~~The lawyer must always seek to persuade the client to adopt a lawful course of action. When this~~
18 ~~attempt is not successful, and the lawyer is either required to reveal information relating to the~~
19 ~~representation of the client or permitted to reveal such information and determined to do so, the~~
20 ~~disclosure should be no greater than is required under the circumstances and tailored—both as to the~~
21 ~~quantity of information revealed and the manner of the revelation—to minimize to the extent~~
22 ~~practicable the adverse effect upon the client. A lawyer required to decide the manner in which to~~
23 ~~reveal information relating to the representation should consider the nature of the lawyer's relationship~~
24 ~~with the client and with those who might be injured by the client, the lawyer's own involvement in the~~
25 ~~transaction, and factors that may extenuate the conduct in question.~~

26 [6] Although the public interest is usually best served by a strict rule requiring lawyers to
27 preserve the confidentiality of information relating to the representation of their clients, the

1 confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of
2 life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain
3 death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered
4 imminently or if there is a present and substantial threat that a person will suffer such harm at a later
5 date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that
6 a client has accidentally discharged toxic waste into a town's water supply must reveal this
7 information to the authorities if there is a present and substantial risk that a person who drinks the
8 water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary
9 to eliminate the threat or reduce the number of victims.

10 [7] Paragraph (c)(1) is a limited exception to the rule of confidentiality that permits the lawyer
11 to reveal information to the extent necessary to enable affected persons or appropriate authorities to
12 prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably
13 certain to result in substantial injury to the financial or property interests of another and in furtherance
14 of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer
15 relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such
16 disclosure by refraining from the wrongful conduct. Although paragraph (c)(1) does not require the
17 lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the
18 lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the
19 lawyer's obligation or right to withdraw from the representation of the client in such circumstances,
20 and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information
21 relating to the representation in limited circumstances.

22 [8] Paragraph (c)(2) addresses the situation in which the lawyer does not learn of the client's
23 crime or fraud until after it has been consummated. Although the client no longer has the option of
24 preventing disclosure by refraining from the wrongful conduct, there will be situations in which the
25 loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the
26 lawyer may disclose information relating to the representation to the extent necessary to enable the
27 affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses.
28 Paragraph (c)(2) does not apply when a person who has committed a crime or fraud thereafter

1 employs a lawyer for representation concerning that offense.

2 **Disclosure to Secure Compliance Advice**

3 [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential
4 legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations,
5 disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out
6 the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(3) permits
7 such disclosure because of the importance of a lawyer's compliance with these Rules.

8 **Disclosure in Controversies Regarding the Lawyer's Conduct**

9 [10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's
10 conduct or other misconduct of the lawyer involving representation of the client, the lawyer may
11 respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true
12 with respect to a claim involving the conduct or representation of a former client. Such a charge can
13 arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly
14 committed by the lawyer against the client or on a wrong alleged by a third person, for example, a
15 person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right
16 to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not
17 require the lawyer to await the commencement of an action or proceeding that charges such
18 complicity, so that the defense may be established by responding directly to a third party who has
19 made such an assertion. The right to defend also applies, of course, where a proceeding has been
20 commenced.

21 [11] A lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered
22 in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a
23 fiduciary relationship may not exploit it to the detriment of the fiduciary.

24 **Disclosure Required by Law or Court Order**

1 [12] When disclosure of information relating to the representation appears to be required by
2 other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If the
3 other law requires disclosure, paragraph (c)(5) permits the lawyer to make such disclosures as are
4 necessary to comply with the law.

5 [13] A lawyer may be ordered to reveal information relating to the representation of a client
6 by a court or by another tribunal or governmental entity claiming authority pursuant to other law to
7 compel the disclosure. Absent the client's written consent to do otherwise, the lawyer should assert
8 on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the
9 information sought is protected against disclosure by the attorney-client privilege or other applicable
10 law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility
11 of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (c)(5)
12 permits the lawyer to comply with the court's order.

13 **Limits of Extent of Disclosure**

14 [14] Paragraph (b) requires and paragraph (c) permits disclosure only to the extent the lawyer
15 reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where
16 practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the
17 need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than
18 the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made
19 in connection with a judicial proceeding, the disclosure should be made in a manner that limits access
20 to the information to the tribunal or other persons having a need to know it and appropriate
21 protective orders or other arrangements should be sought by the lawyer to the fullest extent
22 practicable.

23 [15] Paragraph (c) permits but does not require the disclosure of information relating to a
24 client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(5). In
25 exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature
26 of the lawyer's relationship with the client and with those who might be injured by the client, the

1 lawyer's own involvement in the transaction and factors that may extenuate the conduct in question.
2 A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule.
3 Disclosure may be required, however, by other rules. Some rules require disclosure only if such
4 disclosure would be permitted by paragraph (c). See Rules 8.1 and 8.3. Rule 3.3, on the other hand,
5 requires disclosure in some circumstances regardless of whether such disclosure is permitted by this
6 Rule.

7 **Withdrawal**

8 ~~If the lawyer's services will be used by the client in materially furthering a course of criminal or~~
9 ~~fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1):~~

10 ~~After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences,~~
11 ~~except as otherwise provided in this Rule. This Rule, Rule 1.8(b), and Rule 1.16(c) do not prevent~~
12 ~~the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or~~
13 ~~disaffirm any opinion, document, affirmation, or the like:~~

14 ~~Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will~~
15 ~~actually be carried out by the organization. Where necessary to guide conduct in connection with this~~
16 ~~Rule, the lawyer may make inquiry within the organization (See Comment to Rule 1.13):~~

17 **Dispute Concerning Lawyer's Conduct**

18 ~~Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or~~
19 ~~other misconduct of the lawyer involving representation of the client, the lawyer may respond to the~~
20 ~~extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect~~
21 ~~to a claim involving the conduct or representation of a former client. The lawyer's right to respond~~
22 ~~arises when an assertion of such complicity has been made. Paragraph (c) does not require the lawyer~~
23 ~~to await the commencement of an action or proceeding that charges such complicity, so that the~~
24 ~~defense may be established by responding directly to a third party who has made such an assertion.~~
25 ~~The right to defend, of course, applies where a proceeding has been commenced. Where practicable~~

1 and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client
2 of the third party's assertion and request that the client respond appropriately. In any event,
3 disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate
4 innocence, the disclosure should be made in a manner which limits access to the information to the
5 tribunal or other persons having a need to know it, and appropriate protective orders or other
6 arrangements should be sought by the lawyer to the fullest extent practicable.

7 If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of
8 confidentiality should not prevent the lawyer from defending against the charge. Such a charge can
9 arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly
10 committed by the lawyer against the client, or on a wrong alleged by a third person, such as when a
11 person claims to have been defrauded by the lawyer and client acting together. A lawyer entitled to
12 a fee is permitted by paragraph (e) to prove the services rendered in an action to collect it. This
13 aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not
14 exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort
15 practicable to avoid unnecessary disclosure of information relating to a representation, to limit
16 disclosure to those having the need to know it, and to obtain protective orders or make other
17 arrangements minimizing the risk of disclosure.

18 Acting Competently to Preserve Confidentiality

19 [16] A lawyer must act competently to safeguard information relating to the
20 representation of a client against inadvertent or unauthorized disclosure by the lawyer or other
21 persons who are participating in the representation of the client or who are subject to the
22 lawyer's supervision. See Rules 5.1, 5.3 and 8.4(a).

23 [17] When transmitting a communication that includes information relating to the
24 representation of a client, the lawyer must take reasonable precautions to prevent the
25 information from coming into the hands of unintended recipients. This duty, however, does
26 not require that the lawyer use special security measures if the method of communication

1 affords a reasonable expectation of privacy. Special circumstances, however, may warrant
2 special precautions. Factors to be considered in determining the reasonableness of the lawyer's
3 expectation of confidentiality include the sensitivity of the information and the extent to which
4 the privacy of the communication is protected by law or by a confidentiality agreement. A
5 client may require the lawyer to implement special security measures not required by this Rule
6 or may give written consent to the use of a means of communication that would otherwise
7 be prohibited by this Rule.

8 **~~Lawyer Copying of Items Related to Representation~~**

9 ~~For the lawyer's own purposes, including facilitation of any revelation that might be permitted~~
10 ~~by paragraph (c), a lawyer is permitted to make copies of items in a file. The lawyer may~~
11 ~~charge the client for this copying only if allowed by Rule 1.19. The protection of this Rule,~~
12 ~~and the circumstances in which revelation is required or permitted, are applicable to the~~
13 ~~lawyer's copy or copies.~~

14 **~~Disclosures Otherwise Required or Authorized~~**

15 ~~This Rule and other provisions in these Rules (see Rules 2.2, 2.3, and 3.3), in some~~
16 ~~circumstances permit and in others require a lawyer to disclose information relating to the~~
17 ~~representation. In these instances, the obligation not to reveal is not breached by disclosure.~~

18 ~~Provisions in other law may seem to permit or require a lawyer to disclose information~~
19 ~~relating to a representation. Such a provision raises the legal issue of which directive takes~~
20 ~~precedence—the general rule of non-revelation found in this Rule or the provision in other~~
21 ~~law authorizing disclosure. It is the lawyer's obligation to disclose only when the precedence~~
22 ~~of the law authorizing disclosure is clear; an order of a court requiring or permitting~~
23 ~~disclosure is to be taken as a determination of that precedence.~~

24 ~~The attorney-client privilege is a protector of some matters related to the representation of~~
25 ~~a client, and, as to a part of the information possessed by a lawyer about a client, operates as~~
26 ~~an obligation of the lawyer not to reveal. However, the law of attorney-client privilege differs~~

1 ~~among the jurisdictions. If a lawyer is called as a witness to give testimony concerning a~~
2 ~~client, and the client has not consented to the disclosure or the disclosure is neither permitted~~
3 ~~nor required by these Rules, the lawyer must invoke the privilege to resist disclosure~~
4 ~~whenever the privilege is applicable. The failure to invoke the client's privilege in such~~
5 ~~circumstances is a violation of the obligation recognized in this Rule. If invocation of the~~
6 ~~privilege results in a ruling issued by a court or other tribunal of competent jurisdiction~~
7 ~~requiring the lawyer to disclose the information, the lawyer may comply, that compliance is~~
8 ~~not a violation of the obligation of confidence recognized in this Rule.~~

9 ~~Former Client~~

10 ~~The duty of confidentiality continues after the client-lawyer relationship has terminated~~

11 Lawyer Copying of Items Related to Representation

12 [18] For the lawyer's own purposes, including facilitation of any revelation that might
13 be permitted by paragraph (c), a lawyer is permitted to make copies of items in a file. The
14 lawyer may charge the client for this copying only if allowed by Rule 1.19. The protection
15 of this Rule, and the circumstances in which revelation is required or permitted, are applicable
16 to the lawyer's copy or copies.

17 Use of Confidential Information to the Disadvantage of Client or Former Client

18 [19] Use by the lawyer of confidential information to the disadvantage of a client or
19 former client is equivalent to revelation. This Rule and comment permits neither revelation
20 nor use to the disadvantage of a client except as required or permitted governed by the Rule
21 Rules 1.8(b) and 1.9.

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney
23 Standards Committee on 03/16/84, 05/23/84, 06/27/84, 08/17/84, 09/13/84, 10/19/84,
24 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85 and 03/15/86; Minutes of the Joint

1 Committee on Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00,
2 9/15/00, 11/17/00, and 6/12/01, 02/28/03, 02/27/04, 11/19/04, 06/14/05, 09/09/05.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

The Joint Committee proposes relatively minor changes to the black-letter Rule. A writing requirement is added to paragraphs (c)(2) and (d) regarding, respectively, client consent concerning representation of a client if representation may be adversely affected by competing interests and client consent to use of information to the disadvantage of the client. Paragraph (e) regarding the definition of "matter" is deleted and relocated to new Rule 1.0.

The Joint Committee proposes several changes to the Comment to incorporate Model Rule Comment provisions considered useful in assessing conflict situations. The changes to the Comment are intended to clearly describe how a conflict is analyzed. For purposes of applying the Rule, Comment [3] provides an explanation of what constitutes an adverse effect that would preclude representation of a client. Comment [4] clearly articulates the steps a lawyer should take in resolving a conflict of interest problem. Comments [11] and [12] offer specific explanations concerning the role and obligations of government lawyers. The balance of the proposed changes to the Comment reflect the Model Rule Comment or adaptations of the those Comment provisions to further explain the application of the current black-letter rule, as modified.

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

1 (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or
2 carry out a course of action on behalf of the client will be adversely affected by the lawyer's
3 responsibilities to another client or to a third person, or by the lawyer's own interests.

4 (b) A lawyer shall not represent a client when the lawyer's own interests are likely to
5 adversely affect the representation.

6 (c) A lawyer shall not represent a client if the representation of that client might be adversely
7 affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own
8 interests, unless:

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

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

15 (d) Except as required or permitted by Rule 1.6, a lawyer shall not use information relating
16 to representation of a client to the disadvantage of a client unless a client who would be
17 disadvantaged consents in writing after consultation.

18 ~~(e) As used in Rules 1.7 through 1.12, the term "matter" includes any judicial or other~~
19 ~~proceeding, application, request for a ruling or other determination, contract, claim, controversy,~~
20 ~~investigation, charge, accusation, arrest, or other particular matter involving a specific party.~~

21 **Comment**

1 **Loyalty to a Client**

2 Analysis of a Potential Conflict

3 [1] Loyalty ~~is an~~ and independent judgment are essential ~~element~~ elements in the lawyer's
4 relationship to a client. ~~An~~ If an impermissible conflict of interest ~~may exist~~ exists before
5 representation is undertaken, ~~in which event~~ the representation ~~should~~ ordinarily must be declined.
6 If such a conflict arises after representation has been undertaken, the lawyer should withdraw from
7 the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws
8 because a an impermissible conflict arises after representation, whether the lawyer may continue to
9 represent any of the clients is determined by Rule 1.9. ~~See also Rule 2.2(c).~~ As to whether a
10 ~~client-lawyer~~ lawyer-client relationship exists ~~or, having once been established, is continuing or~~
11 continues after having once been established. see Comment to Rule 1.3 ~~and Scope.~~

12 [2] Paragraphs (a), (b) and (c) of this ~~rule~~ Rule address three separate and distinct conflict
13 of interest situations. Paragraph (a) addresses the situation ~~where~~ in which the lawyer's own interests
14 or the lawyer's responsibilities to another client or to a third person *will* adversely affect the lawyer's
15 representation of a client ~~and paragraph.~~ Paragraph (b) addresses the situation ~~where~~ in which the
16 lawyer's own interests *are likely to* adversely affect the representation. In both of these conflict
17 situations, the lawyer is absolutely prohibited from undertaking or continuing representation of the
18 client. Paragraph (c) addresses the situation ~~where~~ in which the lawyer's own interests or the
19 lawyer's responsibilities to another client or to a third person simply *might* adversely affect the
20 lawyer's representation of a client. In this situation the lawyer is permitted to undertake the
21 representation if the lawyer reasonably believes there will be no adverse effect on the representation
22 and if the clients consent in writing after consultation.

23 ~~Loyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an~~
24 ~~appropriate course of action for the client because of the lawyer's other responsibilities or interests.~~

1 ~~The conflict in effect forecloses alternatives that would otherwise be available to the client. A~~
2 ~~possible conflict does not itself preclude the representation.~~

3 [3] An adverse effect is any material limitation on a lawyer's representation of a client
4 attributable to the lawyer's responsibilities to another client, to a former client, to a third person, or
5 arising from a personal interest of the lawyer. When a lawyer cannot consider, recommend, or carry
6 out an appropriate course of action for the client because of the lawyer's other responsibilities or
7 interests, the representation will be adversely affected and must be declined or terminated. The
8 conflict in effect forecloses alternatives that would otherwise be available to the client.

9 [4] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1)
10 clearly identify the client or clients; 2) determine whether a material limitation on the representation
11 of the client exists; 3) decide whether the representation may be undertaken despite the material
12 limitation, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected
13 under paragraph (c) and obtain their written consent. The clients affected under paragraph (c) include
14 any clients whose representations might be adversely affected. The critical questions are the
15 likelihood that a conflict material limitation will eventuate and, if it does, the likelihood the conflict;
16 will interfere with the lawyer's independent professional judgment in considering alternatives or
17 foreclose courses of action that reasonably should be pursued on behalf of the client. ~~In the situation~~
18 ~~involving the lawyer's own interest, if the conflict is likely to interfere, the lawyer is prohibited from~~
19 ~~undertaking the representation. In the situation involving the lawyer's responsibilities to another~~
20 ~~client or to a third person, the lawyer is prohibited from undertaking the representation only if the~~
21 ~~conflict will interfere.~~

22 **~~Consultation and Consent~~**

23 ~~A client may consent to representation notwithstanding that there might be a conflict. However, as~~
24 ~~indicated in paragraph (a) with respect to the lawyer's responsibilities to other clients or to third~~
25 ~~persons and the lawyer's own interests that will adversely affect the representation and in paragraph~~
26 ~~(b) with respect to the lawyer's own interests that are likely to affect adversely the representation, the~~
27 ~~lawyer involved cannot properly ask for such agreement or provide representation on the basis of the~~
28 ~~client's consent. Also, as indicated in paragraph (c)(1) with respect to the lawyer's responsibilities~~
29 ~~to other clients or to third persons and the lawyer's own interests that might adversely affect the~~

1 representation, the lawyer involved cannot ask for such agreement or provide representation on the
2 basis of the client consent when the lawyer reasonably concludes that the client should not agree to
3 the representation under the circumstances. When more than one client is involved, the question of
4 conflict must be resolved as to each client. Moreover, there may be circumstances where it is
5 impossible to make the disclosure necessary to obtain consent. For example, when the lawyer
6 represents different clients in related matters and one of the clients refuses to consent to the
7 disclosure necessary to permit the other client to make an informed decision, the lawyer cannot
8 properly ask the latter to consent.

9 Lawyer's Personal Interests

10 [5] A lawyer is required to exercise independent professional judgment in advising a client.

11 A lawyer is required to decline representation of a client if the lawyer's own financial, business,
12 property or personal interests are likely to affect adversely the advice to be given or services to be
13 rendered to the prospective a potential client. ~~A lawyer is required to exercise independent~~
14 ~~professional judgment in advising the client.~~ If the probity of a lawyer's own conduct in a transaction
15 is in serious question, it may be difficult or impossible for the lawyer to give a client detached
16 advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent
17 of the lawyer's client, or with a law firm representing the opponent, such discussions could materially
18 limit the lawyer's representation of the client. In addition, a lawyer may not allow related business
19 interests to affect representation, for example, by referring clients to an enterprise in which the
20 lawyer has an undisclosed financial interest. See Rule 1.8 for specific rules pertaining to a number
21 of personal interest conflicts, including business transactions with clients. See also Rule 1.10.

22 [6] In a situation involving the lawyer's own interests, if the conflict will interfere or is likely
23 to interfere, the lawyer is prohibited from undertaking the representation. In a situation involving
24 the lawyer's responsibilities to another client or to a third person, the lawyer is prohibited from
25 undertaking the representation only if the conflict will interfere. If, in the same situation, the conflict
26 only may interfere, the lawyer may go forward with the representation, but only in compliance with
27 paragraphs (c) (1) and (c)(2) of this rule.

1 ~~The lawyer's own interests are not permitted to have adverse effect on representation of a client. For~~
2 ~~example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be~~
3 ~~handled competently and at a reasonable fee. See Rules 1.1 and 1.5.~~

4 ~~A business interest of the lawyer might act to compromise the lawyer's ability to exercise that~~
5 ~~independent professional judgment and therefore limit the advice provided the client. A lawyer shall~~
6 ~~not allow related business interests to affect representation, for example, by referring clients to an~~
7 ~~enterprise in which the lawyer has an undisclosed interest.~~

8 [7] ~~Similarly, a lawyer's personal interests cannot be allowed to affect the representation. For~~
9 ~~example, a lawyer's personal relationship through marriage, blood, or otherwise, with the opposing~~
10 ~~counsel or the opposing client, may compromise the lawyer's ability to exercise the independent~~
11 ~~professional judgment required. The closer the relationship the more likely the adverse effect. When~~
12 ~~lawyers representing different clients in the same matter or in substantially related matters are closely~~
13 ~~related by blood or marriage, there may be a significant risk that client confidences will be revealed~~
14 ~~and that the lawyer's family relationship will interfere with both loyalty and independent professional~~
15 ~~judgment. Because of that risk, each client is entitled to know of the existence and implications of~~
16 ~~the relationship between the lawyers before the client agrees to the representation. Thus, where two~~
17 ~~lawyers are related, e.g., as parent, child, sibling or spouse, they ordinarily may not represent~~
18 ~~opposing parties unless each client consents in writing. The disqualification arising from a close~~
19 ~~family relationship is personal and ordinarily is not imputed to members of firms with whom the~~
20 ~~lawyers are associated. See Rule 1.10.~~

21 **Conflicts in Litigation**

22 [8] Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous
23 representation of parties whose interests in litigation may conflict, such as co-plaintiffs or
24 co-defendants, is governed by paragraph (c). An impermissible conflict may exist by reason of

1 substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an
2 opposing party or the fact that there are substantially different possibilities of settlement of the claims
3 or liabilities in question. Such conflicts can arise in criminal cases as well as in civil cases. The
4 potential for conflict of interest in representing multiple defendants in a criminal case is so grave that
5 ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand,
6 common representation of persons having similar interests in civil litigation is proper if the risk of
7 adverse effect is minimal and the requirements of paragraph (c) are met. ~~Compare Rule 2.2~~
8 ~~involving intermediation between clients.~~

9 [9] Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in
10 some other matter, even if the other matter is wholly unrelated. However, there are circumstances
11 in which a lawyer may act as an advocate against a client. For example, a lawyer representing an
12 enterprise with diverse operations may accept employment as an advocate against the enterprise in
13 an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise
14 or conduct of the suit and if both clients consent in writing after ~~upon~~ consultation. ~~By the same~~
15 ~~token, government lawyers in some circumstances may represent government employees in~~
16 ~~proceedings in which a government agency is the opposing party.~~ The propriety of concurrent
17 representation can depend on the nature of the litigation. For example, a suit charging fraud entails
18 conflict to a degree not involved in a suit for a declaratory judgment concerning statutory
19 interpretation.

20 [10] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a
21 class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the
22 lawyer for purposes of applying paragraph (c) of this Rule. Thus, the lawyer does not typically need
23 to get the consent of such a person before representing a client in an unrelated matter adverse (or
24 against) the unnamed member of the class. Similarly, a lawyer seeking to represent an opponent in
25 a class action does not typically need the consent of an unnamed member of the class whom the
26 lawyer represents in an unrelated matter.

1 [11] Under various legal provisions, including constitutional, statutory and common law,
2 the responsibilities of government lawyers may include authority concerning legal matters that
3 ordinarily reposes in the client in private lawyer-client relationships. For example, a lawyer for a
4 government agency may have authority on behalf of the government to decide upon settlement or
5 whether to appeal from an adverse judgment. Such authority in various respects is generally vested
6 in the attorney general and the state's attorney in state government, and their federal counterparts,
7 and the same may be true of other government law officers. Also, lawyers under the supervision of
8 these officers may be authorized to represent several government agencies in intragovernmental legal
9 controversies in circumstances where a private lawyer could not represent multiple private clients.
10 These Rules do not abrogate any such authority.

11 [12] Government lawyers in some circumstances may represent government employees in
12 proceedings in which a government agency is an opposing party. With the consent of the Attorney
13 General, lawyers representing the state in litigation as special assistant attorney s general may
14 represent other parties in other litigation against the state.

15 [13] A lawyer may represent parties having antagonistic positions on a legal question that has
16 arisen in different cases, unless representation of either client would be adversely affected. Thus,
17 it is ordinarily not improper to assert such differing positions in cases pending in different trial
18 courts, but it may be improper to do so in cases pending at the same time in an appellate court.

19 **Nonlitigation Conflicts**

20 [14] Conflicts of interest in contexts other than litigation may be difficult to assess. In
21 addition to conflicts arising from responsibilities to other current clients, a lawyer's duties of loyalty
22 and independence may be materially limited by responsibilities to former clients under Rule 1.9 or
23 by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's
24 service as a trustee, executor, or corporate director. Relevant factors in determining whether there
25 is potential for adverse effect include: the duration and intimacy of the lawyer's relationship with the
26 client, clients, or others involved; the functions being performed by the lawyer; the likelihood that

1 a conflict actually will arise; and the likely prejudice to the client from the conflict if it does arise.
2 The question is often one of proximity and degree.

3 [15] Conflict questions may arise in transactional matters. For example, if a lawyer is asked
4 to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the
5 same transaction but in another, unrelated matter, the lawyer could not undertake the representation
6 without the clients' consent in writing after consultation. In a negotiation, a lawyer may not
7 represent multiple parties whose interests are fundamentally antagonistic to each other. Common
8 representation is permissible, however, where the clients are generally aligned in interest even
9 though there is some difference of interest among them.

10 [16] Conflict questions may also arise in estate planning and estate administration. A lawyer
11 may be called upon to prepare wills for several family members, such as husband and wife. In that
12 situation, a conflict of interest may be present. In order to comply with conflict of interest rules, the
13 lawyer should make clear the lawyer's relationships to the parties involved.

14 [17] A lawyer for a corporation or other organization who is also a member of its board of
15 directors should determine whether the responsibilities of the two roles may conflict. The lawyer
16 may be called on to advise the corporation in matters involving actions of the directors.
17 Consideration should be given to the frequency with which such situations may arise, the potential
18 intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of
19 the corporation's obtaining legal advice from another lawyer in such situations. If there is material
20 risk that the dual role will compromise the lawyer's independence of professional judgment, the
21 lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts
22 of interest arise. The lawyer should advise the other members of the board that in some
23 circumstances matters discussed at board meetings while the lawyer is present in the capacity of
24 director might not be protected by the attorney-client privilege and that conflict of interest
25 considerations might require the lawyer's recusal as a director or might require the lawyer and the
26 lawyer's firm to decline representation of the corporation in a matter.

1 **Special Considerations in Common Representation**

2 [18] In considering whether to represent multiple clients in the same matter, a lawyer should
3 be mindful that if the common representation fails because the potentially adverse interests cannot
4 be reconciled, the result can be additional cost, embarrassment, and recrimination. Ordinarily, the
5 lawyer will be forced to withdraw from representing all of the clients if the common representation
6 fails. In some situations, the risk of failure is so great that multiple representation is plainly
7 impossible. For example, a lawyer cannot undertake common representation of clients where
8 litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer
9 is required to be impartial between commonly represented clients, representation of multiple clients
10 is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship
11 between the parties has already assumed antagonism, the possibility that the clients' interests can be
12 adequately served by common representation is low. Other relevant factors are whether the lawyer
13 subsequently will represent both parties on a continuing basis and whether the situation involves
14 creating or terminating a relationship between the parties.

15 [19] A particularly important factor in determining the appropriateness of common
16 representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With
17 regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented
18 clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between
19 the clients, the privilege will not protect any such communications, and the clients should be so
20 advised.

21 [20] As to the duty of confidentiality, continued common representation will almost certainly
22 be inadequate if one client asks the lawyer not to disclose to the other client information relevant to
23 the common representation. This is so because the lawyer has an equal duty of loyalty to each client,
24 and each client has the right to be informed of anything bearing on the representation that might
25 affect that client's interests and the right to expect that the lawyer will use that information to that
26 client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as
27 part of the process of obtaining each client's written consent, advise each client that information will

1 be shared and that the lawyer will have to withdraw if one client decides that some matter material
2 to the representation should be kept from the other. In limited circumstances, it may be appropriate
3 for the lawyer to proceed with the representation when the clients have agreed, after being properly
4 informed, that the lawyer will keep certain information confidential. For example, the lawyer may
5 reasonably conclude that failure to disclose one client's trade secrets to another client will not
6 adversely affect representation involving a joint venture between the clients and agree to keep that
7 information confidential with the consent of both clients.

8 [21] When seeking to establish or adjust a relationship between clients, the lawyer should
9 make clear that the lawyer's role is not that of partisanship normally expected in other circumstances
10 and, thus, that the clients may be required to assume greater responsibility for decisions than when
11 each client is separately represented. Any limitations on the scope of the representation made
12 necessary as a result of the common representation should be fully explained to the clients at the
13 outset of the representation. See Rule 1.2(c).

14 [22] Subject to the above limitations, each client in the common representation has the right
15 to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a
16 former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

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

18 [23] A lawyer may be paid from a source other than the client, if the client is informed of the
19 fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.
20 See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter
21 arising from a liability insurance agreement, and the insurer is required to provide special counsel
22 for the insured, the arrangement should assure the special counsel's professional independence. So
23 also, when a corporation and its directors or employees are involved in a controversy in which they
24 have conflicting interests, the corporation may provide funds for separate legal representation of the
25 directors or employees, if the ~~clients~~ directors or employees consent after consultation and the
26 arrangement ensures the lawyer's professional independence.

~~Other Conflict Situations~~

~~Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect 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 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.~~

~~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.~~

~~Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationships to the parties involved.~~

~~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.~~

Consultation and Consent

1 [24] In limited circumstances, a client may consent to representation notwithstanding that
2 there might be a conflict. The consent must be in writing after consultation. However, as indicated
3 in paragraph (a) with respect to the lawyer's responsibilities to other clients or to third persons and
4 the lawyer's own interests that will affect adversely the representation, and in paragraph (b) with
5 respect to the lawyer's own interests that are likely to affect adversely the representation, the lawyer
6 involved cannot properly ask for such agreement or provide representation on the basis of the client's
7 consent. Also, as indicated in paragraph (c)(1) with respect to the lawyer's responsibilities to other
8 clients or to third persons and the lawyer's own interests that might adversely affect the _____
9 representation, the lawyer involved cannot ask for such agreement or provide representation on the
10 basis of the client's consent when the lawyer cannot reasonably conclude that the lawyer will be able
11 to provide competent and diligent representation . When more than one client is involved, the _____
12 question of conflict must be resolved as to each client. Moreover, there may be circumstances where
13 it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer
14 represents different clients in related matters and one of the clients refuses to consent to the
15 disclosure necessary to permit the other client to make an informed decision, the lawyer cannot
16 properly ask the latter to consent.

17 **Consent in Writing**

18 [25] Paragraph (c) requires the lawyer to obtain the written consent of the client. If it is not
19 feasible to obtain the writing at the time the client gives consent, then the lawyer must obtain it
20 within a reasonable time thereafter. The requirement of a writing does not supplant the need in most
21 cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of _____
22 representation burdened with a conflict of interest, as well as reasonably available alternatives, and
23 to afford the client a reasonable opportunity to consider the risks and alternatives and to raise _____
24 questions and concerns.

25 **Revoking Consent**

1 [26] A client who has given consent to a conflict may revoke the consent and, like any other
2 client, may terminate the lawyer's representation at any time. Whether revocation of consent by one
3 client precludes the lawyer from continuing to represent other clients affected by the potential
4 conflict depends on the circumstances, including the nature of the conflict, whether the client
5 revoked consent because of a material change in circumstances, the reasonable expectations of the
6 other client, and whether material detriment to the other clients or the lawyer would result.

7 **Consent to Future Conflict**

8 [27] Only in rare circumstances may a lawyer properly request a client to waive a conflict that
9 may arise in the future. Advance waiver is not permissible for future conflicts described under
10 paragraphs (a) or (b) of this Rule. The effectiveness of such waivers in other circumstances is
11 generally determined by the extent to which the client reasonably understands the material risks that
12 the waiver entails. The more comprehensive the explanation of the types of future representations
13 that might arise and the actual and reasonably foreseeable adverse consequences of those
14 representations, the greater the likelihood that the client will have the requisite understanding. Thus,
15 if the client agrees to consent to a particular type of conflict with which the client is already familiar,
16 then the consent ordinarily will be effective with regard to that type of conflict. If the consent is
17 general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably
18 likely that the client will have understood the material risks involved. On the other hand, if the client
19 is an experienced user of the legal services involved and is reasonably informed regarding the risk
20 that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the
21 client is independently represented by other counsel in giving consent and the consent is limited to
22 future conflicts unrelated to the subject of the representation. In any case, advance consent cannot
23 be effective if the circumstances that materialize in the future are such as would make the conflict
24 one for which consent is not allowed under paragraph (c).

25 **Conflict Charged by an Opposing Party**

26 ~~Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking~~
27 ~~the representation. In litigation, a court may raise the question when there is reason to infer that the~~

1 ~~lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required~~
2 ~~when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in~~
3 ~~question the fair or efficient administration of justice, opposing counsel may properly raise the~~
4 ~~question. Such an objection should be viewed with caution, however, for it can be misused as a~~
5 ~~technique of harassment. See Scope.~~

6 **Definition of "Matter"**

7 ~~The term "matter" is used to describe a variety of legal proceedings, as indicated by paragraph (c).~~
8 ~~In some situations, this definition may be expanded by statutes or regulations. See Rule 1.11(c).~~

9 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
10 Committee on 08/17/84, 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85/04/26/85, 01/31/86, and
11 03/15/86; and Minutes of the Joint Committee on Attorney Standards on 02/28/03, 03/18/05,
12 06/14/05.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

The Joint Committee proposes changes to the black-letter Rule to incorporate certain Model Rule provisions and to generally follow the Model Rule structure. Significant portions of the current Rule are retained.

In keeping with the Joint Committee's conclusion not to follow the Model Rule's informed consent approach, a writing requirement is included at several points in the Rule: paragraph (a)(2), paragraph (b), and paragraph (g). The Joint Committee declined to propose a writing requirement for client consent under paragraph (f), which governs accepting compensation for representing a client from someone other than the client.

Proposed changes to paragraph (c) incorporate the Model Rule's definition of related persons for purposes of the prohibition against a lawyer preparing an instrument giving the lawyer or a person related to the lawyer a substantial gift from the client.

Paragraph (h) is modified to generally follow the Model Rule structure and to incorporate the reference to "potential claims" in paragraph (h)(2). The additional language clarifies that the Rule applies even when the client has not actually asserted a claim. The opening sentences of current paragraph (i) are relocated to paragraph (h)(1) and the remainder of paragraph (i) is deleted to follow the Model Rule.

New paragraph (i) generally prohibiting the acquiring of a proprietary interest in the cause of action is added to follow the Model Rule with the exception of including a reference to Rule 1.5 in paragraph (i)(2). The Rule reference is considered more useful than the Model Rule's general reference to a "reasonable" contingent fee.

Current paragraph (j) regarding the practice of law by a part-time prosecutor or judge is retained and relocated to paragraph (k).

New paragraph (j) incorporates the Model Rule provision generally prohibiting sexual relations with a client.

The Joint Committee proposes several changes to conform the Comment to the current Model Rule Comment. Comment [20] is retained in that it is related to new paragraph (k), a provision unique to the current Rule in addressing the practice of law by part-time prosecutors or judges.

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

1 (a) Except for standard commercial transactions involving products or services that the client
2 generally markets to others, a lawyer shall not enter into a business, financial, or property transaction
3 with a client unless:

4 (1) ~~The~~ the transaction is fair and reasonable to the client; and

5 (2) ~~After~~ after consultation, including written advice to seek independent counsel, the
6 client consents to the transaction in writing.

7 (b) Except as permitted or required in Rules 1.6 and 3.3, a lawyer shall not use information
8 relating to representation of a client to the disadvantage of the client ~~for purposes of furthering either~~
9 ~~the lawyer's or another person's interest~~ unless after consultation, including written advice to seek
10 independent counsel, the client consents in writing.

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

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

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

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

3 (2) ~~A~~ a lawyer representing an indigent client may pay court costs and expenses of
4 litigation on behalf of the client; and

5 (3) ~~A~~ a lawyer may guarantee a loan reasonably needed to enable the client to
6 withstand delay in litigation that would otherwise put substantial pressure on the
7 client to settle a case because of financial hardship rather than on the merits, provided
8 that the client remains ultimately liable for repayment of the loan without regard to
9 the outcome of the litigation and, further provided; that no promise of financial
10 assistance was made to the client by the lawyer, or by another in the lawyer's behalf,
11 prior to the employment of that lawyer by the client.

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

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

16 (2) information relating to representation of a client is protected as required by Rule
17 1.6; and

18 (3) after consultation, the client consents.

19 (g) A lawyer who represents two or more clients, other than in class actions, shall not
20 participate in making an aggregate settlement of the claims of or against the clients, or ~~in a criminal~~
21 ~~case~~ an aggregated agreement as to guilty pleas in a criminal case, unless, after consultation,

1 including disclosure of the existence and nature of all the claims or pleas involved and of the
2 participation of each person in the settlement, each client consents in writing.

3 (h) A lawyer shall not:

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

7 (2) settle a claim or potential claim for the lawyer's liability for malpractice with an
8 unrepresented client or former client unless, after consultation, including written
9 advice to seek independent counsel, the client or former client consents.

10 ~~(i) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to the~~
11 ~~a client for malpractice except in an emergency where:~~

12 ~~(1) referral to or consultation or association with another lawyer has been found to be~~
13 ~~impractical; or~~

14 ~~(2) the lawyer's advice to a client to seek consultation or association with another lawyer is~~
15 ~~unequivocally rejected; and~~

16 ~~(3) the immediate services of a lawyer who has advised the client that the lawyer does not~~
17 ~~have the ordinary skill required to give competent representation in the matter are unequivocally~~
18 ~~requested.~~

19
20 ~~(j) A part-time prosecutor or judge permitted by law to engage in the practice of law in~~
21 ~~addition to the part-time service shall not in that practice represent a client if the representation will~~
22 ~~or probably will require any pleading or appearance on the client's behalf.~~

1 ~~(1) If the lawyer is a part-time prosecutor and the client is charged or expects to be charged~~
2 ~~with crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment, and~~

3 ~~(2) If the lawyer is a part-time judge, in:~~

4 ~~(i) the court in which the judge holds appointment, or~~

5 ~~(ii) any court from which appeals may be brought to the court in which the judge~~
6 ~~holds appointment.~~

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

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

10 (2) contract with a client for a contingent fee in a civil case as permitted by Rule 1.5.

11 (j) A lawyer shall not have sexual relations with a client unless a consensual sexual
12 relationship existed between them when the client-lawyer relationship commenced.

13 (k) A part-time prosecutor or judge permitted by law to engage in the practice of law in
14 addition to the part-time service shall not, in that practice, represent a client if the representation will
15 or probably will require any pleading or appearance on the client's behalf:

16 (1) if the lawyer is a part-time prosecutor and the client is charged or expects to be
17 charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial
18 appointment; and

19 (2) if the lawyer is a part-time judge in:

1 (i) the court in which the judge holds appointment; or

2 (ii) any court from which appeals may be brought to the court in which the
3 judge holds appointment.

4 **Comment**

5 **Business Transactions Between Client and Lawyer**

6 ~~As a general principle, all transactions between client and lawyer should be fair and reasonable to~~
7 ~~the client. The lawyer has a duty to consult with the client about the transaction and any possible~~
8 ~~adverse consequences and to advise the client to seek review by independent counsel.~~

9 ~~Furthermore, a lawyer may not exploit information relating to the representation to the client's~~
10 ~~disadvantage. For example, a lawyer who has learned that the client is investing in specific real~~
11 ~~estate may not, without the client's consent, seek to acquire nearby property where doing so would~~
12 ~~adversely affect the client's plan for investment. Paragraph (a) [1] A lawyer's legal skill and~~
13 ~~training, together with the relationship of trust and confidence between lawyer and client, create the~~
14 ~~possibility of overreaching when the lawyer participates in a business, property or financial~~
15 ~~transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf~~
16 ~~of a client. The requirements of paragraph (a) must be met even when the transaction is not closely~~
17 ~~related to the subject matter of the representation, as when a lawyer drafting a will for a client learns~~
18 ~~that the client needs money for unrelated expenses and offers to make a loan to the client. This Rule~~
19 ~~applies to lawyers engaged in the sale of goods or services related to the practice of law, for example,~~
20 ~~the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See~~
21 ~~Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply~~
22 ~~to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although~~
23 ~~its requirements must be met when the lawyer accepts an interest in the client's business or other~~
24 ~~nonmonetary property as payment of all or part of a fee. This Rule does not, however, apply to~~
25 ~~standard commercial transactions between the lawyer and the client for products or services that the~~

1 client generally markets to others, ~~for~~ For example, in banking or brokerage services, medical
2 services, products manufactured or distributed by the client, and utilities services. ~~In such~~
3 transactions, the lawyer has no advantage in dealing with the client, and ; therefore, the restrictions
4 in paragraph (a) are unnecessary and impracticable.

5 [2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its
6 essential terms be communicated to the client in a manner that can be reasonably understood.
7 Paragraph (a)(2)
8 requires that the client also be advised, in writing, of the desirability of seeking the advice of
9 independent legal counsel and requires the lawyer to obtain the client's written consent. When
10 necessary, the lawyer should discuss both the material risks of the proposed transaction, including
11 any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives
12 and should explain why the advice of independent legal counsel is desirable.

13 [3] The risk to a client is greatest when the client expects the lawyer to represent the client
14 in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that
15 the lawyer's representation of the client will be materially limited by the lawyer's financial interest
16 in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the
17 requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the
18 lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and
19 participant in the transaction, such as the risk that the lawyer will structure the transaction or give
20 legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the
21 lawyer must obtain the client's written consent. In some cases, the lawyer's interest may be such that
22 Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

23 [4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule
24 is inapplicable. The fact that the client was independently represented in the transaction is relevant
25 in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1)
26 further requires.

1 **Use of Information Related to Representation**

2 [5] Use of information relating to the representation to the disadvantage of the client violates
3 the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the
4 lawyer or a third person, such as another client or business associate of the lawyer. For example, if
5 a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may
6 not use that information to purchase one of the parcels in competition with the client or to
7 recommend that another person make such a purchase. This Rule allows uses that do not
8 disadvantage the client. For example, a lawyer who learns a government agency's interpretation of
9 trade legislation during the representation of one client may properly use that information to benefit
10 other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client
11 gives written consent, after written advice to seek independent counsel. See Rules 1.6, 1.9(c), 8.1,
12 and 8.3.

13 ~~In dealing with confidential information of the client, the lawyer needs also to consult Rule 1.6 and~~
14 ~~Rule 3.3 in determining whether or not the lawyer may use information relating to the representation~~
15 ~~of a client to the disadvantage of that client. Rule 1.8(b) also requires that an attorney who~~
16 ~~contemplates using information relating to representation of a client received from a client in a~~
17 ~~manner disadvantageous to that client must advise that client to seek independent counsel.~~

18 **Gifts to Lawyers**

19 [6] A lawyer may accept a gift from a client, if the transaction meets general standards of
20 fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation
21 is permitted. In any event, due to concerns about overreaching and imposition on clients, a lawyer
22 may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where
23 the lawyer is related to the client as set forth in paragraph (c).

1 [7] If effectuation of a substantial gift requires preparing a legal instrument such as a will
2 or conveyance, ~~however, the client should have the detached advice that another lawyer can provide~~
3 that legal instrument must be prepared by a different lawyer under a separate representation .
4 Paragraph (c) recognizes an The sole exception to this Rule is where the client is a relative of the
5 donee ~~or the gift is not substantial~~.

6 [8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or
7 associate of the lawyer named as executor of the client's estate or to another potentially lucrative
8 fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest
9 provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the
10 appointment will materially limit the lawyer's independent professional judgment in advising the
11 client concerning the choice of an executor or other fiduciary. In obtaining the client's written
12 consent to the conflict, the lawyer should advise the client concerning the nature and extent of the
13 lawyer's financial interest in the appointment, as well as the availability of alternative candidates for
14 the position.

15 **Literary Rights**

16 [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct
17 of the representation creates a conflict between the interests of the client and the personal interests
18 of the lawyer. Measures suitable in the representation of the client may detract from the publication
19 value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a
20 client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist
21 of a share in ownership in the property, if the arrangement conforms to Rules 1.5 and 1.7.

22 **Financial Assistance to Client**

23 [10] Rule 1.8(e) recognizes the impact of finances on a client's access to the judicial system
24 and provides limited avenues to improve the client's financial ability to be represented by counsel

1 through negotiation or litigation or both without undue financial pressure to settle prematurely. This
2 provision is not to be interpreted as requiring lawyers to provide financial assistance to clients.

3 **Person Paying for Lawyer's Service**

4 ~~Rule 1.8(f) requires disclosure of the fact that the lawyer's services are being paid for by the third~~
5 ~~party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning~~
6 ~~confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may~~
7 ~~be obtained on behalf of the class by court-supervised procedure.~~

8 [11] Lawyers are frequently asked to represent a client under circumstances in which a third
9 person will compensate the lawyer, in whole or in part. The third person might be a relative or friend,
10 an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along
11 with one or more of its employees). Because third-party payers frequently have interests that differ
12 from those of the client, including interests in minimizing the amount spent on the representation
13 and in learning how the representation is progressing, lawyers are prohibited from accepting or
14 continuing such representations unless the lawyer determines that there will be no interference with
15 the lawyer's independent professional judgment, and there is consent from the client. See also Rule
16 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends,
17 employs or pays the lawyer to render legal services for another).

18 [12] Sometimes, it will be sufficient for the lawyer to obtain the client's consent regarding
19 the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement
20 creates a conflict of interest for the lawyer, the lawyer must comply with Rule 1.7. The lawyer must
21 also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7, a conflict
22 of interest exists if there is significant risk that the lawyer's representation of the client will be
23 materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's
24 responsibilities to the third-party payer (for example, when the third-party payer is a co-client). The
25 lawyer may accept or continue the representation with the written consent of each affected client only
26 if the conflict is one described in Rule 1.7(c).

1 **Aggregate Settlements**

2 [13] Differences in willingness to make or accept an offer of settlement are among the risks
3 of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the
4 risks that should be discussed before undertaking the representation as part of the process of
5 obtaining the clients' written consent. In addition, Rule 1.2(a) protects each client's right to have the
6 final say in deciding whether to accept or reject an offer of settlement and in deciding whether to
7 enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a
8 corollary of both these Rules and provides that, before any settlement offer or plea bargain is made
9 or accepted on behalf of multiple clients, the lawyer must inform each client about all the material
10 terms of the settlement, including what the other clients will receive or pay if the settlement or plea
11 offer is accepted. Lawyers representing a class of plaintiffs or defendants, or those proceeding
12 derivatively, may not have a full client-lawyer relationship with each member of the class;
13 nevertheless, such lawyers must comply with applicable rules regulating notification of class
14 members and other procedural requirements designed to ensure adequate protection of the entire
15 class.

16 **Lawyer Limiting Liability and Settling Malpractice Claims**

17 ~~Rule 1.8(i) provides that a lawyer cannot prospectively limit liability for negligence, except in an~~
18 ~~emergency. This exception is limited to situations in which employment of another lawyer is~~
19 ~~impractical or the client unequivocally rejects the lawyer's advice to seek other counsel. In all cases~~
20 ~~covered by paragraph 1.8(i), the client must unequivocally request the immediate services of the~~
21 ~~lawyer after the lawyer advises the client that the lawyer does not have the ordinary skill required~~
22 ~~to give competent representation. This exception is consistent with the comment to Rule 1.1.~~

23 [14] An agreement prospectively limiting a lawyer's liability for malpractice is prohibited
24 unless the client is independently represented in making the agreement because it is likely to
25 undermine competent and diligent representation. Also, many clients are unable to evaluate the
26 desirability of making such an agreement before a dispute has arisen, particularly if they are then

1 represented by the lawyer seeking the agreement. Paragraph (h) does not, however, prohibit a lawyer
2 from entering into an agreement with the client to arbitrate legal malpractice claims, provided such
3 agreements are enforceable and the client is fully informed of the scope and effect of the agreement.
4 Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity,
5 where permitted by law, provided that each lawyer remains personally liable to the client for his or
6 her own conduct and that the firm complies with any conditions required by law, such as provisions
7 requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an
8 agreement in accordance with Rule 1.2 that defines the scope of the representation, although a
9 definition of scope that makes the obligations of representation illusory will amount to an attempt
10 to limit liability.

11 [15] Agreements settling a claim or a potential claim for malpractice are not prohibited by
12 this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an
13 unrepresented client or former client, the lawyer must first advise such a person in writing of the
14 appropriateness of independent representation in connection with such a settlement. In addition, the
15 lawyer must give the client or former client a reasonable opportunity to find and consult independent
16 counsel.

17 **Acquiring Proprietary Interest in Litigation**

18 [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring
19 a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law
20 champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the
21 representation. In addition, when the lawyer acquires an ownership interest in the subject of the
22 representation, it will be more difficult for a client to discharge the lawyer if the client so desires.
23 The Rule is subject to specific exceptions developed in decisional law and continued in these Rules.
24 The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition,
25 paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses
26 and contracts for reasonable contingent fees. When a lawyer acquires by contract a security interest

1 in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition
2 is a business or financial transaction with a client and is governed by the requirements of paragraph
3 (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

4 **Lawyer-Client Sexual Relationships**

5 [17] The relationship between lawyer and client is a fiduciary one in which the lawyer
6 occupies the highest position of trust and confidence. The relationship is almost always unequal;
7 thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's
8 fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to
9 the client's disadvantage. In addition, such a relationship presents a significant danger that, because
10 of the lawyer's emotional involvement, the lawyer will be unable to represent the client without
11 impairment of the exercise of independent professional judgment. Moreover, a blurred line between
12 the professional and personal relationships may make it difficult to predict to what extent client
13 confidences will be protected by the attorney-client evidentiary privilege, since client confidences
14 are protected by privilege only when they are imparted in the context of the client-lawyer
15 relationship. Because of the significant danger of harm to client interests and because the client's own
16 emotional involvement renders it unlikely that the client could give adequate written consent, this
17 Rule prohibits the lawyer from having sexual relations with a client regardless of whether the
18 relationship is consensual and regardless of the absence of prejudice to the client.

19 [18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues
20 relating to the exploitation of the fiduciary relationship and client dependency are diminished when
21 the sexual relationship existed prior to the commencement of the client-lawyer relationship.
22 However, before proceeding with the representation in these circumstances, the lawyer should
23 consider whether the lawyer's ability to represent the client will be materially limited by the
24 relationship. See Rule 1.7.

1 [19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the
2 organization (whether inside counsel or outside counsel) from having a sexual relationship with a
3 constituent of the organization who supervises, directs or regularly consults with that lawyer
4 concerning the organization's legal matters.

5 **Law Practice by Part-Time Prosecutors and Part-Time Judges**

6 [20] Part-time prosecutors or part-time judges permitted by law to practice in addition to the
7 part-time service must not engage in ~~that practice in~~ matters which ~~that~~ compromise their public
8 functions. This rule identifies the circumstances in which the public function would be
9 compromised. ~~There is no~~ No compromise of the public function exists when a part-time municipal
10 prosecutor or judge defends persons charged with crime to be tried in another court, or when a
11 part-time state's attorney defends a person charged with a crime to be tried in another county.
12 Persons associated in the practice of law with a part-time prosecutor or judge may not, of course,
13 take on a representation denied to the part-time official by this Rule. See Rule 1.10. Other
14 considerations may prohibit a part-time judge or prosecutor, or another lawyer associated with the
15 part-time official in practice, from accepting or combining representations not specifically prohibited
16 by this Rule: ~~for.~~ For instance, even though a matter will be defended in a court other than the one
17 which the part-time official serves, ~~and thus would not be forbidden by this rule,~~ that matter ~~could~~
18 may still not be undertaken if it ~~involved~~ involves parties or issues with which the part-time official
19 had any involvement as a judge or prosecutor.

20 **~~Definition of "Matter"~~**

21 ~~For purposes of this Rule, the term "matter" is defined in Rule 1.7(e).~~

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
23 Committee on 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85, 09/20/85,
24 01/10/86, 01/31/86 and 03/15/86 ; Minutes of the Joint Committee on Attorney Standards on
25 02/28/03, 09/25/03, 11/14/03, 04/16/04, 08/06/04, 11/19/04, 06/14/05, 09/09/05.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

The Joint Committee proposes limited changes to the black-letter Rule.

Paragraph (b) is modified to include a writing requirement for a former client's consent to representation in a substantially related matter in which the person's interests are adverse to those of the former client.

Paragraph (c) is modified to permit a lawyer's use of information relating to the representation if the information has become generally known. This provision is relocated from Rule 1.6(h).

The Joint Committee proposes changes to the Comment to generally align the Comment with the Model Rule Comment.

RULE 1.9 CONFLICT OF INTEREST: FORMER CLIENT

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

2 (a) ~~Represent~~ represent another person in the same matter in which that person's interests are
3 materially adverse to the interests of the former client; or

4 (b) ~~Represent~~ represent another person in a substantially related matter in which that person's
5 interests are materially adverse to the interests of the former client unless the former client consents
6 after consultation; or

7 (c) ~~Use~~ use information relating to the representation to the disadvantage of the former client
8 in the same or a substantially related matter except as ~~Rule 1.6~~ these Rules would require or permit
9 with respect to a client, or when the information has become generally known.

10 Comment

11 [1] After termination of a ~~client-lawyer~~ lawyer-client relationship, a lawyer has certain
12 continuing duties with respect to confidentiality and conflicts of interest and thus may not represent
13 another client except in conformity with this Rule. ~~The principles in Rule 1.7 determine whether the~~
14 ~~interests of the present and former client are adverse. Thus~~ For example, a lawyer could not properly
15 seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a
16 lawyer who has prosecuted an accused person could not properly represent the accused in a
17 subsequent civil action against the government concerning the same transaction. Nor could a lawyer
18 who has represented multiple clients in a matter represent one of the clients against the others in the
19 same or a substantially related matter after a dispute arose among the clients in that matter, unless all
20 affected clients give written consent. See Comment [5]. Current and former government lawyers must
21 comply with this Rule to the extent required by Rule 1.11.

1 [2] ~~The term "matter" is defined by Rule 1.7(e).~~ The scope of a "matter" for purposes of this
2 Rule ~~may depend~~ depends on the facts of a particular situation or transaction. The lawyer's
3 involvement in a matter can be a question of degree. When a lawyer has been directly involved in a
4 specific transaction, subsequent representation of other clients with materially adverse interests in that
5 transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of
6 problem for a former client is not precluded from later representing another client in a wholly factually
7 distinct problem of that type even though the subsequent representation involves a position adverse
8 to the prior client. Similar considerations can apply to the reassignment of military lawyers between
9 defense and prosecution functions within the same military jurisdiction. The underlying question is
10 whether the lawyer was so involved in the matter that the subsequent representation can be justly
11 regarded as a changing of sides in the matter in question.

12 [3] Matters are "substantially related" for purposes of this Rule if they involve the same
13 transaction or legal dispute or if there otherwise is a substantial risk that confidential factual
14 information as would normally have been obtained in the prior representation would materially
15 advance the client's position in the subsequent matter. For example, a lawyer who has represented a
16 businessperson and learned extensive private financial information about that person may not then
17 represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously
18 represented a client in securing environmental permits to build a shopping center may not then
19 represent neighbors seeking to oppose rezoning of the property on the basis of environmental
20 considerations. However, the lawyer would not be precluded, on the grounds of substantial
21 relationship, from defending a tenant of the completed shopping center in resisting eviction for
22 nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to
23 the former client ordinarily will not be disqualifying. Information acquired in a prior representation
24 may have been rendered obsolete by the passage of time, a circumstance that may be relevant in
25 determining whether two representations are substantially related. In the case of an organizational
26 client, general knowledge of the client's policies and practices ordinarily will not preclude a
27 subsequent representation. On the other hand, knowledge of specific facts gained in a prior
28 representation that are relevant to the matter in question ordinarily will preclude such a

1 representation. A former client is not required to reveal the confidential information learned by the
2 lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the
3 subsequent matter. A conclusion about the possession of such information may be based on the nature
4 of the services the lawyer provided the former client and information that would in ordinary practice
5 be learned by a lawyer providing such services.

6 [4] Information Paragraph (c) provides that information acquired by the lawyer in the course
7 of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage
8 of the client. ~~in the same or a substantially related matter except as Rule 1.6 would require or permit.~~
9 ~~Rule 1.6(h) would permit a~~ However, the fact that a lawyer has once served a client does not preclude
10 the lawyer to use from using generally known information about a former that client when later
11 representing another client.

12 ~~The former client may consent to the lawyer's representation of an adverse party in a substantially~~
13 ~~related matter, but not to representation of an adverse party in the same matter. When consent is~~
14 ~~permitted, it is effective only after consultation with the client about the circumstances, including the~~
15 ~~lawyer's intended role in behalf of the new client.~~

16 ~~With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7.~~

17 ~~With regard to disqualification of a firm with which a lawyer is associated, see Rule 1.10.~~

18 [5] The provisions of this Rule are for the protection of former clients and can be waived if
19 the client gives written consent. With regard to the effectiveness of an advance waiver, see Comment
20 [27] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly
21 associated, see Rule 1.10.

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
23 Committee on 12/14/84, 02/08/85, 04/26/85, 08/23/85, 09/20/85 and 01/31/86; Minutes of the Joint
24 Committee on Attorney Standards on 11/14/03, 02/27/04, 11/19/04, 06/14/05, 09/09/05.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

The Joint Committee proposes two notable changes to the black-letter Rule.

Paragraph (a) is modified to incorporate the Model Rule language providing an exception from imputed conflicts based on personal interest. The language would eliminate imputation in the case of conflicts between a lawyer's own personal interest and the interest of a client. The Joint Committee also proposes adding a definition of "personal interest" that is adapted from the definition of personal interest set out in *The Law and Ethics of Lawyering*, 4th edition (p. 426), by Geoffrey Hazard.

Paragraph (b) is amended to more clearly articulate circumstances under which lawyers in a firm may represent a client if another lawyer in the firm is prohibited under Rule 1.9 from representing the client.

Paragraph (c)(3) is modified to include a reference to "has had access to" material information with respect to the prohibition against a firm representing a person if any lawyer in the firm has information protected by Rule 1.6. The proposed change responds to the impact of *Heringer v. Haskell*, 536 N.W.2d 362 (N.D.1995), which concluded that the disqualification under paragraph (c)(3) applied to situations in which a lawyer who has left a firm not only had information protected by the Rule, but also had access to the information. The language added to paragraph (c)(3) would explicitly address this situation.

Paragraph (d) is modified to include a writing requirement through which a client may consent to waive disqualification from representation if the representation does not involve a claim by one client against another client represented by the same firm in the same litigation or other proceeding.

The Joint Committee proposes changes to the Comment to conform to the black-letter Rule changes. Additionally, Comment [5] is added to complement the personal interest provisions included in paragraph (a). Comment [9] is modified to reflect the change to paragraph (c)(3). The definition of "matter" is deleted as it is now addressed in Rule 1.0.

RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

1 (a) Lawyers associated in a firm may not knowingly represent a client when any one of them
2 practicing alone would be prohibited from doing so by these rules, except as provided by Rule 1.11
3 or, Rule 1.12, 1.18, or 6.5, unless the prohibition is based on a personal interest of the prohibited
4 lawyer and does not present a significant risk of materially limiting the representation of the client
5 by the remaining lawyers in the firm. For purposes of this paragraph, a personal interest
6 disqualification is one created by a lawyer's interests other than those arising from the representation
7 of other clients or the owing of fiduciary duties to some third party.

8 (b) When a lawyer becomes associated with a firm, ~~the firm may not knowingly represent~~
9 ~~a person when~~ and the lawyer is prohibited from representing a client pursuant to Rule 1.9, other
10 lawyers in the firm may not thereafter represent the client unless:

11 (1) ~~The lawyer had previously represented a non-governmental client whose interests~~
12 ~~are materially adverse to that person~~ any confidential information communicated to
13 the lawyer is unlikely to be significant in the matter.

14 (2) ~~The matter is the same or is substantially related to that in which the lawyer~~
15 ~~represented the client~~ there is no reasonably apparent risk that any use of confidential
16 information of the former client will have a material adverse effect on the client:

17 (3) ~~The lawyer had acquired material information protected by Rule 1.6 while~~
18 ~~associated with a prior firm~~ the lawyer is timely screened from any participation in
19 the matter and is apportioned no part of the fee therefrom; and

20 (4) written notice is promptly given to all affected clients.

21 (c) When a lawyer has terminated an association with a firm, the firm may not thereafter
22 knowingly represent a person when:

1 (1) ~~The~~ the person has interests materially adverse to those of a non-governmental
2 client represented by the formerly associated lawyer;

3 (2) ~~The~~ the matter is the same or is substantially related to that in which the formerly
4 associated lawyer represented the client; and

5 (3) ~~Any~~ any lawyer remaining in the firm has or has had access to material
6 information protected by Rule 1.6.

7 (d) A disqualification prescribed by this rule may be waived by the affected client's consent
8 in writing after consultation, so long as the representation does not involve the assertion of a claim
9 by one client against another client represented by the same firm in the same litigation or other
10 proceedings before the tribunal.

11 Comment

12 Definition of "Firm"

13 [1] For purposes of ~~the these~~ Rules of Professional Conduct, the term "firm" ~~includes~~ denotes
14 lawyers in a private firm, and law partnership, professional corporation, sole proprietorship or other
15 association authorized to practice law; or lawyers employed in the a legal services organization or
16 the legal department of a corporation or other organization, ~~or in a legal services organization.~~ See.
17 Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the
18 specific facts. See, Rule 1.0, Comments [2] – [4]. ~~For example, two practitioners who share office~~
19 ~~space and occasionally consult or assist each other ordinarily would not be regarded as constituting~~
20 ~~a firm. However, if they present themselves to the public in a way suggesting that they are a firm~~
21 ~~or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The~~
22 ~~terms of any formal agreement between associated lawyers are relevant in determining whether they~~
23 ~~are a firm, as is the fact that they have mutual access to confidential information concerning the~~
24 ~~clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose~~

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

4 ~~[2] With respect to the law department of an organization, there is ordinarily no question that the~~
5 ~~members of the department constitute a firm within the meaning of the Rules of Professional~~
6 ~~Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not~~
7 ~~be clear whether the law department of a corporation represents a subsidiary or an affiliated~~
8 ~~corporation, as well as the corporation by which the members of the department are directly~~
9 ~~employed. A similar question can arise concerning an unincorporated association and its local~~
10 ~~affiliates.~~

11 ~~[3] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the~~
12 ~~same unit of a legal service organization constitute a firm, but not necessarily those employed in~~
13 ~~separate units. As in the case of independent practitioners, whether the lawyers should be treated as~~
14 ~~associated with each other can depend on the particular rule that is involved, and on the specific facts~~
15 ~~of the situation.~~

16 [2] When a lawyer has joined a private firm after having represented the government, the
17 situation is governed by Rule 1.11(a) and (b); where a lawyer represented the government after
18 having served private clients, the situation is governed by Rule 1.11(d). The individual lawyer
19 involved is bound by the ~~Rules~~ rules generally, including Rules 1.6, 1.7, and 1.9.

20 [3] Different provisions are thus made for movement of a lawyer from one private firm to
21 another and for movement of a lawyer between a private firm and the government. The government
22 is entitled to protection of its client confidences, and therefore to the protections provided in Rules
23 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to
24 former government lawyers, the potential effect on the government would be unduly burdensome.
25 The government deals with all private citizens and organizations, and thus has a much wider circle
26 of adverse legal interests than does any private law firm. In these circumstances, the government's
27 recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government.

1 On balance, therefore, the government is better served in the long run by the protections stated in
2 Rule 1.11.

3 **Principles of Imputed Disqualification**

4 [4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle
5 of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be
6 considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules
7 governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the
8 obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)
9 operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm
10 to another, the situation is governed by paragraphs (b) and (c).

11 **Personal Interest**

12 [5] A conflict of interest based upon a lawyer's personal interest will not impute to the
13 lawyer's law firm provided the personal interest falls within the definition included in this Rule and
14 to the extent usual concerns justifying imputation are not present. This exception applies only where
15 the prohibited lawyer does not personally represent the client in the matter and no other
16 circumstances suggest the conflict of the prohibited lawyer is likely to influence the work of others
17 in the firm.

18 **Lawyers Moving Between Firms**

19 [6] When lawyers have been associated in a firm ~~but then~~ and end their association, ~~however,~~
20 the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no
21 longer wholly realistic. There are several competing considerations. First, the client previously
22 represented must be reasonably assured that the principle of loyalty to the client is not compromised.
23 Second, the rule of disqualification should not be so broadly cast as to preclude other persons from
24 having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably
25 hamper lawyers from forming new associations and taking on new clients after having left a previous
26 association. In this connection, it should be recognized that today many lawyers practice in firms,

1 that many to some degree limit their practice to one field or another, and that many move from one
2 association to another several times in their careers. If the concept of imputed disqualification were
3 defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers
4 to move from one practice setting to another and of the opportunity of clients to change counsel.

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

14 ~~The other rubric formerly used for dealing with vicarious disqualification is the appearance of~~
15 ~~impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This~~
16 ~~rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new~~
17 ~~client-lawyer relationship that might make a former client feel anxious. If that meaning were~~
18 ~~adopted, disqualification would become little more than a question of subjective judgment by the~~
19 ~~former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is~~
20 ~~question-begging. It therefore has to be recognized that the problem of imputed disqualification~~
21 ~~cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very~~
22 ~~general concept of appearance of impropriety.~~

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

26 Confidentiality

1 [7] Preserving confidentiality is a question of access to information. Access to information,
2 in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions,
3 or working presumptions that reasonably may be made about the way in which lawyers work
4 together. A lawyer may have general access to files of all clients of a law firm and may regularly
5 participate in discussions of their affairs: it should be inferred that such a lawyer in fact is privy to
6 all information about all the firm's clients. In contrast, another lawyer may have access to the files
7 of only a limited number of clients and participate in discussion of the affairs of no other clients; in
8 the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to
9 information about the clients actually served but not those of other clients.

10 [8] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such
11 inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

12 [9] Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has
13 ~~acquired~~ or has had access to, material information protected by Rule 1.6. Thus, if a lawyer while
14 with one firm ~~acquired no~~ did not have access to material information relating to a particular non-
15 governmental client of the firm; and that lawyer later joined another firm, neither the lawyer
16 individually nor the second firm is disqualified from representing another client in the same or a
17 substantially related matter even though the interests of the two clients conflict. Situations involving
18 lawyers who represent governmental clients and those involving former judges or other adjudicative
19 officers are covered by Rule 1.11 and Rule 1.12, respectively.

20 [10] Independent of the question of disqualification of a firm, a lawyer changing professional
21 association has a continuing duty to preserve confidentiality of information about a client formerly
22 represented. See Rules 1.6 and 1.9.

23 **Adverse Positions**

24 [11] The second aspect of loyalty to client is the lawyer's obligation to decline subsequent
25 representations involving positions adverse to a former client arising in the same or substantially
26 related matters. This obligation requires abstention from adverse representation by the individual
27 lawyer involved, but does not necessarily entail abstention of other lawyers through imputed

1 disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a) and (b). Thus, if a
2 lawyer left one firm for another, the new affiliation would not preclude the firms involved from
3 continuing to represent clients with adverse interests in the same or substantially related matters, so
4 long as the conditions of Rule 1.10(b) and (c) concerning confidentiality have been met.

5 **~~Definition of "Matter"~~**

6 ~~For the purposes of this Rule, the term "matter" is defined by Rule 1.7(c).~~

7 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
8 Committee on 12/14/84, 04/26/85, 09/20/85 and 01/31/86; Minutes of the Joint Committee on
9 Attorney Standards on 04/16/04, 08/06/04, 11/19/04, 06/14/05, 09/09/05.

RULE 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule.

The proposed change to paragraph (a)(1) clarifies that a former government lawyer is subject to Rule 1.9(c) regarding confidentiality of information relating to the former representation of a government client. Paragraph (a)(2) requires consent from the government agency before a former government lawyer may represent a client in connection with a matter in which the lawyer participated as a public officer or employee.

Proposed changes to paragraph (b) clarify that conflicts under paragraph (a), including former client conflicts, are not imputed to other associated lawyers when the individual lawyer is properly screened and written notice is promptly given to the appropriate government agency.

Proposed changes to paragraph (c) generally preclude representation of a private client with adverse interests to a person about whom a lawyer has received confidential government information while a public officer or employee. A definition of "confidential government information" is provided. A screening provision is also included.

Proposed changes to paragraph (d) address situations in which a private lawyer moves to government employment. The language provides that a lawyer serving as a current public officer or employee is subject to Rules 1.7 and 1.9 and cannot participate in a matter in which the lawyer participated while in private practice, unless the government agency consents. Limitations are placed on the lawyer's ability to negotiate private employment with any person involved as a party or lawyer in a matter in which the lawyer participated. A definition of "matter" is included in paragraph (e).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

**RULE 1.11 SUCCESSIVE GOVERNMENT
AND PRIVATE EMPLOYMENT**

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

7 (1) ~~The disqualified lawyer is screened from any participation in the matter and is~~
8 ~~apportioned no part of the fee therefrom~~ is subject to Rule 1.9(c); and

9 (2) ~~Written notice is promptly given to the appropriate government agency shall not~~
10 ~~otherwise represent a client in connection with a matter in which the lawyer~~
11 ~~participated personally and substantially as a public officer or employee, unless the~~
12 ~~appropriate government agency consents to the representation.~~

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

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

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

3 (c) Except as law may otherwise expressly permit, ~~a lawyer serving as a public officer or~~
4 ~~employee shall not negotiate for private employment with any person who is involved as a party or~~
5 ~~as attorney for a party in a matter in which the lawyer is participating personally and substantially~~
6 ~~except as provided by Rule 1.12(b) a lawyer having information that the lawyer knows is confidential~~
7 ~~government information about a person acquired when the lawyer was a public officer or employee~~
8 ~~may not represent a private client whose interests are adverse to that person in a matter in which the~~
9 ~~information could be used to the material disadvantage of that person. As used in this Rule,~~
10 ~~"confidential government information" means information that has been obtained under~~
11 ~~governmental authority and which, at the time this Rule applied, the government is prohibited by law~~
12 ~~from disclosing to the public or has a legal privilege not to disclose and which is not otherwise~~
13 ~~available to the public. A firm with which that lawyer is associated may undertake or continue~~
14 ~~representation in the matter only if the disqualified lawyer is timely screened from any participation~~
15 ~~in the matter and is apportioned no part of the fee therefrom.~~

16 (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public
17 officer or employee; ~~shall not participate in a matter in which the lawyer participated personally and~~
18 ~~substantially while in private practice or nongovernment employment, unless under applicable law~~
19 ~~no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter and;~~
20 ~~all persons and entities involved in the former representation consent. If these conditions cannot be~~
21 ~~met, the lawyer must resign public office or employment~~

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

23 (2) shall not:

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

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

10 (e) As used in this rule, the term "matter" includes: ~~in addition to the definition in Rule 1.7(e);~~
11 ~~any matter covered by the conflict of interest rules of the appropriate government agency ;~~

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

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

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

21 **Comment**

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

3 [1] A lawyer representing a government agency, whether employed or specially retained by
4 the government, who has served or is currently serving as a public officer or employee is subject to
5 these Rules, including the prohibition against representing adverse interests stated in Rule 1.7 and
6 the protections afforded former clients in Rule 1.9. In addition, such a lawyer is may be subject to
7 Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes
8 and regulations may circumscribe the extent to which the government agency may give consent
9 under this Rule.

10 [2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who
11 has served or is currently serving as an officer or employee of the government toward a former
12 government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this
13 Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that
14 provides for screening and notice. Because of the special problems raised by imputation within a
15 government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an
16 officer or employee of the government to other associated government officers or employees,
17 although ordinarily it will be prudent to screen such lawyers.

18 [3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former
19 client and are thus designed not only to protect the former client, but also to prevent a lawyer from
20 exploiting public office for the advantage of another client. For example, a lawyer who has pursued
21 a claim on behalf of the government may not pursue the same claim on behalf of a later private client
22 after the lawyer has left government service, except when authorized to do so by the government
23 agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client
24 may not pursue the claim on behalf of the government, except when authorized to do so by paragraph
25 (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest
26 addressed by these paragraphs.

1 ~~Where~~ This Rule represents a balancing of interests. On the one hand, where the
2 successive clients are a public government agency and a private another client, public or private, the
3 risk exists that power or discretion vested in that agency public authority might be used for the
4 special benefit of a private the other client. A lawyer should not be in a position where benefit to
5 ~~a private the other client~~ might affect performance of the lawyer's professional functions on behalf
6 of ~~public authority the government~~. Also, unfair advantage could accrue to the ~~private other~~ client
7 by reason of access to confidential government information about the client's adversary obtainable
8 only through the lawyer's government service. ~~However~~ On the other hand, the rules governing
9 lawyers presently or formerly employed by a government agency should not be so restrictive as to
10 inhibit transfer of employment to and from the government. The government has a legitimate need
11 to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government
12 lawyer is disqualified only from particular matters in which the lawyer participated personally and
13 substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the
14 disqualification rule from imposing too severe a deterrent against entering public service. The
15 limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or
16 parties, rather than extending disqualification to all substantive issues on which the lawyer worked,
17 serves a similar function.

18 [5] When a lawyer has been employed by ~~the client is an agency of~~ one government agency
19 and then moves to a; that second government agency should be treated it may be appropriate to treat
20 the second agency as a private another client for purposes of this Rule if ~~the lawyer thereafter~~
21 represents an agency of another government, as e.g., when a lawyer represents is employed by a city
22 and subsequently is employed by a federal agency. However, because the conflict of interest is
23 governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b)
24 requires a law firm to do. The question of whether two government agencies should be regarded as
25 the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See
26 Rule 1.13 Comment[9].

1 [6] Paragraphs (a)(1) and (b) and (c) contemplate a screening arrangement. See Rule 1.0(n)
2 (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving
3 a salary or partnership share established by prior independent agreement. They prohibit, but the
4 lawyer may not receive compensation directly relating the attorney's compensation to the fee in the
5 matter in which the lawyer is disqualified.

6 [7] Notice, including a description of the screened lawyer's prior representation and of the
7 screening procedures employed, should be given as soon as practicable after the need for screening
8 becomes apparent.

9 ~~Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when~~
10 ~~premature disclosure would injure the client; a requirement for premature disclosure might preclude~~
11 ~~engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in~~
12 ~~order that the government agency will have a reasonable opportunity to take appropriate action if it~~
13 ~~believes the lawyer is not complying with this Rule.~~

14 [8] Paragraph (b) (c) operates only when the lawyer in question has knowledge of the
15 information, which means actual knowledge; it does not operate with respect to information that
16 merely could be imputed to the lawyer.

17 [9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party
18 and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by
19 law.

20 ~~Paragraphs (c) and (d) do not disqualify other lawyers in the agency with which the lawyer in~~
21 ~~question has become associated:~~

22 ~~The term "matter" is defined by Rule 1.7(c). That definition may be expanded for the purposes of~~
23 ~~this Rule by government agencies' conflict of interest rules.~~

1 *Reference:* Minutes of the Professional Conduct Study Subcommittee of the Attorney Standards
2 Committee on 04/26/85, 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney
3 Standards on 11/14/03, 11/19/04, 06/14/05, 09/09/05.

RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR, ADJUDICATIVE OFFICER, THIRD-PARTY NEUTRAL, AND LAW CLERK

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule, with one exception, in broadening application to include arbitrators, mediators, and third-party neutrals.

The proposed changes extend the listing of affected positions to paragraph (b), while the Model Rule does not. Paragraph (a) incorporates a writing requirement for party consent to representation. The changes to paragraph (c)(1) and (2) regarding timely screening and notice reflect the Model Rule. Paragraph (d) is retained unchanged as it is the same as the Model Rule provision.

The Joint Committee proposes changes to the Comment to conform to the Model Rule. Comment [2] explains the expanded application of paragraph (a) to arbitrators, mediators, and third-party neutrals. Comment [3] discusses the rationale for imputing the conflicts of a personally disqualified lawyer unless there is compliance with paragraph (c). Comment [4] addresses the requirements imposed by paragraph (c) and cross-references the definition of screening in Rule 1.0. Comment [5] discusses requirements imposed under paragraph (c)(2).

**RULE 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR,
ADJUDICATIVE OFFICER, THIRD-PARTY NEUTRAL, AND LAW CLERKS**

1 (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with
2 a matter in which the lawyer participated personally and substantially as a judge or other adjudicative
3 officer; ~~arbitrator~~ or law clerk to such a person, or as an arbitrator, mediator, or other third-party
4 neutral, unless all parties to the proceeding consent in writing after consultation.

5 (b) A lawyer shall not negotiate for employment with any person who is involved as a party
6 or as attorney for a party in a matter in which the lawyer is participating personally and substantially
7 as a judge or other adjudicative officer; ~~or arbitrator, mediator, or other third-party neutral~~. A lawyer
8 serving as a law clerk to a judge; ~~or other adjudicative officer or, arbitrator, mediator, or other third-~~
9 party neutral may negotiate for employment with a party or attorney involved in a matter in which
10 the clerk is participating personally and substantially, but only after the lawyer has notified the judge;
11 ~~or other adjudicative officer or, arbitrator, mediator, or other third-party neutral~~.

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

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

16 (2) ~~Written~~ written notice is promptly given to the parties and any appropriate tribunal
17 to enable them to ascertain compliance with the provisions of this rule.

18 (d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not
19 prohibited from subsequently representing that party.

20 **Comment**

1 [1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies
2 that a judge who was a member of a multimember court, and thereafter left judicial office to practice
3 law, is not prohibited from representing a client in a matter pending in the court, but in which the
4 former judge did not participate. So also the fact that a former judge exercised administrative
5 responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where
6 the judge had previously exercised remote or incidental administrative responsibility that did not affect
7 the merits. The term "adjudicative officer" includes such officials as judges pro tempore, referees,
8 special masters, hearing officers and other parajudicial officers, ~~mediators, fact finders, conciliators,~~
9 and also lawyers who serve as part-time judges. ~~The compliance section of the Rules of Judicial~~
10 ~~Conduct Paragraphs (A)(2), (B)(2) and (C) of the Compliance section of the North Dakota Code of~~
11 ~~Judicial Conduct~~ provide that a part-time judge, judge pro tempore or retired judge recalled to active
12 service, may not "act as a lawyer in a proceeding in which the person has served as a judge or in any
13 other proceeding related thereto." ~~This rule is consistent with the Rules of Judicial Conduct.~~

14 [2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party
15 neutrals may be asked to represent a client in a matter in which the lawyer participated personally and
16 substantially. This Rule forbids such representation unless all of the parties to the proceedings give
17 their consent in writing. See Rule 1.0(b). Other law or codes of ethics governing third-party neutrals
18 may impose more stringent standards of personal or imputed disqualification. See Rule 2.3.

19 [3] Although lawyers who serve as third-party neutrals do not have information concerning
20 the parties that is protected under Rule 1.6, they typically owe the parties an obligation of
21 confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c)
22 provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law
23 firm unless the conditions of that paragraph are met.

24 [4] Requirements for screening procedures are stated in Rule 1.0(n). Paragraph (c)(1) does
25 not prohibit the screened lawyer from receiving a salary or partnership share established by prior

1 independent agreement, but that lawyer may not receive compensation directly related to the matter
2 in which the lawyer is disqualified.

3 [5] Notice, including a description of the screened lawyer's prior representation and of the
4 screening procedures employed, should be given as soon as practicable after the need for screening
5 becomes apparent.

6 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
7 Committee on 04/26/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
8 11/14/03, 11/19/04, 06/14/05, 09/09/05.

RULE 1.13 ORGANIZATION AS CLIENT

The Joint Committee proposes changes to the black-letter Rule to incorporate post-Ethics 2000 changes to the Model Rule and, as a result, align the current Rule with the Model Rule. The Rule is intended to guide lawyers in the proper handling of their role in the lawyer-client relationship when the client is an entity, rather than a person. The post-Ethics 2000 changes to the Model Rule were in response to the Sarbanes-Oxley Act enacted in 2002 which imposed greater obligations on lawyers to report certain violations of their corporate clients. These "up the ladder" reporting requirements or considerations are addressed in the Comment to the current Rule.

The proposed changes to paragraph (b) incorporate in the black-letter Rule the Model Rule's requirement that a lawyer report an employer's misconduct "up the ladder".

Language added to paragraph (c) also permits a lawyer to reveal information relating to representation of the organization if the highest authority in the organization does not address a violation of law or an obligation to the organization.

Proposed changes to paragraph (d) provide an exception to the permitted revelation under paragraph (c). Changes to paragraph (e) require the lawyer to take reasonable steps to inform the highest authority in the organization if the lawyer reasonably believes the lawyer has been discharged for actions taken under paragraph (b) or (c).

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 1.13 ORGANIZATION AS CLIENT

1 (a) A lawyer employed or retained by an organization represents the organization acting
2 through its duly authorized constituents.

3 (b) If a lawyer for an organization knows that an officer, employee or other person associated
4 with the organization is engaged in action, intends to act or refuses to act in a matter related to the
5 representation that is a violation of a legal obligation to the organization, or a violation of law that
6 reasonably might be imputed to the organization, and that is likely to result in substantial injury to the
7 organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the
8 organization. Unless the lawyer reasonably believes that it is not necessarily in the best interest of
9 the organization to do so, the lawyer shall refer the matter to the highest authority in the organization,
10 including, if warranted by the circumstances, to the highest authority that can act on behalf of the
11 organization as determined by applicable law.

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

- 13 (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority
14 that can act on behalf of the organization insists upon or fails to address in a timely
15 and appropriate manner an action, or a refusal to act, that is clearly a violation of law,
16 and
17 (2) the lawyer reasonably believes that the violation is reasonably certain to result in
18 substantial injury to the organization

19 then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits
20 such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent
21 substantial injury to the organization.

22 (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's
23 representation of an organization to investigate an alleged violation of law, or to defend the

1 organization or an officer, employee, or other consultant associated with the organization against a
2 claim arising out of an alleged violation of law.

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

8 **(b) (f)** In dealing with an organization's directors, officers, employees, members, shareholders
9 or other constituents, a lawyer shall explain the identity of the client when the lawyer reasonably
10 believes that the organization's interests are or are likely to become adverse to those of the
11 constituents with whom the lawyer is dealing.

12 **(c) (g)** A lawyer representing an organization may also represent any of its directors, officers,
13 employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the
14 organization's consent to the dual representation is required by Rule 1.7, the consent shall be given
15 by an appropriate constituent of the organization other than the individual who is to be represented.

16 **Comment**

17 **The Entity as the Client**

18 **[1]** An organizational client is a legal entity, but it cannot act except through its officers,
19 directors, employees, shareholders and other constituents. Officers, directors, employees and
20 shareholders are the constituents of the corporate organizational client. The duties defined in this
21 **Comment Rule** apply equally to unincorporated associations. "Other constituents" as used in this

1 ~~Comment~~ Rule means the positions equivalent to officers, directors, employees and shareholders held
2 by persons acting for other organizational clients that are not corporations.

3 [2] When one of the constituents of an organizational client communicates with the
4 organization's lawyer in that person's organizational capacity, the communication is protected by Rule
5 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations
6 of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's
7 employees or other constituents are covered by Rule 1.6. This does not mean, however, that
8 constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to
9 such constituents information relating to the representation except for disclosures explicitly or
10 impliedly authorized by the organizational client in order to carry out the representation or as
11 otherwise permitted by Rule 1.6.

12 ~~In determining how to proceed pursuant to Rule 1.6, the lawyer should consider the seriousness of~~
13 ~~the violation and its consequences, the scope and nature of the lawyer's representation, the~~
14 ~~responsibility in the organization and the apparent motivation of the person involved, the policies of~~
15 ~~the organization concerning such matters, and any other relevant considerations.~~

16 [3] When constituents of the organization make decisions for it, the decisions ordinarily must
17 be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy
18 and operations, including ones entailing serious risk, are not as such in the lawyer's province.
19 ~~However, different considerations arise when the lawyer knows that the organization may be~~
20 ~~substantially injured by action of a constituent that is in violation of law or the bylaws of the~~
21 ~~organization. In such a circumstance, it may be reasonably necessary for the lawyer to ask the~~
22 ~~constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and~~
23 ~~importance to the organization, it may be reasonably necessary for the lawyer to take steps to have~~
24 ~~the matter reviewed by a higher authority in the organization. Clear justification should exist for~~
25 ~~seeking review over the head of the constituent normally responsible for it. The stated policy of the~~
26 ~~organization may define circumstances and prescribe channels for such review, and a lawyer should~~

1 encourage the formulation of such a policy. Even in the absence of organization policy, however, the
2 lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of
3 the matter and whether the constituent in question has apparent motives to act at variance with the
4 organization's interest. Review by the chief executive officer or by the board of directors may be
5 required when the matter is of importance commensurate with their authority. At some point it may
6 be useful or essential to obtain an independent legal opinion. When an officer or other constituent acts
7 in a manner that violates a legal obligation to the organization or violates the law in a way that might
8 be imputed to the organization, and the lawyer knows that the organization is likely to be substantially
9 injured by such acts, paragraph (b) requires the lawyer to proceed as is reasonably necessary in the
10 best interest of the organization. Knowledge can be inferred from a person's conduct in the
11 circumstances, and a lawyer cannot ignore the obvious. The terms "reasonable" and "reasonably"
12 imply a range within which the lawyer's conduct will satisfy the requirements of this Rule. In
13 determining what is reasonable in the best interest of the organization, the circumstances at the time
14 of determination are relevant. Such circumstances may include, among others, the lawyer's area of
15 expertise, the time constraints under which the lawyer is acting, and the lawyer's previous experience
16 and familiarity with the client. For example, the facts suggesting a violation may be part of a large
17 volume of information that the lawyer has insufficient time to comprehend fully. Or the facts known
18 to the lawyer may be sufficient to signal the likely existence of a violation to an expert in a particular
19 field of law but not to a lawyer who works in another specialty. Under such circumstances the lawyer
20 would not have an obligation to proceed under paragraph (b).

21 [4] In determining how to proceed under paragraph (b), the lawyer should give due
22 consideration to the seriousness of the violation and its consequences, the responsibility in the
23 organization and the apparent motivation of the person involved, the policies of the organization
24 concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher
25 authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer
26 to ask the constituent to reconsider the matter; for example, if the circumstances involve a
27 constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice,
28 the lawyer may reasonably conclude that the best interest of the organization does not require that
29 the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's

1 advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher
2 authority in the organization. If the matter is of sufficient seriousness and importance or urgency to
3 the organization, referral to higher authority in the organization may be necessary even if the lawyer
4 has not communicated with the constituent. Any measures taken should, to the extent practicable,
5 minimize the risk of revealing information relating to the representation to persons outside the
6 organization. Even in circumstances where a lawyer is not obligated by this Rule to proceed under
7 paragraph (b), a lawyer may bring to the attention of an organizational client, including its highest
8 authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing
9 so in the best interest of the organization.

10 ~~[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to~~
11 ~~the Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to~~
12 ~~address the matter in a timely and appropriate manner, the lawyer must refer the matter to the highest~~
13 ~~authority that can act on behalf of the organization under applicable law. The organization's highest~~
14 ~~authority. Ordinarily, that is to whom a matter may be referred will be the board of directors or~~
15 ~~similar governing body. However, applicable law may prescribe that under certain conditions highest~~
16 ~~authority reposes elsewhere, for example, in the independent directors of a corporation.~~

17 **Relation to Other Rules**

18 ~~[6] This The authority and responsibility provided in this Rule are concurrent with the~~
19 ~~authority and responsibility provided in other rules. In particular, this Rule does not limit or expand~~
20 ~~the lawyer's responsibility under Rules ~~1.6, 1.8, 1.16, 3.3 or 4.1.~~ Paragraph (c) of this Rule~~
21 ~~supplements Rule 1.6(c) by providing an additional basis upon which the lawyer may reveal~~
22 ~~information relating to the representation, but does not modify, restrict, or limit the provisions of Rule~~
23 ~~1.6(c)(1) – (5). Under paragraph (c) of this Rule, the lawyer may reveal such information only when~~
24 ~~the organization's highest authority insists upon or fails to address threatened or ongoing action that~~
25 ~~is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to~~
26 ~~prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's~~
27 ~~services be used in furtherance of the violation, but it is required that the matter be related to the~~

1 lawyer's representation of the organization. If the lawyer's services are being used by an organization
2 to further a crime or fraud by the organization, ~~Rule 1.2(d) can be applicable~~ Rules 1.6(c)(1) and
3 1.6(c)(2) may permit the lawyer to disclose confidential information. In such circumstances Rule
4 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule
5 1.16(a)(1) may be required.

6 [7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating
7 to a representation in circumstances described in paragraph (c) does not apply with respect to
8 information relating to a lawyer's engagement by an organization or an officer, employee or other
9 person associated with the organization against a claim arising out of an alleged violation of law. This
10 is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in
11 conducting an investigation or defending against a claim.

12 [8] A lawyer who reasonably believes that he or she has been discharged because of the
13 lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that
14 require or permit the lawyer to take action under either of these paragraphs, must proceed as the
15 lawyer reasonably believes necessary to assure that the organization's highest authority is informed
16 of the lawyer's discharge or withdrawal.

17 Government Agency

18 [9] The duty defined in this Rule applies to governmental organizations. Defining precisely
19 the identity of the client and prescribing the resulting obligations of such lawyers may be more
20 difficult in the government context and is a matter beyond the scope of these Rules. Although in some
21 circumstances the client may be a specific agency, it may also be a branch of government, such as the
22 executive branch, or the government as a whole. For example, if the action or failure to act involves
23 the head of a bureau, either the department of which the bureau is a part or the relevant branch of
24 government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct
25 of government officials, a government lawyer may have authority under applicable law to question
26 such conduct more extensively than that of a lawyer for a private organization in similar

1 circumstances. Thus, when the client is a governmental organization, a different balance may be
2 appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or
3 rectified, for public business is involved. In addition, duties of lawyers employed by the government
4 or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that
5 authority.

6 **Clarifying the Lawyer's Role**

7 [10] There are times when the organization's interest may be or become adverse to those of
8 one or more of its constituents. In such circumstances the lawyer should advise any constituent,
9 whose interest ~~he reasonable believes is or is likely to become~~ the lawyer finds adverse to that of the
10 organization of the conflict or potential conflict of interest, that the lawyer cannot represent such
11 constituent, and that such person may wish to obtain independent representation. Care must be take
12 to assure that the individual understands that, when there is such adversity of interest. the lawyer for
13 the organization cannot provide legal representation for that constituent individual. and that
14 discussions between the lawyer for the organization and the individual may not be privileged.

15 [11] Whether such a warning should be given by the lawyer for the organization to any
16 constituent individual may turn on the facts of each case.

17 **Dual Representation**

18 [12] Paragraph ~~(c)~~(g) recognizes that a lawyer for an organization may also represent a
19 principal officer, ~~or~~ major shareholder or other constituent of the organization.

20 **Derivative Actions**

21 [13] Under generally prevailing law, the shareholders or members of a corporation may bring
22 suit to compel the directors to perform their legal obligations in the supervision of the organization.
23 Members of unincorporated associations have essentially the same right. Such an action may be

1 brought nominally by the organization, but usually is, in fact, a legal controversy over management
2 of the organization.

3 [14] The question can arise whether counsel for the organization may defend such an action.
4 The proposition that the organization is the lawyer's client does not alone resolve the issue. Most
5 derivative actions are a normal incident of an organization's affairs, to be defended by the
6 organization's lawyer like any other suit. However, if the claim involves serious charges of
7 wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty
8 to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7
9 governs who should represent the directors and the organization.

10 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
11 Committee on 04/26/85, 08/23/85, 09/20/85, 11/08/85 and 01/31/86; Minutes of the Joint Committee
12 on Attorney Standards on 02/27/04, 03/18/05, 06/14/05.

RULE 1.14 CLIENT WITH LIMITED CAPACITY

The Joint Committee proposes changes to the black-letter Rule to substitute the Model Rule, with one exception. The Model Rule refers to clients with "diminished capacity". The Joint Committee concluded "limited capacity" is a more appropriate reference since the focus of the rule is representation of clients whose decision-making capacity is limited in such a way that the lawyer may be required to seek some form of assistance for the client. Additionally, "diminished capacity" has a settled criminal law meaning and application that is inapt in the context of the Rule's purpose.

The Joint Committee proposes changes to the Comment to conform to the Model Rule Comment, with changed references to "limited capacity".

1 relating to real property or any interest therein, or relating to any personal property not in the minor's
2 immediate possession or control.

3 [2] The law nevertheless recognizes that a minor, or a person ~~who is impaired by reason of~~
4 ~~one or more of the above-described conditions,~~ with limited capacity may be able to ~~make~~
5 independently make some, but not all, of the decisions necessary for that person's own care and well-
6 being or for management of that person's property. For example, some children ~~as young as five or~~
7 ~~six years of age, and certainly those of ten or twelve,~~ may be regarded as having ~~have~~ opinions that
8 are entitled to weight in legal proceedings concerning their custody. ~~Also, some~~ Some persons of
9 advanced age can be are quite capable of handling routine financial matters while needing special legal
10 protection concerning major transactions.

11 ~~A lawyer whose client suffers from a disability as described above is expected to maintain as normal~~
12 ~~a client-lawyer relationship as is possible under the circumstances.~~ [3] The fact that a client is a minor
13 or has limited capacity does not diminish the lawyer's obligation to treat the client with attention and
14 respect. Even if the person has an appointed representative, the lawyer should as far as possible
15 accord the represented person the status of client, particularly in maintaining communication.
16 Appointed representatives include guardians ad litem, conservators, guardians, individuals appointed
17 in a durable power of attorney or in an advanced health care directive.

18 [4] Family members or other persons may serve as representatives of a client with limited
19 capacity in discussions with the lawyer. The lawyer must keep the client's interests foremost and,
20 except for protective action authorized under paragraph (b), must look to the client, and not the
21 representatives, to make decisions on the client's behalf.

22 [5] ~~In those situations where a legal representative has been appointed to act in behalf of the~~
23 ~~client, it should be kept in mind that the powers and duties of such representative vary depending~~
24 ~~upon the nature and extent of the client's disability~~ If the client has an appointed representative, the
25 lawyer should ordinarily look to the representative for decisions on behalf of the client. The lawyer

1 ~~in the course of representing the client~~ should be cognizant of the extent of the powers and duties
2 conferred upon the client's legal appointed representative ~~by the appointing authority as such~~
3 ~~enumeration of powers and duties will delineate what types of decisions the client may or may not~~
4 ~~make with regard to the client's own care and well-being, or concerning management of the client's~~
5 ~~property. In matters involving a minor, whether the lawyer should look to the parents as natural~~
6 ~~guardians may depend on the type of proceeding or matter in which the lawyer is representing the~~
7 ~~minor. Where the client is the appointed representative as distinct from the minor or the person with~~
8 ~~limited capacity and a lawyer knows that the appointed representative is acting adversely to the~~
9 ~~interests of the person with limited capacity, the lawyer may have an obligation to prevent or rectify~~
10 ~~the appointed representative's misconduct.~~

11 Taking Protective Action

12 ~~In those situations where a legal representative has not been appointed but in the lawyer's professional~~
13 ~~judgment such an appointment would serve the client's best interests, or is in fact necessary for the~~
14 ~~effective completion of a transaction involving the client's property, the lawyer should seek to have~~
15 ~~a legal representative appointed to act in behalf of the client. The nature and extent of the client's~~
16 ~~disability may be disclosed by the lawyer to the extent the lawyer reasonably believes necessary to~~
17 ~~obtain the appointment of a legal representative.~~

18 ~~When considering the nature and extent of a client's disability and whether or not disclosure of the~~
19 ~~client's condition is necessary in the advancement of the client's interests, a lawyer may consult with~~
20 ~~an appropriate diagnostician.~~

21 ~~Where the client is the legal representative as distinct from the person with the disability and a lawyer~~
22 ~~knows that the legal representative is acting adversely to the interests of the person with the disability,~~
23 ~~the lawyer may have an obligation to prevent or rectify the legal representative's misconduct. See~~
24 ~~Rule 1.2(d).~~

1 [6] In determining the extent of the client's limited capacity, the lawyer should consider and
2 balance such factors as: the client's ability to articulate the reason leading to a decision; variability of
3 state of mind and ability to appreciate consequences of a decision; the substantive fairness of a
4 decision; and the consistency of a decision with the known long-term commitments and values of the
5 client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

6 [7] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or
7 other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained
8 as provided in paragraph (a) because the client is a minor or has limited capacity to communicate or
9 to make adequately considered decisions in connection with the representation, then paragraph (b)
10 permits the lawyer to take protective measures deemed necessary. Such measures could include:
11 consulting with family members; using a reconsideration period to permit clarification or improvement
12 of circumstances; and consulting with support groups or existing surrogates, professional services,
13 adult-protective agencies or other individuals or entities that have the ability to protect the client. In
14 taking any protective action, the lawyer should be guided by such factors as the client's known wishes
15 or values, the client's best interests and the goals of minimizing the intrusion into the client's
16 decisionmaking autonomy, maximizing client capacities and respecting the client's family and social
17 connections.

18 [8] The lawyer should consider whether there is a need for an appointed representative to
19 protect the client's interests. If a client is a minor or has limited capacity and has substantial property
20 that should be sold for the client's benefit, effective completion of the transaction may require
21 appointment of an appointed representative. In addition, rules of procedure in litigation sometimes
22 provide that minors or persons with limited capacity must be represented by a guardian or next friend
23 if they do not have a general guardian. In many circumstances, however, appointment of a
24 representative may be more expensive or traumatic for the client than circumstances in fact require.
25 Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer.
26 In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer
27 to advocate the least restrictive action on behalf of the client.

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

2 [9] Disclosure of the client's limited capacity could adversely affect the client's interests. For
3 example, raising the question of limited capacity could, in some circumstances, lead to proceedings
4 for involuntary commitment. Information relating to the representation is protected by Rule 1.6.
5 Unless authorized to do so under Rule 1.6, the lawyer may not disclose such information. When
6 taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the
7 necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the
8 risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other
9 individuals or entities or seeking the appointment of a legal representative. At the very least, the
10 lawyer should determine whether it is likely that the person or entity consulted will act adversely to
11 the client's interests before discussing matters related to the client. The lawyer's position in such cases
12 is an unavoidably difficult one.

13 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
14 Committee on 04/26/85, 08/23/85, 12/13/85 and 01/31/86; Minutes of the Joint Committee on
15 Attorney Standards on 11/14/03, 08/06/04, 03/18/05, 06/14/05, 09/09/05.

RULE 1.15 SAFEKEEPING PROPERTY

Paragraphs (a) through (e) of the current Rule are essentially similar to the Model Rule before recent Ethics 2000 revisions. The Joint Committee proposes changes to the black-letter provisions to follow the Model Rule as modified by the Ethics 2000 changes.

New paragraph (b) permits a lawyer to deposit funds in a trust account for the purpose of paying bank service charges. Language is also added concerning deposit of funds for fees associated with credit card payments or wire transfer fees.

New paragraph (c) provides guidance to lawyers on how to handle advance deposits of fees and expenses.

Proposed changes to paragraph (e) clarify that conflicting claims to funds in a trust account may involve third parties and provide that funds not in dispute may not be held while the dispute is resolved.

New paragraphs (f) through (i) retain the current Rule's provisions pertaining to IOLTA.

The Joint Committee proposes changes to the Comment to conform to the Model Rule Comment, with the exception of new Comment [6] which directs lawyers to the IOLTA Committee for guidance regarding the administration of trust accounts.

RULE 1.15 SAFEKEEPING PROPERTY

1 (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in
2 connection with a representation separate from the lawyer's own property. Funds shall be deposited
3 in one or more identifiable interest bearing trust accounts in accordance with the provisions of
4 paragraph ~~(d)~~ (f). Other property shall be identified as such and appropriately safeguarded.
5 Complete records of such account funds and other property shall be kept by the lawyer in the manner
6 prescribed in paragraph ~~(f)~~ (h).

7 (b) A lawyer may deposit the lawyer's own funds in a client trust account only for the purpose
8 of paying bank service charges, fees associated with credit card payments, or wire transfers related
9 to that account, but only in an amount necessary for that purpose.

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

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

18 ~~(c)~~ (e) When, in the course of representation, a lawyer is in possession of property in which
19 ~~both two or more persons (one of whom may be the lawyer and another person)~~ claim interests, the
20 property shall be kept separate by the lawyer until ~~there is an accounting and severance of their~~
21 ~~interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept~~
22 ~~separate by the lawyer until the dispute is resolved.~~ The lawyer shall promptly distribute all portions
23 of the property as to which the interests are not in dispute.

1 ~~(d)~~ (f) Each trust account referred to in paragraph (a) shall be an interest bearing trust account
2 in a bank, savings bank, trust company, saving and loan association, savings association, credit union,
3 or federally regulated investment company selected by a lawyer in the exercise of ordinary prudence
4 authorized by federal or state law to do business in North Dakota and insured by the Federal Deposit
5 Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and
6 Loan Insurance Corporation. Interest bearing trust funds shall be placed in accounts in which
7 withdrawals or transfers can be made by the depositing lawyer or law firm without delay, subject only
8 to any notice period which the depository institution is required to reserve by law or regulation.

9 (1) A lawyer who receives funds of clients or third persons shall maintain a pooled
10 interest bearing trust account for deposit of all such funds received that are nominal
11 in amount or expected to be held for a short period of time. The interest accruing on
12 this account, net of any transaction costs, shall be paid to and administered by the
13 North Dakota Bar Foundation in accordance with Administrative Rule 24 of the
14 Supreme Court of North Dakota. The North Dakota Bar Foundation holds the entire
15 beneficial interest in all interest monies accruing on this account.

16 (2) All funds of a client or third person shall be deposited in the account specified in
17 paragraph ~~(d)~~ (f)(1) unless they are deposited in:

18 (i) a separate interest bearing trust account for the particular client or third
19 person on which the interest, net of any transaction costs, will be paid to the
20 client or third person; or

21 (ii) a pooled interest bearing trust account with subaccounting which will
22 provide for computation of interest earned by each client's or third person's
23 funds and the payment thereof, net of any transaction costs, to the client or
24 third person.

1 (3) In determining whether to use the account specified in paragraph ~~(d)~~ (f)(1) or an
2 account specified in paragraph ~~(d)~~ (f)(2), a lawyer should take into consideration the
3 following factors when deciding whether the funds to be invested may be utilized to
4 provide a positive net return to the client or third person:

5 (i) the amount of interest which the funds would earn during the period they
6 are expected to be deposited;

7 (ii) the cost of establishing and administering the account, including the cost
8 of the lawyer's services and the cost of preparing any tax reports required for
9 interest accruing to a client's or third person's benefit; and

10 (iii) the capability of financial institutions described in paragraph ~~(d)~~ (f) to
11 calculate and pay interest on individual accounts or subaccounts.

12 (4) As to accounts under paragraph ~~(d)~~ (f)(1), a lawyer or law firm shall direct the
13 depository institution:

14 (i) to remit interest or dividends, net of any service charges or fees, on the
15 average monthly balance in the account, or as otherwise computed in
16 accordance with an institution's standard accounting practice, at least
17 quarterly, to the North Dakota Bar Foundation (the foundation); and

18 (ii) to transmit with each remittance to the foundation a statement showing the
19 name of the lawyer or law firm for whom the remittance is sent, the rate of
20 interest applied, and the amount of service charges deducted, if any, and the
21 account balance(s) of the period in which the report is made, with a copy of
22 such statement to be transmitted to the depositing lawyer or law firm.

1 of each lawyer or law firm. ~~No charge of ethical impropriety or other breach of professional conduct~~
2 ~~shall attend a lawyer's exercise of sound judgment if the lawyer acts in good faith.~~

3 [2] While normally it is impermissible to commingle the lawyer's own funds with client funds,
4 paragraph (b) provides that it is permissible when necessary to pay bank service charges on that
5 account. Accurate records must be kept regarding which part of the funds are the lawyer's.

6 [3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid.
7 ~~If there is risk that the client may divert the funds without paying the fee, the~~ The lawyer is not
8 ~~required to remit the portion from which the fee is to be paid, although~~ to the client funds that the
9 lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce
10 a client into accepting the lawyer's contention, the . The disputed portion of the funds ~~may be~~ must
11 be kept in a trust account and if the lawyer ~~suggests~~ should suggest means for prompt resolution of
12 the dispute, such as arbitration, ~~and the~~ . The undisputed portion of the funds ~~is~~ shall be promptly
13 distributed.

14 [4] Third Paragraph (e) also recognizes that third parties, ~~such as a client's creditors,~~ may have
15 just lawful claims against specific funds or other property in a lawyer's custody such as a client's
16 creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty
17 under applicable law to protect such third-party claims against wrongful interference by the client;
18 ~~and accordingly may .~~ In such cases, when the third party claim is not frivolous under applicable law,
19 the lawyer must refuse to surrender the property to the client until the claims are resolved. However,
20 a A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party,
21 but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer
22 may file an action to have a court resolve the dispute.

23 [5] The obligations of a lawyer under this Rule are independent of those arising from activity
24 other than rendering legal services. When a lawyer holds funds in a capacity other than as a lawyer
25 representing a client, this Rule does not regulate the manner in which those funds are to be held and

1 protected. For example, a lawyer who serves as an escrow agent is governed by the applicable law
2 relating to fiduciaries even though the lawyer does not render legal services in the transaction.

3 [6] Guidance regarding the administration of trust accounts may be available from the
4 Interest on Lawyer Trust Account Committee of the North Dakota Bar Foundation.

5 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
6 Committee on 04/26/85 and 08/23/85; and Revised by the State Bar Association of North
7 Dakota on 08/29/86 and approved by the Board of Governors on 09/06/86; Minutes of the Joint
8 Committee on Attorney Standards on 11/14/03, 03/18/05, 06/14/05, 09/09/05.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

The Joint Committee proposes limited changes to the black-letter Rule. The current Rule is, in substantial part, similar to the Model Rule.

The reference in paragraph (b) to withdrawal without adverse effect is relocated to subparagraph (1).

Paragraph (b)(4) is modified to permit withdrawal from representation if the lawyer has a fundamental disagreement with the objectives sought by the client.

Paragraph (c) is modified to require refunding any advance payment for an expense that has not been incurred.

In light of the limited proposed changes to the current Rule, the Joint Committee proposes limited changes to the Comment based on the Model Rule Comment. Comment [1] includes language addressing the question of when a representation is completed and cross-referencing other Rules, including those in which services are limited or intended to be short-term in nature. Language added to Comment [3] further explains the obligation of a lawyer to continue representation if withdrawal is denied. Proposed language in Comment [4] includes references to Rules 1.6 and 3.3 regarding any exchange with the court requesting an explanation for the lawyer's request to withdraw. Language added to Comment [8] tracks the proposed change to paragraph (b)(4). Proposed language in Comment [10] directs lawyers to Rule 1.19 regarding disposition of files and papers in the event of withdrawal from representation.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

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

3 (1) ~~The~~ the lawyer reasonably believes that the representation will result in violation
4 of ~~the rules of professional conduct~~ these Rules or other law;

5 (2) ~~The~~ the lawyer's physical or mental condition materially impairs the lawyer's ability
6 to represent the client;

7 (3) ~~The~~ the lawyer has offered material evidence in the testimony of the client and has
8 come to know of its falsity and the client has refused to consent to disclosure of its
9 false character to the tribunal; or

10 (4) ~~The~~ the lawyer is discharged.

11 (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if
12 ~~withdrawal can be accomplished without material adverse effect on the interests of the client, or:~~

13 (1) withdrawal can be accomplished without material adverse effect on the interests
14 of the client;

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

17 (2) (3) ~~The~~ the client has used the lawyer's services to perpetrate a crime or fraud;

18 (3) ~~A~~ (4) a client insists upon pursuing objectives or means that the lawyer considers
19 repugnant or imprudent with which the lawyer has a fundamental disagreement;

1 **Mandatory Withdrawal**

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

7 [3] Rule 3.3 and this ~~rule~~ Rule require a lawyer to seek to withdraw from representation of
8 a client upon learning that the client offered false evidence if the lawyer is unable to persuade the
9 client to disclose its false character immediately to the tribunal. If withdrawal is denied, the lawyer
10 must continue the representation notwithstanding paragraph (a)(3) of this Rule. In the continued
11 representation, the lawyer remains bound by the obligation of candor under Rule 3.3.

12 [4] When a lawyer has appeared on behalf of a client, withdrawal ordinarily requires approval
13 of the tribunal. ~~See also Rule 6.2.~~ Difficulty may be encountered if withdrawal is based on the client's
14 demand that the lawyer engage in unprofessional conduct. The court may ~~wish~~ request an explanation
15 for the withdrawal, while the lawyer may be bound to keep confidential the facts that would
16 constitute such an explanation. The lawyer's statements that professional considerations require
17 termination of the representation ordinarily should be accepted as sufficient. Lawyers should be
18 mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

19 **Discharge**

20 [5] A client has a right to discharge a lawyer at any time, with or without cause, subject to
21 liability for payment for the lawyer's services. Where future dispute about the withdrawal may be
22 anticipated, it may be advisable to prepare a written statement reciting the circumstances.

1 [6] Whether a client can discharge appointed counsel may depend on applicable law. A client
2 seeking to do so should be given a full explanation of the consequences. These consequences may
3 include a decision by the appointing authority that appointment of successor counsel is unjustified,
4 thus requiring the client to ~~represent himself~~ appear pro se.

5 [7] If the client is ~~mentally incompetent~~ a minor or is of limited capacity, the client may lack
6 the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse
7 to the client's interest. The lawyer should make special effort to help the client consider the
8 consequences and, ~~in an extreme case,~~ may ~~initiate proceedings for a conservatorship or similar~~
9 ~~protection of the client.~~ See take reasonably necessary protective action as provided in Rule 1.14.

10 **Optional Withdrawal**

11 [8] A lawyer may withdraw from representation in some circumstances. The lawyer has the
12 option to withdraw if it can be accomplished without material adverse effect on the client's interests.
13 Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably
14 believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even
15 if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused
16 in the past even if that would materially prejudice the client. The lawyer may also withdraw where
17 the client insists on a taking action that the lawyer considers repugnant or imprudent objective with
18 which the lawyer has a fundamental disagreement.

19 [9] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating
20 to the representation, such as an agreement concerning fees or court costs or an agreement limiting
21 the objectives of the representation.

22 **Assisting the Client Upon Withdrawal**

1 [10] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all
2 reasonable steps to mitigate the consequences to the client. With regard to the disposition of the
3 client's files, papers or property, the lawyer should follow Rule 1.19.

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

7 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
8 Committee on 04/26/85, 08/23/85, 09/20/85, and 01/10/86; Minutes of the Joint Committee on
9 Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, 11/17/00, and 6/12/01,
10 02/27/04, 03/18/05, 06/14/05.

RULE 1.17 SALE OF A LAW PRACTICE

The current Rule is substantially similar to the Model Rule and the Joint Committee does not propose any changes to the black-letter Rule.

The Joint Committee proposes changes to the Comment to incorporate language from the Model Rule Comment that is not inconsistent with the current Rule.

Rule 1.17 SALE OF A LAW PRACTICE

1 A lawyer or a law firm may sell or purchase all or part of a law practice, including good will,
2 if the following conditions are satisfied:

- 3 (a) The seller ceases to engage in the private practice of law or some particular area of
4 the practice of law within an agreed upon geographic area in which the practice has
5 been conducted;
- 6 (b) The practice or particular area of practice is sold as an entirety to another lawyer or
7 law firm;
- 8 (c) Actual written notice is given by certified mail, return receipt requested, to each of the
9 seller's clients regarding:
- 10 (1) the proposed sale;
- 11 (2) the terms of any proposed change in the fee arrangement authorized by
12 paragraph (d);
- 13 (3) the client's right to retain other counsel or right to take possession of the file;
14 and
- 15 (4) the fact that the client's consent to the sale will be presumed if the client does
16 not take any action or does not otherwise object within ninety days of receipt
17 of the notice.

18 If written notice by certified mail is ineffective, the seller should take all reasonable
19 steps to see that notice of the sale is received by the client. If after all reasonable
20 steps have been exhausted, notice has still not been received by the client,
21 representation of the client may be transferred to the purchaser only upon entry of an
22 order so authorizing by a court having jurisdiction. The seller may disclose to the
23 court *in camera* information relating to the representation only to the extent necessary
24 to obtain an order authorizing the transfer of a file.

- 25 (d) The sale may not be financed by increases in fees charged the clients of the practice.
26 Existing agreements between the seller and the client as to fees and the scope of the

1 work must be honored by the purchaser, unless the client consents in writing after
2 consultation.

- 3 (e) Any sale of any particular area of practice arising out of the selling lawyer's cessation
4 of practice in an area of practice must include all of the selling attorney's files in the
5 area of specialty or practice.

6 Comment

7 [1] The practice of law is a profession, not merely a business. Clients are not commodities that
8 can be purchased and sold at will. Under this rule, when a lawyer or an entire firm ceases to practice
9 in total or in a particular area of specialty or practice and ~~another lawyer~~ other lawyers or ~~firm~~ takes
10 firms take over the representation, the selling lawyer or firm may obtain compensation for the
11 reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

12 ~~Sale of a Part of a Practice~~

13 ~~This rule does not require that the practice be sold in its entirety, but allows a seller to sell all or a part~~
14 ~~of the practice to different purchasing lawyers. Allowing the sale of a portion of a law practice will~~
15 ~~benefit clients because every lawyer's practice is unique and, consequently, lawyers develop unique~~
16 ~~expertise from which to serve that practice. A purchasing lawyer's expertise may not be so identical~~
17 ~~to the selling lawyer's so as to assure that the purchasing lawyer will be able to serve the selling~~
18 ~~lawyer's entire clientele. Under this rule, the selling lawyer may sell those discrete parts of the practice~~
19 ~~to lawyers best able to serve the clients within each part of the practice that is sold; this rule~~
20 ~~emphasizes the competency of a purchasing lawyer as a major consideration in the sale of a law~~
21 ~~practice.~~

22 ~~Lack of Requirement that Seller Retire or Leave the Practice~~

23 ~~ABA Model Rule 1.17 permits the sale of a law practice only where an attorney is retiring or~~
24 ~~otherwise entirely ceasing to practice law. This rule contains no such requirement. Such a provision~~
25 ~~is considered unnecessary because (a) the disclosure and other procedures contemplated by this rule~~

1 ~~are sufficiently rigorous to deter lawyers from developing and selling their practice as a routine~~
2 ~~matter, and, (b) the predominately rural nature of North Dakota would make it practically impossible~~
3 ~~for a lawyer to repeatedly build a "book of cases" with a view towards selling them. Finally, while~~
4 ~~covenants not to compete are heavily burdened under North Dakota substantive law, a valid covenant~~
5 ~~not to compete would go a long way towards addressing the perceived problem.~~

6 ~~The requirement that all of the private practice or an entire area of practice be sold is satisfied if the~~
7 ~~seller in good faith makes the entire practice or area of practice available for sale to the purchaser.~~
8 ~~The fact that a number of the seller's clients decide not to be represented by the purchaser but take~~
9 ~~their matters elsewhere, therefore, does not result in a violation. Neither does a return to private~~
10 ~~practice as a result of an unanticipated change of circumstances result in a violation. For example, a~~
11 ~~lawyer who has sold the practice to accept an appointment to a judicial office does not violate the~~
12 ~~requirement that the sale be attendant to cessation of practice if the lawyer later resumes private~~
13 ~~practice upon being defeated in an election for the office.~~

14 [2] The requirement that a seller cease to engage in the private practice of law or an area of
15 practice does not prohibit employment as a lawyer on the staff of a public agency or a legal services
16 entity which provides legal services to the poor persons of limited means or as in-house counsel to
17 a business.

18 Sale of Entire Practice or Entire Area of Practice

19 [3] This rule permits a the sale of an entire practice attendant upon retirement from the private
20 practice of law within the agreed upon geographic area. It accommodates the lawyer who sells a
21 practice upon the occasion of moving to another state or to another geographic area. There is no
22 requirement that the lawyer leave the jurisdiction; it is sufficient that the selling lawyer ceases to
23 practice in the agreed upon geographic area where the practice to be sold is located. See also
24 commentary to Rule 5.6.

1 [4] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice
2 is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any
3 matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint
4 responsibility for a matter in connection with the division of a fee with another lawyer as would
5 otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate
6 planning matters and a substantial number of probate administration cases may sell the estate planning
7 portion of the practice but remain in the practice of law by concentrating on probate administration;
8 however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer
9 who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule
10 permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the
11 lawyer's right to continue practice in the areas of the practice that were not sold.

12 **Single Purchaser:** ~~[5] This rule Rule requires that all the files in an area of practice be the subject of~~
13 ~~a single purchase by one or more lawyers the seller's entire practice, or an entire area of practice be~~
14 ~~sold. The prohibition against piecemeal sale of a less than an entire practice or any area of practice~~
15 ~~protects those clients whose matters are less lucrative and who might find it difficult to secure other~~
16 ~~counsel if a sale could be limited to substantial fee-generating matters. The purchaser is Purchasers~~
17 ~~are required to undertake all client matters in the practice or particular area of practice, subject to~~
18 ~~client consent. If This requirement is satisfied, however, the even if a purchaser is unable to undertake~~
19 ~~all a particular client matters matter because of a conflict of interest in a specific matter respecting~~
20 ~~which the purchaser is not permitted by Rule 1.7 or another rule to represent the client, the~~
21 ~~requirement that there be a single purchase is nevertheless satisfied.~~

22 **Client Confidences, Consent, and Notice:**

23 [6] Negotiations between seller and prospective purchaser prior to disclosure of information
24 relating to a specific representation of an identifiable client no more violate the confidentiality
25 provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another
26 lawyer or mergers between firms, with respect to which client consent is not required. Providing the

1 purchaser access to client-specific information relating to the representation and to the file, however,
2 requires client consent. The rule provides that before such information can be disclosed by the seller
3 to the purchaser the client must be given actual written notice of the contemplated sale, including the
4 identity of the purchaser and any proposed change in terms of future representation, and must be told
5 that the decision to consent or to make other arrangements must be made within ninety days. If
6 nothing is heard from the client within that time, consent to the sale is presumed.

7 [7] A lawyer or law firm ceasing to practice cannot be required to remain in practice because
8 some clients cannot be given actual notice of the proposed purchase. Since these clients cannot
9 themselves consent to the purchase or direct any other disposition of their files, this rule requires an
10 order from a court having jurisdiction authorizing ~~their~~ the transfer or other disposition. The court
11 can be expected to determine whether reasonable efforts to locate the client have been exhausted, and
12 whether the absent client's legitimate interests will be served by authorizing the transfer of the file so
13 that the purchaser may continue the representation. Preservation of client confidences requires that
14 the petition for court order be considered *in camera*.

15 [8] All the elements of client autonomy, including the client's absolute right to discharge a
16 lawyer and transfer the representation to another, survive the sale of the practice or an area of
17 practice.

18 **Fee Arrangements Between Client and Purchaser:**

19 [9] The fees charged clients shall not be increased by reason of the sale, except as provided
20 for in this ~~rule~~ Rule. As a practical matter, this requires the purchasing lawyer to honor the existing
21 fee agreement between the seller and the client unless and until the purchasing lawyer and the client
22 agree to a new fee arrangement.

23 [10] This ~~rule, like ABA Model Rule 1.17,~~ Rule provides for the automatic transfer of the
24 client's legal work to the purchaser if the client does not object within ninety days of the proposed

1 sale. ~~This is in contrast to some states' rules which require the client to affirmatively assent to the~~
2 ~~transfer of the file.~~ The automatic transfer provision should greatly reduce the possibility of a gap in
3 the representation of the client. This is particularly true in instances where the selling lawyer has died,
4 disappeared or is disabled, will be retiring, or is entirely ceasing to practice law.

5 **Other Applicable Ethical Standards**

6 [11] Lawyers participating in the sale of a law practice or a practice area are subject to the
7 ethical standards applicable to involving another lawyer in the representation of a client. These
8 include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified
9 to assume the practice and the purchaser's obligation to undertake the representation competently (see
10 Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's consent if consent
11 is allowable under Rule 1.7(c); and the obligation to protect information relating to the representation
12 (see Rules 1.6, 1.8(b) and 1.9).

13 [12] This rule Rule also provides that either the selling lawyer or someone authorized to act
14 on the selling lawyer's behalf in the case of a deceased, or disabled or disappeared lawyer, is
15 responsible for preparing and providing the clients with the notice of sale. While it is obviously
16 necessary for someone to act on behalf of a deceased, or disabled or disappeared lawyer in the case
17 of the sale of a practice, this rule contemplates that the selling lawyer continues representation of the
18 client until the transfer is finalized. During the pendency of the transfer, the selling lawyer remains
19 responsible to ensure that the clients' business is not neglected. The selling lawyer cannot ~~evade~~ avoid
20 the ethical duty to protect clients' positions by allowing the lawyer's practice to be "brokered." This
21 rule retains accountability with the selling lawyer until the transfer is complete.

22 **Approval of Substitution of Counsel:**

1 [13] If the approval of the substitution of the purchasing attorney for the selling attorney is
2 required by the rules of any tribunal in which a matter is pending, such approval must be obtained
3 before the matter can be included in the sale. See Rule 1.16.

4 **Application of the Rule:**

5 [14] This ~~rule~~ Rule applies to the sale of a law practice by representatives of a deceased,
6 disabled, or disappeared lawyer. Thus, a seller may be represented by a non-lawyer representative
7 who is not subject to these rules. Since, however, no lawyer may participate in a sale of a law practice
8 that does not conform to the requirements of this ~~rule~~ Rule, the representatives of the seller as well
9 as the purchasing lawyer can be expected to see to it that they are met.

10 [15] Admission to or retirement from a law partnership or a professional association,
11 retirement plans and similar arrangements, and a sale of the tangible assets of a law practice do not
12 constitute a sale or purchase governed by this ~~rule~~ Rule.

13 [16] This ~~rule~~ Rule does not apply to the transfers of legal representation between lawyers
14 when such transfers are unrelated to the sale of a law practice.

15 *Reference:* Minutes of the Joint Committee on Attorney Standards Meetings of 09/15/95,
16 12/01/95, 06/11/96; 02/27/04, 03/18/05, 06/14/05.

RULE 1.18 DUTIES TO POTENTIAL CLIENT (New Rule)

The current Rule mirrors Rule 1.13 except that it pertains to government entities, rather than organizations, as clients. There is no counterpart to current rule 1.18 in the Model Rules. The Joint Committee proposes that current Rule 1.18 be replaced with Model Rule 1.18 in its entirety, with some noted modifications. The subject of the Model Rule is duties to "prospective clients". The Joint Committee proposes replacing that reference throughout with "potential client" to avoid confusion with the use of "prospective client" in Rule 7.3, which is explained in Comment [1].

Paragraphs (b), (c), and (d) are modified from the Model Rule to refer to receipt, use, or revelation of "significantly harmful" information, rather than "disqualifying" information as used in the Model Rule. This change resulted from concerns expressed by the SBAND Board of Governors regarding the use of the disqualifying reference. Paragraph (c) was also modified from its Model Rule construction to delete a screening requirement concerning permissible representation if the lawyer has received significantly harmful information regarding a client.

1 **Client-Lawyer Relationship**

2 Under various legal provisions, including constitutional, statutory and common law, the
3 responsibilities of government lawyers may include authority concerning legal matters that ordinarily
4 reposes in the client in private client-lawyer relationships. For example, a lawyer for a government
5 agency may have authority on behalf of the government to decide upon settlement or whether to appeal
6 from an adverse judgment. This authority in various respects is generally vested in the attorney general
7 and the state's attorney in state government, and their federal counterparts, and the same may be true
8 of other government law officers. Also, lawyers under the supervision of these officers may be
9 authorized to represent several government agencies in intragovernmental legal controversies in
10 circumstances where a private lawyer could not represent multiple private clients. They also may have
11 authority to represent the "public interest" in circumstances where a private lawyer would not be
12 authorized to do so. These Rules do not abrogate this authority.

13 **Clarifying the Lawyer's Role**

14 There are times when the governmental entity's interests may be or become adverse to those of
15 one or more of its officials or employees. In these circumstances the lawyer should advise any official
16 or employee, whose interest the lawyer reasonably believes is or is likely to become adverse to that of
17 the governmental entity, of the conflict or potential conflict of interest, that the lawyer cannot represent
18 the official or employee, and that the official or employee may wish to obtain independent
19 representation. Care must be taken to assure that the official or employee understands that, when there
20 is an adversity of interest, the lawyer for the governmental entity cannot provide legal representation
21 for the official or employee, and that discussions between the lawyer for the governmental entity and
22 the official or employee may not be privileged. Whether and when this warning should be given by the
23 lawyer may turn on the facts of each case.

24 **Dual Representation**

1 Paragraph (c) recognizes that a lawyer for a governmental entity may also represent an official
2 or employee. Rule 1.7 may require consent to the dual representation, and this consent may be given
3 by an appropriate official of the entity but not by the person who is to be represented.

4 (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship
5 with respect to a matter is a potential client.

6 (b) Even when no lawyer-client relationship ensues, a lawyer who has had discussions with a
7 potential client shall not use or reveal significantly harmful information learned in that consultation,
8 except as Rule 1.9 would permit with respect to information of a former client.

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

15 (d) When the lawyer has received significantly harmful information, representation is permissible
16 if:

17 (1) both the affected client and the potential client have given consent; or

18 (2) the lawyer who received the information took reasonable measures to avoid exposure
19 to more significantly harmful information than was reasonably necessary to determine
20 whether to represent the potential client and written notice is promptly given to the
21 potential client.

22 COMMENT

1 **Definition of Potential Client**

2 [1] The term "potential client" is used in this Rule to eliminate any confusion with the term
3 "prospective client" as used in Rule 7.3. Potential clients, like clients, may disclose information to a
4 lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A
5 lawyer's discussions with a potential client usually are limited in time and depth and leave both the
6 potential client and the lawyer free (and sometimes required) to proceed no further. Hence, potential
7 clients should receive some but not all of the protection afforded clients.

8 [2] Not all persons who communicate information to a lawyer are entitled to protection under
9 this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable
10 expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship,
11 is not a "potential client" within the meaning of paragraph (a).

12 **Initial Consultation**

13 [3] It is often necessary for a potential client to reveal information to the lawyer during an initial
14 consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must
15 learn such information to determine whether there is a conflict of interest with an existing client and
16 whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from
17 using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides
18 not to proceed with the representation. The duty exists regardless of how brief the initial conference may
19 be. A lawyer is not prohibited from revealing to an existing client that an opposing party has contacted
20 the lawyer seeking representation.

21 [4] In order to avoid acquiring significantly harmful information from a potential client, a lawyer
22 considering whether or not to undertake a new matter should limit the initial interview to only such
23 information as reasonably appears necessary for that purpose. Where the information indicates that a
24 conflict of interest or other reason for non-representation exists, the lawyer should so inform the

1 potential client or decline the representation. If the potential client wishes to retain the lawyer, and if
2 consent is allowed under Rule 1.7(c), then consent from all affected present or former clients must be
3 obtained before accepting the representation.

4 [5] A lawyer may condition conversations with a potential client on the person's consent that no
5 information disclosed during the consultation will prohibit the lawyer from representing a different client
6 in the matter. If the agreement expressly so provides, the potential client may also consent to the
7 lawyer's subsequent use of information received from the potential client.

8 [6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from
9 representing a client with interests adverse to those of the potential client in the same or a substantially
10 related matter unless the lawyer has received from the potential client information that could be
11 significantly harmful if used in the matter.

12 [7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in
13 Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains consent from
14 both the potential and affected clients. While it is not a requirement, it is a preferable practice to obtain
15 the consent in writing. In the alternative, imputation may be avoided if the conditions of paragraph
16 (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to
17 the potential client.

18 [8] Notice, including a general description of the subject matter about which the lawyer was
19 consulted generally should be given as soon as practical.

20 [9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a
21 potential client, see Rule 1.1. For a lawyer's duties when a potential client entrusts valuables or papers
22 to the lawyer's care, see Rule 1.15.

23 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
24 Committee on 11/08/85, 01/31/86 and 03/15/86; Minutes of the Joint Committee on Attorney

1 Standards Meetings of 09/15/95, 12/01/95, 06/11/96; 02/27/04; 04/16/04, 03/18/05, 06/14/05,
2 09/09/05.

RULE 2.1 ADVISER

The Joint Committee does not propose any changes to the black-letter rule as the North Dakota Rule and the Model Rule are identical.

The Joint Committee proposes only minor changes to the Comment: essentially grammatical changes in Comment [2] and the addition in Comment [5] of language regarding offering a client information about other forms of dispute resolution that may be alternatives to litigation. The additional language reflects the Model Rule Comment.

COUNSELOR

RULE 2.1 ADVISER

1 In representing a client, a lawyer shall exercise independent professional judgment and render
2 candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations,
3 such as moral, economic, social, and political factors, that may be relevant to the client's situation.

4 COMMENT

5 **Scope of Advice**

6 [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment.
7 Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to
8 confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice
9 in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving
10 candid advice by the prospect that the advice will be unpalatable to the client.

11 [2] Advice couched in ~~narrowly~~ narrow legal terms may be of little value to a client,
12 especially where practical considerations, such as cost or effects on other people, are predominant.
13 Purely technical legal ~~advise~~ advice, therefore, can sometimes be inadequate. It is proper for a
14 lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is
15 not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and
16 may decisively influence how the law will be applied.

17 [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When
18 such a request is made by a client experienced in legal matters, the lawyer may accept it at face
19 value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's
20 responsibility as advisor may include indicating that more may be involved than strictly legal
21 considerations.

1 [4] Matters that go beyond strictly legal questions may also be in the domain of another
2 profession. Family matters can involve problems within the professional competence of psychiatry,
3 clinical psychology or social work; business matters can involve problems within the competence
4 of the accounting profession or of financial specialists. Where consultation with a professional in
5 another field is itself something a competent lawyer would recommend, the lawyer should make such
6 a recommendation. At the same time, a lawyer's advice at its best often consists of recommending
7 a course of action in the face of conflicting recommendations of experts.

8 **Offering Advice**

9 [5] In general, a lawyer is not expected to give advice until asked by the client. However,
10 when a lawyer knows that a client proposes a course of action that is likely to result in substantial
11 adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer
12 act if the client's course of action is related to the representation. Similarly, when a matter is likely
13 to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute
14 resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty
15 to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted,
16 but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

17 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 08/23/85 and 09/20/85; Minutes of the Joint Committee on Attorney Standards on
19 02/27/04, 03/18/05, 06/14/05.

RULE 2.2 INTERMEDIARY

In keeping with the Model Rule approach, the Joint Committee proposes the repeal of current Rule 2.2. Issues concerning common representation are discussed in the Comment to Rule 1.7 - the approach followed by the Model Rule.

PROPOSED REPEAL

RULE 2.2 INTERMEDIARY

1 ~~———— (a) A lawyer may act as an intermediary between clients with potentially conflicting interests~~
2 ~~if:~~

3 ~~———— (1) The lawyer consults with each client concerning the implications of the intermediation,~~
4 ~~including the advantages and risks involved, and the effect on the attorney-client privilege and~~
5 ~~obtains each client's consent to the intermediation;~~

6 ~~———— (2) The lawyer reasonably believes that the matter can be resolved on terms compatible with~~
7 ~~the clients' best interests, that each client will be able to make adequately informed decisions in the~~
8 ~~matter and that there is little risk of material prejudice to the interests of any of the clients if the~~
9 ~~contemplated resolution is unsuccessful, and~~

10 ~~———— (3) The lawyer reasonably believes that the intermediation can be undertaken impartially and~~
11 ~~without improper effect on other responsibilities the lawyer has to any of the clients.~~

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

15 ~~———— (c) A lawyer shall withdraw as an intermediary if any of the clients so requests, or if any of~~
16 ~~the conditions stated in paragraph (a) is no longer satisfied. After withdrawal, the lawyer shall not~~
17 ~~represent any of the clients in the matter that was the subject of the intermediation.~~

18 ~~———— COMMENT~~

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

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

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

20 ~~———— In considering whether to act as an intermediary between clients, a lawyer should be mindful~~
21 ~~that if the intermediation fails the result can be additional cost, embarrassment and recrimination.~~
22 ~~In some situations the risk of failure is so great that intermediation is plainly impossible. For~~
23 ~~example, a lawyer cannot undertake intermediation with clients between whom contentious litigation~~
24 ~~is imminent or who contemplate contentious negotiations. More generally, if the relationship~~
25 ~~between the parties has already assumed definite antagonism, the possibility that the clients' interests~~
26 ~~can be adjusted by intermediation ordinarily is not very good.~~

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

8 **Confidentiality and Privilege**

9 ~~————A particularly important factor in determining the appropriateness of intermediation is the~~
10 ~~effect on client-lawyer confidentiality and the attorney-client privilege. In an intermediation, the~~
11 ~~lawyer is still required both to keep each client adequately informed and to maintain confidentiality~~
12 ~~of information relating to the intermediation. See Rules 1.4 and 1.6. Complying with both~~
13 ~~requirements while acting as an intermediary requires a delicate balance. If the balance cannot be~~
14 ~~maintained, the intermediation is improper. With regard to the attorney-client privilege, the~~
15 ~~prevailing rule is that as between clients participating in an intermediation the privilege does not~~
16 ~~attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will~~
17 ~~not protect any such communications, and the clients should be so advised.~~

18 ~~————Since the lawyer is required to be impartial between clients participating in an intermediation,~~
19 ~~intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who~~
20 ~~has represented one of the clients for a long period and in a variety of matters might have difficulty~~
21 ~~being impartial between that client and one to whom the lawyer has only recently been introduced.~~

22 **Consultation**

23 ~~————In acting as an intermediary between clients, the lawyer is required to consult with the clients~~
24 ~~on the implications of doing so, and proceed only upon consent based on such a consultation. The~~

1 ~~consultation should make clear that the lawyer's role is not that of partisanship normally expected~~
2 ~~in other circumstances.~~

3 ~~—— Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is~~
4 ~~an intermediary, the clients ordinarily must assume greater responsibility for decisions than when~~
5 ~~each client is independently represented.~~

6 **Court Proceedings**

7 ~~—— Ordinarily court proceedings are adversarial and traditional concepts of a lawyer's role as~~
8 ~~advocate may cause doubt concerning the propriety of an intermediary appearing in court~~
9 ~~proceedings. However, a lawyer acting as an intermediary should be permitted to appear if the~~
10 ~~lawyer's role is disclosed to the tribunal and if the appearance is necessary or desirable to properly~~
11 ~~continue or conclude the intermediation. To prohibit the intermediary from appearing in such~~
12 ~~circumstances would eliminate a substantial benefit intended to be permitted by this Rule.~~

13 **Withdrawal**

14 ~~—— Intermediation does not diminish the rights of each client in the client-lawyer relationship.~~
15 ~~Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in~~
16 ~~Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.~~

17 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 08/23/85, 09/20/85, 12/13/85 and 01/10/86; Minutes of the Joint Committee on
19 Attorney Standards on 02/27/04, 03/18/05.

NEW RULE 2.2 EVALUATION FOR USE BY THIRD PERSONS

In light of the proposed repeal of Rule 2.2, the Joint Committee proposes that current Rule 2.3 be renumbered as Rule 2.2. Additionally, the Joint Committee proposes changes to paragraph (a) that are essentially structural in nature, and changes to paragraph (b) which clarify when a lawyer may not provide an evaluation of a matter without client consent. These changes reflect the Model Rule. The Joint Committee also proposes including a writing requirement with respect to the client's consent after consultation to the evaluation.

The Joint Committee proposes minor changes to the Comment, all reflective of the Model Rule Comment. Language is added to Comment [1] regarding implied authorization for performance of an evaluation and language is added to Comment [5] explaining the prohibition against making a false statement of material fact or law in providing an evaluation.

CURRENT RULE 2.3 RENUMBERED AS RULE 2.2

RULE ~~2.3~~ 2.2 EVALUATION FOR USE BY THIRD PERSONS

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

4 ~~(1) The lawyer reasonably believes that making the evaluation is compatible with other aspects~~
5 ~~of the lawyer's relationship with the client, and~~

6 ~~(2) The~~ **(b)** When the lawyer knows or reasonably should know that the evaluation is likely
7 to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation
8 unless client consents in writing after consultation.

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

11 COMMENT

12 **Definition**

13 [1] An evaluation may be performed at the client's direction but or when impliedly authorized
14 in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary
15 purpose of establishing information for the benefit of third parties; for example, an opinion
16 concerning the title of property rendered at the behest of a vendor for the information of a
17 prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In
18 some situations, the evaluation may be required by a government agency; for example, an opinion
19 concerning the legality of the securities registered for sale under the securities laws. In other
20 instances, the evaluation may be required by a third person. such as a purchaser of a business.

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

6 [3] A legal evaluation should be distinguished from an investigation of a person with whom
7 the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser
8 to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So
9 also, an investigation into a person's affairs by a government lawyer, or by special counsel employed
10 by the government, is not an evaluation as that term is used in this Rule. The question is whether the
11 lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by
12 that person, the general rules concerning loyalty to client and preservation of confidences apply,
13 which is not the case if the lawyer is retained by someone else. For this reason, it is essential to
14 identify the person by whom the lawyer is retained. This should be made clear not only to the person
15 under examination, but also to others to whom the results are to be made available.

16 **Duty to Third Person**

17 [4] When the evaluation is intended for the information or use of a third person, a legal duty
18 to that person may or may not arise. That legal question is beyond the scope of this Rule. However,
19 since such an evaluation involves a departure from the normal client-lawyer relationship, careful
20 analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment
21 that making the evaluation is compatible with other functions undertaken in behalf of the client. For
22 example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would
23 normally be incompatible with that responsibility for the lawyer to perform an evaluation for others
24 concerning the same or a related transaction. Assuming no such impediment is apparent, however,
25 the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's
26 responsibilities to third persons and the duty to disseminate the findings.

1 **Access to and Disclosure of Information**

2 [5] The quality of an evaluation depends on the freedom and extent of the investigation upon
3 which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary
4 as a matter of professional judgment. Under some circumstances, however, the terms of the
5 evaluation may be limited. For example, certain issues or sources may be categorically excluded, or
6 the scope of search may be limited by time constraints or the noncooperation of persons having
7 relevant information. Any such limitations which are material to the evaluation should be described
8 in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the
9 terms upon which it was understood the evaluation was to have been made, the lawyer's obligations
10 are determined by law, having reference to the terms of the client's agreement and the surrounding
11 circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of
12 material fact or law in providing an evaluation under this Rule. See Rule 4.1.

13 **Financial Auditors' Requests for Information**

14 [6] When a question concerning the legal situation of a client arises at the instance of the
15 client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made
16 in accordance with procedures recognized in the legal profession. Such a procedure is set forth in
17 the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors'
18 Requests for Information, adopted in 1975.

19 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
20 Committee on 04/26/85, 12/13/85 and 01/10/86; Minutes of the Joint Committee on Attorney
21 Standards on 04/16/04; 03/18/05, 06/14/05.

NEW RULE 2.3 LAWYER SERVING AS THIRD-PARTY NEUTRAL

The Joint Committee proposes the adoption of new Rule 2.3, which is set out in the Model Rules as Rule 2.4. New Rule 2.3, in reflecting the Model Rule, is designed to promote understanding of the lawyer-neutral's role by parties to dispute resolution. The Rule defines "third-party neutral" in paragraph (a) and in paragraph (b) informs the parties of the nature of the lawyer's role.

The various paragraphs of the proposed Comment describe dispute-resolution processes, describe the role of a third-party neutral, refer to other law and ethics codes that may apply, explain the purpose of the advisory in paragraph (b), and draw attention to conflict issues that may arise and which are governed by Rule 1.12.

PROPOSED NEW RULE 2.3

Rule 2.3 — LAWYER SERVING AS THIRD-PARTY NEUTRAL

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

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

Comment

9
10 [1] Alternative dispute resolution has become a substantial part of the civil justice system.
11 Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party
12 neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator,
13 who assists the parties, represented or unrepresented, in the resolution of a dispute or in the
14 arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator
15 or decisionmaker depends on the particular process that is either selected by the parties or mandated
16 by a court.

17 [2] The role of a third-party neutral is not unique to lawyers, although, in some court-
18 connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases.
19 In performing this role, the lawyer may be subject to court rules or other law that apply either to
20 third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also
21 be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial
22 Disputes prepared by a joint committee of the American Bar Association and the American
23 Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the

1 American Bar Association, the American Arbitration Association and the Society of Professionals
2 in Dispute Resolution.

3 [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may
4 experience unique problems as a result of differences between the role of a third-party neutral and
5 a lawyer's service as a client representative. The potential for confusion is significant when the
6 parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform
7 unrepresented parties that the lawyer is not representing them. For some parties, particularly parties
8 who frequently use dispute-resolution processes, this information will be sufficient. For others,
9 particularly those who are using the process for the first time, more information will be required.
10 Where appropriate, the lawyer should inform unrepresented parties of the important differences
11 between the lawyer's role as third-party neutral and a lawyer's role as a client representative,
12 including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure
13 required under this paragraph will depend on the particular parties involved and the subject matter
14 of the proceeding, as well as the particular features of the dispute-resolution process selected.

15 [4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a
16 lawyer representing a client in the same matter. The conflicts of interest that arise for both the
17 individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

18 [5] Lawyers who represent clients in alternative dispute-resolution processes are governed
19 by these rules. When the dispute-resolution process takes place before a tribunal, as in binding
20 arbitration, the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of
21 candor toward both the third-party neutral and other parties is governed by Rule 4.1.

22 Reference: Minutes of the Joint Committee on Attorney Standards on 03/18/05, 06/14/05.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

The current rule and the Model Rule are nearly identical. The Joint Committee proposes only the addition in the black-letter rule of a reference to "in law and fact", which would reflect the Model Rule. This change only makes explicit the requirement that a claim must have a non-frivolous basis in law and fact. The Joint Committee also proposes adding a reference to "commitment" as the civil counterpart to incarceration and regarding which a lawyer may defend to the extent necessary to ensure every element of the case is established.

The Joint Committee proposes changes to the Comment which would result in the Comment fully reflecting, with one exception, the Model Rule Comment. Comment [4], which is contained in the current Comment, is retained as additional guidance for lawyers concerning other rules and statutes pertaining to lawyer duties.

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

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

7 COMMENT

8 ~~Allegations and denials in any pleading, made without reasonable cause and not in good faith,~~
9 ~~may subject the lawyers who plead them, and their clients, to prejudice. Such pleading is~~
10 ~~unprofessional conduct. A lawyer's signature on a pleading, motion or other paper certifies to the~~
11 ~~court that the lawyer has read it, that to the best of the lawyer's knowledge, information, and belief~~
12 ~~formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good~~
13 ~~faith argument for the extension, modification, or reversal of existing law, and that it is not interposed~~
14 ~~for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the~~
15 ~~cost of litigation. A lawyer whose certification is found to have been false has misused the legal~~
16 ~~system and its procedures and has acted unprofessionally.~~

17 [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause,
18 but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes
19 the limits within which an advocate may proceed. However, the law is not always clear and never
20 is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the
21 law's ambiguities and potential for change.

22 [2] ~~Pleading and other documents prepared for and used in litigation on a client's behalf are~~
23 The filing of an action or defense or similar action taken for a client is not frivolous merely because
24 the facts have not first been fully substantiated or because the lawyer expects to develop vital

1 evidence through only by discovery. What is required of lawyers, however, is that they inform
2 themselves about the facts of their clients' cases and the applicable law and determine that they can
3 make good faith arguments in support of their clients' positions. Such documents are action is not
4 frivolous even though the lawyer believes that the client's position ultimately might not prevail. A
5 document The action is frivolous, however, if the client desires its preparation and use primarily for
6 the purpose of harassing or maliciously injuring another, or where regardless of the good faith of the
7 attorney or client responsible for the document there is such a complete absence of actual facts or law
8 in support of the document that a reasonable person could not have thought that a tribunal would
9 render a favorable judgment upon it the lawyer is unable either to make a good faith argument on the
10 merits of the action taken or to support the action taken by a good faith argument for an extension,
11 modification, or reversal of existing law.

12 [3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional
13 law that entitles the defendant in a criminal matter to the assistance of counsel in presenting a claim
14 or contention that otherwise would be prohibited by this Rule.

15 [4] The duties of a lawyer are also governed by Rule 11, N.D. Rules of Civil Procedure, and
16 sections 28-26-01 and 28-26-31, N.D.C.C.

17 Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 09/20/85, 11/08/85, 12/13/85 and 01/31/86; Minutes of the Joint Committee on
19 Attorney Standards on 04/16/04, 03/18/05, 06/14/05, 09/09/05.

RULE 3.2 EXPEDITING LITIGATION

The Joint Committee does not propose any changes to the black-letter rule. The current Rule and the Model Rule are identical.

The Joint Committee proposes retention of Comment [1] as useful explanation of the Rule's purpose. Proposed changes to Comment [2] reflect the Model Rule Comment.

RULE 3.2 EXPEDITING LITIGATION

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

3 COMMENT

4 [1] The public, which pays the bill for the judicial system, is entitled to have it operate
5 efficiently. Parties in litigation should have their disputes resolved promptly for the same reasons
6 often given in support of doctrines favoring finality and preventing relitigation. The lawyer's duties
7 must, therefore, include the obligation to assist the court in expeditious consideration and disposal
8 of pending cases. A lawyer should, whenever the client's interests permit, assist the court in moving
9 matters to final disposition more quickly than might be the case without the lawyer's affirmative
10 assistance.

11 ~~[2] It goes without saying that a lawyer may not use the legal process to achieve delay, or~~
12 ~~delay the normal consideration and disposal of pending cases. Such conduct would not only be~~
13 ~~antithetical to the spirit of this Rule, but is specifically forbidden by other law.~~ Dilatory practices
14 bring the administration of justice into disrepute. ~~Delay should not be indulged merely for the~~
15 ~~convenience of the advocates, or~~ Although there will be occasions when a lawyer may properly seek
16 a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite
17 litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable
18 if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.
19 It is not a justification that similar conduct is often tolerated by the bench and bar. The question is
20 whether a competent lawyer acting in good faith would regard the course of action as having some
21 substantial purpose other than delay. Realizing financial or other benefit from otherwise improper
22 delay in litigation is not a legitimate interest of the client.

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
2 Committee on 09/21/85 and 12/13/85; Minutes of the Joint Committee on Attorney Standards on
3 04/16/04, 03/18/05, 06/14/05.

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

The Rule governs a lawyer's obligation of candor to the tribunal with respect to testimony given and actions taken by the client and other witnesses. The Joint Committee proposes a number of changes to the black-letter rule to follow the Model Rule approach regarding candor toward the tribunal. However, the Joint Committee proposes no change to provisions upon which the current Rule and Model Rule differ most significantly. Under the current Rule [paragraph (d)], if a lawyer has offered testimony from a client and later learns the testimony is false, and the lawyer fails to convince the client to consent to disclosure, the lawyer must attempt to withdraw without disclosure. If withdrawal is refused by the court, the lawyer must continue in the representation. The Model Rule, on the other hand, provides that if false testimony from anyone, including the client, is offered the lawyer is required to take reasonable remedial measures, including, if necessary, disclosure. The current Rule's approach reflects the Supreme Court's early decision in *Grievance Comm'n v. Malloy*, 248 N.W.2d 43 (N.D.1976). The Joint Committee discussed at length whether to follow the Model Rule exclusively and abandon the *Malloy* approach. The Joint Committee concluded that while nearly all of the proposed changes to the Rule would reflect the Model Rule, the *Malloy* approach should be retained. The relevant language is included in proposed paragraph (a)(3). The Joint Committee also proposes additional language in paragraph (a)(3) to provide that a lawyer may not use or argue the client's false testimony. The remainder of the proposed changes, additions and deletions, to the black-letter Rule reflect the Model Rule.

In light of the proposed changes to the black-letter Rule, the Joint Committee proposes numerous changes to the Comment which reflect long-existing Model Rule Comment language in some areas, but most changes reflect revisions to the Model Rule Comment made as part of the ABA's Ethics 2000 review. Language specific to the *Malloy* approach is contained in Comment [10].

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

1 (a) A lawyer shall not knowingly:

2 (1) ~~Make~~ make a false statement of fact or law to a tribunal of fact or law that the
3 lawyer knows to be false or fail to correct a false statement of material fact or law
4 previously made to the tribunal by the lawyer; or

5 (2) ~~Offer evidence that the lawyer knows to be false.~~ Fail to disclose to the tribunal
6 legal authority in the controlling jurisdiction known to the lawyer to be directly
7 adverse to the position of the client and not disclosed by opposing counsel; or

8 (3) ~~offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client,~~
9 ~~or a witness called by the lawyer, has offered material evidence and the lawyer comes~~
10 ~~to know of its falsity, the lawyer shall take reasonable remedial measures, including,~~
11 ~~if necessary, disclosure to the tribunal unless the evidence was contained in testimony~~
12 ~~of the lawyer's client. If the evidence was contained in testimony of the lawyer's~~
13 ~~client, the lawyer shall make reasonable efforts to convince the client to consent to~~
14 ~~disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to~~
15 ~~withdraw from the representation without disclosure. If withdrawal is not permitted,~~
16 ~~the lawyer may continue the representation and such continuation alone is not a~~
17 ~~violation of these rules. The lawyer may not use or argue the client's false testimony.~~

18 (b) ~~A~~ Subject to paragraph (a)(3), a lawyer may refuse to offer evidence that the lawyer
19 believes is false who represents a client in an adjudicative proceeding and who knows that a person
20 intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the
21 proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the
22 tribunal.

1 (c) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall
2 disclose this fact to the tribunal unless the evidence was contained in the testimony of the lawyer's
3 client. This duty does not exist if the lawyer comes to know of the falsity of the evidence after the
4 duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding.

5 (1) The lawyer withdraws in accordance with Rule 1.16.

6 (2) The issue to which the duty relates is determined by the highest tribunal that may consider
7 the issue; or

8 (3) The time has expired for the determination in paragraph (c)(2).

9 (d) If a lawyer has offered material evidence and comes to know of its falsity and the
10 evidence was contained in the testimony of the lawyer's client, the lawyer shall make reasonable
11 efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure,
12 the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not
13 permitted, the lawyer may continue the representation and such continuation alone is not a violation
14 of these rules. This duty does not exist if the lawyer comes to know of the falsity of the evidence
15 after:

16 (1) The lawyer withdraws in accordance with Rule 1.16;

17 (2) The issue to which the duty relates is determined by the highest tribunal that may consider
18 the issue; or

19 (3) The time has expired for the determination in paragraph (d)(2).

1 [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct
2 that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an
3 adjudicative proceeding has an obligation to present the client's case with persuasive force.
4 Performance of that duty while maintaining confidences of the client, however, is qualified by the
5 advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary
6 proceeding is not required to present an impartial exposition of the law or to vouch for the evidence
7 submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law
8 or fact or evidence that the lawyer knows to be false.

9 **Representations of Law and Fact by a Lawyer**

10 [3] An advocate is responsible for pleadings and other documents prepared for litigation, but
11 is usually not required to have personal knowledge of matters asserted therein, for litigation
12 documents ordinarily present assertions by the client, or by someone on the client's behalf, and not
13 assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's
14 own knowledge, as in an affidavit by the lawyer or in a statement to the tribunal, may properly be
15 made only when the lawyer knows the assertion is true or believes it to be true on the basis of a
16 reasonably diligent inquiry. ~~Too, legal argument based on a knowingly false representation of law~~
17 ~~constitutes dishonesty toward the tribunal.~~ There are circumstances in which failure to make a
18 disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule
19 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation.
20 Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to
21 Rule 8.4(b).

22 **Legal Argument**

23 [4] Legal argument based on knowingly false representation of law constitutes dishonesty
24 toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must
25 recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an

1 advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has
2 not been disclosed by the opposing party. The underlying concept is that legal argument is a
3 discussion seeking to determine the legal premises properly applicable to the case.

4 **False Offering Evidence**

5 ~~If a lawyer knows evidence to be false, the lawyer must refuse to offer it regardless of a~~
6 ~~client's wishes and regardless of whether it is to be offered by a client or some other person. If a~~
7 ~~lawyer believes such evidence to be false, the lawyer may refuse to offer the evidence without~~
8 ~~violation of the lawyer's ethical duty to represent the client diligently.~~

9 [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows
10 to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an
11 officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does
12 not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity. When
13 false evidence has been offered by a person other than a client and the lawyer thereafter comes to
14 know of its falsity, the lawyer must disclose its false character to the tribunal regardless of the client's
15 wishes.

16 ~~When false evidence has been offered by a client and the lawyer thereafter comes to know~~
17 ~~of its falsity, a conflict may arise between the lawyer's duty to keep the client's revelations~~
18 ~~confidential and the duty of candor to the court. Upon ascertaining that material evidence is false,~~
19 ~~the lawyer should seek to persuade the client that its false character should immediately be disclosed.~~
20 ~~If the persuasion is ineffective, the lawyer must seek to withdraw from the representation without~~
21 ~~disclosure. If withdrawal from the representation without disclosure. If withdrawal is not permitted,~~
22 ~~the lawyer may continue the representation, and such continuation alone is not a violation of these~~
23 ~~Rules:~~

24 ~~The lawyer's obligation under this Rule to disclose to the tribunal that false evidence has been~~
25 ~~offered by a person other than a client or, where false evidence has been offered by a client, to~~

1 ~~remonstrate or—where remonstration is unsuccessful—to attempt withdrawal arises only during the~~
2 ~~representation. Thus, if a lawyer, after having properly withdrawn from representation of a client,~~
3 ~~or after the issue to which the lawyer's obligation under this Rule relates is determined by the highest~~
4 ~~tribunal that may consider the issue or the time has expired for that determination, comes to know~~
5 ~~that false evidence was offered, that lawyer never becomes obligated under this Rule to disclose or~~
6 ~~to attempt remonstration. However, that lawyer may have obligations under other laws, such as—~~
7 ~~general statutes requiring the reporting of crime, to take some action. In this regard, the lawyer must~~
8 ~~also consider the effect of other factors, such as the attorney-client privilege.~~

9 [6] If a lawyer knows that a client intends to testify falsely or wants the lawyer to introduce
10 false evidence, the lawyer should seek to persuade the client that the evidence should not be offered.
11 If persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse
12 to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may
13 call the witness to testify but may not elicit or otherwise permit the witness to present the testimony
14 that the lawyer knows to be false.

15 [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel
16 in criminal cases. See also Comment [9].

17 [8] The prohibition against offering false evidence only applies if the lawyer knows that the
18 evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its _____
19 presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be _____
20 inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts
21 about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an
22 obvious falsehood.

23 [9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer
24 knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer
25 reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to _____

1 discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.
2 Because of the special protections historically provided criminal defendants, however, this Rule does
3 not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably
4 believes but does not know that the testimony will be false. Unless the lawyer knows the testimony
5 will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

6 ~~Failure to Disclose Adverse Authority~~

7 ~~A lawyer is not required to make a disinterested exposition of the law, but must recognize~~
8 ~~the existence of pertinent legal authorities. As stated in Rule 3.3(e) , an advocate has a duty to~~
9 ~~disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the~~
10 ~~opposing party. The underlying concept is that legal argument is a discussion seeking to determine~~
11 ~~the legal premises properly applicable to the case.~~

12 ~~A lawyer does not have the obligation indefinitely to continue calling to the tribunal's~~
13 ~~attention new, or newly discovered, adverse authority. The duty to do so continues only so long as~~
14 ~~the parallel obligation to the client to raise and use favorable authority exists. Thus, upon a lawyer's~~
15 ~~withdrawal from the representation, the obligation ceases. Similarly, when the matter has~~
16 ~~moved—by appeal or otherwise—out of a tribunal, the duty to that tribunal is ended: if, however,~~
17 ~~the matter is then or later pending before another tribunal, and the lawyer has not in the meanwhile~~
18 ~~withdrawn, the obligation of candor requires that the lawyer call to this different tribunal's attention~~
19 ~~the existence of controlling adverse authority should it then be pertinent and should the opposition~~
20 ~~fail to do so.~~

21 Remedial Measures

22 [10] Having offered material evidence in the belief that it was true, a lawyer may
23 subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the
24 lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be

1 false, either during the lawyer's direct examination or in response to cross-examination by the
2 opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from
3 the client during a deposition, the lawyer must take reasonable remedial measures. In such
4 situations, the advocate's proper course is to remonstrate with the client confidentially, advise the
5 client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to
6 the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take
7 further remedial action. If the evidence is offered by a person other than the client and withdrawal
8 from the representation is not permitted or will not undo the effect of the false evidence, the advocate
9 must make such disclosure to the tribunal as is reasonably necessary to remedy the situation. If the
10 false evidence has been offered by the client, a conflict may arise between the lawyer's duty to keep
11 the client's revelations confidential and the duty of candor to the tribunal. If persuasion of the client
12 is ineffective, the lawyer must seek to withdraw from the representation without disclosure. It is for
13 the tribunal then to determine what should be done — making a statement about the matter to the
14 trier of fact, ordering a mistrial, or perhaps nothing. If withdrawal is not permitted, the lawyer may
15 continue the representation and such continuation alone is not a violation of these Rules. See
16 Comment [15].

17 [11] The disclosure of false testimony can result in grave consequences to the client,
18 including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury.
19 But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-
20 finding process which the adversarial system is designed to implement. See Rule 1.2(d).
21 Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the
22 existence of false evidence, the client can simply reject the lawyer's advice to reveal the false
23 evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into
24 being a party to fraud on the court.

25 **Preserving Integrity of Adjudicative Process**

1 [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent
2 conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or
3 otherwise unlawfully communicating with a witness, juror, court official, or other participant in the
4 proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose
5 information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to
6 take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows
7 that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal
8 or fraudulent conduct related to the proceeding.

9 **Duration of Obligation**

10 [13] A practical time limit on the obligation to rectify false evidence or false statements of
11 law and fact has to be established. The conclusion of the proceeding is a reasonably definite point
12 for the termination of the obligation. A proceeding has concluded withing the meaning of this Rule
13 when a final judgment in the proceeding has been affirmed on appeal or the time for review has
14 passed.

15 **Ex Parte Proceedings**

16 [14] ~~Subject to Rule 3.3(e)~~ Ordinarily, an advocate has the limited responsibility of
17 presenting one side of the ~~matters~~ matter that a tribunal should consider in reaching a decision. The
18 conflicting position is expected to be presented by the opposing party. However, in an ex parte
19 proceeding, such as an application for a temporary restraining order, there is no balance of
20 presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield
21 a substantially just result. The ~~tribunal~~ judge has an affirmative responsibility to accord the absent
22 party just consideration. The lawyer for the represented party has the correlative duty to make
23 disclosures of material facts known to the lawyer and that the lawyer reasonably believes are
24 necessary to an informed decision.

1 **Withdrawal**

2 [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not
3 require that the lawyer withdraw from the representation of a client whose interests will be or have
4 been adversely affected by the lawyer's disclosure. The lawyer may, however, be required under
5 Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this
6 Rule's duty of candor results in such an extreme deterioration of the lawyer-client relationship that
7 the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the
8 circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In
9 connection with a request for permission to withdraw that is premised on a client's misconduct, a
10 lawyer may reveal information relating to the representation only to the extent reasonably necessary
11 to comply with this Rule or as otherwise permitted by Rule 1.6. See also Comment [10].

12 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
13 Committee on 03/16/84, 05/23/84, 06/27/84, 08/17/84, 09/13/84, 10/19/84, 12/14/84, 02/08/85,
14 03/11/85 and 04/26/85; Minutes of the Joint Committee on Attorney Standards on 04/16/04,
15 06/08/04, 03/18/05, 06/14/05, 09/09/05.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

Current Rule 3.4 is identical to the Model Rule except for additional language in paragraph (a) of the Model Rule regarding a prohibition against a lawyer counseling or assisting another person in committing an act otherwise prohibited by paragraph (a). This subject matter is addressed in Rule 8.4(a). The Joint Committee, therefore, does not propose any changes to the black-letter rule.

The Joint Committee proposes minor changes to Comments [1] and [2], which will conform the Comment to the Model Rule Comment.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

1 A lawyer shall not:

2 (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or
3 conceal a document or other material having potential evidentiary value;

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

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

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

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

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

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

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

19 COMMENT

1 ~~[1] While a lawyer in the course of representing a client zealously asserts the client's position~~
2 ~~in an attempt to obtain a result advantageous to the client, the lawyer's actions in the course of the~~
3 ~~representation must be consistent with the requirements of honest dealing with the opposing party~~
4 ~~and counsel.~~ The procedure of the adversary system contemplates that the evidence in a case is to be
5 marshaled competitively by contending parties. Fair competition in the adversary system is ~~fostered~~
6 secured by prohibitions against destruction or concealment of evidence, improperly influencing
7 witnesses, obstructive tactics in discovery procedures, and the like.

8 [2] Documents and other items of evidence are often essential to establish a claim or defense.
9 Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain
10 evidence through discovery or subpoena is an important procedural right. The exercise of that right
11 can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many
12 jurisdictions makes it an offense to destroy material for purposes of ~~precluding~~ impairing
13 availability in a pending proceeding or one whose commencement can be foreseen. Falsifying
14 evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally,
15 including computerized information. Applicable law may permit a lawyer to take temporary
16 possession of physical evidence of client crimes for the purpose of conducting a limited examination
17 that will not alter or destroy material characteristics of the evidence. In such a cases, applicable law
18 may require the lawyer to turn the evidence over to the police or other prosecuting authority,
19 depending on the circumstances.

20 [3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to
21 compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions
22 is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay
23 an expert witness a contingent fee.

24 [4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving
25 information to another party, for the employees may identify their interests with those of the client.
26 See also Rule 4.2.

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
2 Committee on 10/18/85, 11/08/85 and 12/13/85; Minutes of the Joint Committee on Attorney
3 Standards on 04/16/04, 03/18/05, 06/14/05.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

The Joint Committee proposes changes to the black-letter rule to follow the Model Rule. The prohibition against *ex parte* communications in current paragraph (a) is relocated to paragraph (b), with the retention from paragraph (b) of the reference to communicating about a "pending or impending proceeding". Paragraph (c) describes situations in which communication with a juror or prospective juror are prohibited.

The Joint Committee proposes additional language for the Comment regarding the Rule's *ex parte* provision (Comment[2]), communication with a juror or prospective juror (Comment [3]), and the duty to refrain from disruptive conduct (Comment [5]). These changes reflect the Model Rule Comment.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

1 A lawyer shall not:

2 (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by
3 law ~~including ex parte communications concerning a pending or impending proceeding;~~ or

4 (b) communicate ex parte with a judge, impaneled juror, prospective juror or other official
5 concerning a pending or impending proceeding unless authorized to do so by law or court order;

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

7 (1) the communication is prohibited by law or court order;

8 (2) the juror has made known to the lawyer a desire not to communicate; or

9 (3) the communication involves misrepresentation, coercion, duress, or harassment;

10 or

11 ~~(b)~~ (d) engage in conduct intended to disrupt a tribunal.

12 COMMENT

13 [1] Many forms of improper influence upon a tribunal are ~~prescribed~~ proscribed by criminal
14 law. Others are specified in the North Dakota Rules of Judicial Conduct, with which an advocate
15 should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

16 [2] During a proceeding a lawyer may not communicate ex parte with persons serving in an
17 official capacity in the proceeding, such as judges, masters, or jurors, unless authorized to do so by
18 law or court order.

1 [3] A lawyer may on occasion want to communicate with a juror or prospective juror after
2 the jury has been discharged. The lawyer may do so unless the communication is prohibited by law
3 or court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may
4 not engage in improper conduct during the communication.

5 [4] The lawyer's function is to present evidence and argument so that the cause may be
6 decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the
7 lawyer's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a tribunal but
8 should avoid reciprocation; the tribunal's default is no justification for similar dereliction by a lawyer.
9 A lawyer can present the cause, protect the record for subsequent review and preserve professional
10 integrity by patient firmness no less effectively than by belligerence or theatrics.

11 [5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal,
12 including a deposition. See Rule 1.0(p).

13 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
14 Committee on 09/20/85 and 10/18/85; Minutes of the Joint Committee on Attorney Standards on
15 04/16/2004; 03/18/05, 06/14/05, 09/09/05.

RULE 3.6 TRIAL PUBLICITY

The Joint Committee proposes changes that would align the black-letter Rule with the Model Rule. Paragraph (a) is modified to provide that the assessment of the likelihood that an extrajudicial statement will be disseminated by public means is judged from the perspective of a reasonable lawyer ("lawyer knows or reasonably should know") rather than a reasonable "person". Paragraph (a) is additionally modified to prohibit an extrajudicial statement if the lawyer knows or reasonably should know the statement has a "substantial likelihood" of materially prejudicing the proceeding. The current Rule's prohibition hinges on whether the statement will create a "serious and imminent threat" of material prejudice. Proposed paragraphs (b) and (c) are from the Model Rule and set out the kinds of extrajudicial statements a lawyer is permitted to make during a trial. Paragraph (d), also from the Model Rule, extends the prohibition under paragraph (a) to lawyers associated in a firm or government agency with the affected lawyer.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment.

RULE 3.6 TRIAL PUBLICITY

1 (a) A lawyer who is participating or has participated in the investigation or litigation of a
2 matter shall not make an extrajudicial statement that ~~a reasonable person would expect to be~~ the
3 lawyer knows or reasonably should know will be disseminated by means of mass public
4 communication if the lawyer knows or reasonably should know that the statement and will create
5 have a ~~serious and imminent threat~~ substantial likelihood of materially prejudicing an adjudicative
6 proceeding in the matter.

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

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

10 (2) information contained in a public record;

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

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

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

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

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

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

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

4 ~~Some matters, such as juvenile and mental health proceedings, are closed by law.~~
5 ~~Extrajudicial statements by lawyers may be limited by the law which closes these proceedings. In~~
6 ~~addition, the specific provisions of Rules 3.4(c) and 3.8 may impose duties not specifically covered~~
7 ~~by this Rule.~~

8 [2] Special rules of confidentiality may validly govern proceedings in juvenile and mental
9 health proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such
10 rules.

11 [3] This Rule sets forth a basic general prohibition against a lawyer's making statements that
12 the lawyer knows or should know will have a substantial likelihood of materially prejudicing an
13 adjudicative proceeding. Recognizing that the public value of informed commentary is great and the
14 likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the
15 proceeding is small, this Rule applies only to lawyers who are, or who have been, involved in the
16 investigation or litigation of a case, and their associates.

17 [4] Paragraph (b) identifies specific matters about which a lawyer's statements would not
18 ordinarily be considered to present a substantial likelihood of material prejudice, and should not in
19 any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not
20 intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but
21 statements on other matters may be subject to paragraph (a).

22 [5] There are, on the other hand, certain subjects that are more likely than not to have a
23 materially prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to

1 a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects
2 relate to:

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

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

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

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

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

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

20 [6] Another relevant factor in determining prejudice is the nature of the proceedings involved.
21 Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive.
22 Non-jury trials and arbitration proceedings may be even less affected. This Rule will still place
23 limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different
24 depending on the type of proceeding.

25 [7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may
26 be permissible when they are made in response to statements made publicly by another party, another
27 party's lawyer, or third persons, where a reasonable lawyer would believe a public response is

1 required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been
2 publicly made by others, responsive statements may have the salutary effect of lessening any resulting
3 adverse impact on the adjudicative proceeding. Such responsive statements should be limited to
4 contain only such information as is necessary to mitigate undue prejudice created by the statements
5 made by others.

6 [8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial
7 statements in criminal proceedings.

8 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
9 Committee on 09/20/85, 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney
10 Standards on 06/08/04, 03/18/05, 06/14/05.

RULE 3.7 LAWYER AS WITNESS

The Joint Committee proposes essentially minor changes to the black-letter Rule to reflect the Model Rule.

The Joint Committee proposes changes to the Comment that retain some current language that is not inconsistent with the Model Rule Comment, but otherwise incorporate language from the Model Rule Comment. In Comments [2], [3], and [4] references to the tribunal are included to clarify that the prohibition in paragraph (a) of the Rule is for the protection of the tribunal as well as the parties. New Comment [5] explains why paragraph (b) of the Rule permits a lawyer to act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness barring any conflicts of interest. Proposed changes to Comment [6] include language to alert lawyers to the kinds of conflicts that may arise. New Comment [7] discusses various disqualifications that may result if the lawyer-witness is precluded from serving as an advocate under applicable rules.

RULE 3.7 LAWYER AS WITNESS

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

3 (1) The testimony relates to an uncontested issue;

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

6 (3) Disqualification of the lawyer would work substantial hardship on the client
7 ~~because of the distinctive value of the lawyer or the lawyer's firm as counsel in the~~
8 ~~particular case.~~

9 (b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm
10 is likely to be called as a witness unless precluded from doing so by a conflict of interest.

11 COMMENT

12 [1] Combining the roles of advocate and witness can prejudice the opposing party and can
13 involve a conflict of interest between the lawyer and client.

14 Advocate -Witness Rule

15 [2] The tribunal has proper objection when the trier of fact may be confused or misled by a
16 lawyer serving as both advocate and witness. The opposing party has proper objection where the
17 combination of roles may prejudice that party's rights in the litigation. A witness is required to
18 testify on the basis of personal knowledge, while an advocate is expected to explain and comment
19 on evidence given by others. It may not be clear whether a statement by an advocate-witness should
20 be taken as proof or as an analysis of the proof.

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

9 [4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required
10 between the interests of the client and those of the tribunal and the opposing party. Whether the
11 tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature
12 of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the
13 lawyer's testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice,
14 in determining whether the lawyer should be disqualified due regard must be given to the effect of
15 disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee
16 that the lawyer would probably be a witness. ~~The principle of imputed disqualification~~ conflict of
17 interest principles stated in ~~Rule~~ Rules 1.7, 1.9, and 1.10 ~~has~~ have no application to this aspect of
18 the problem.

19 [5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial
20 in which another lawyer in the lawyer's firm will testify as necessary witness, paragraph (b) permits
21 the lawyer to do so except in situations involving a conflict of interest.

22 Conflict of Interest

23 [6] ~~Whether the combination of roles involves improper~~ In determining if it is permissible
24 to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also
25 consider that the dual role may give rise to a conflict of interest ~~with respect to the client is~~

1 ~~determined by the application of the rules concerning conflict of interest, most importantly, Rules~~
2 ~~that will require compliance with Rule 1.7, 1.8, and or 1.9.~~ For example, if there is likely to be
3 substantial conflict between the testimony of the client and that of the lawyer ~~or a member of the~~
4 ~~lawyer's firm,~~ the representation is improper involves a conflict of interest that requires compliance
5 with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a)
6 from simultaneously serving as advocate and witness because the lawyer's disqualification would
7 work a substantial hardship on the client. Similarly, a lawyer who might be permitted to
8 simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from
9 doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of
10 the client or is called by the opposing party. Determining whether or not such a conflict exists is
11 primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must
12 secure the client's consent in writing after consultation. In some cases, the lawyer will be precluded
13 from seeking the client's consent. See ~~Comment to Rule 1.7.~~ If a lawyer who is a member of a firm
14 may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the
15 firm also. See Rule 1.0(b) for the definition of "consent in writing".

16 [7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate
17 because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by
18 paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9
19 from representing the client in the matter, other lawyers in the firm will be precluded from the
20 representing the client by Rule 1.10 unless the client gives consent under the conditions stated in
21 Rule 1.7.

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
23 Committee on 09/20/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on
24 06/08/04; 03/18/05, 06/14/05.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The Joint Committee proposes changes to the black-letter Rule which, with one exception, will align the Rule with the Model Rule. The Joint Committee concluded the current requirement in paragraph (d) that the prosecutor disclose information "at the earliest practical time" is preferable to the Model Rule's direction to make "timely" disclosure. Paragraph (e), from the Model Rule, articulates circumstances in which a prosecutor is permitted to subpoena a lawyer in a grand jury or other criminal proceeding to present evidence. Proposed changes to paragraph (f) generally prohibit the prosecutor from making extrajudicial statements that have a substantial likelihood of heightening public condemnation of the accused.

The Joint Committee proposes changes to the Comment to reflect the Model Rule Comment.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

1 The prosecutor in a criminal case shall:

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

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

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

8 (d) disclose to the defense at the earliest practical time all evidence or information known
9 to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in
10 connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating
11 information known to the prosecutor, except when the prosecutor is relieved of this responsibility
12 by a protective order of the tribunal; ~~and~~

13 (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence
14 about a past or present client unless the prosecutor reasonably believes:

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

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

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

1 [3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate
2 protective order from the tribunal if disclosure of information to the defense could result in
3 substantial harm to an individual or to the public interest.

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

7 [5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have
8 a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal
9 prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing
10 public condemnation of the accused. Although the announcement of an indictment, for example,
11 will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid
12 comments that have no legitimate law enforcement purpose and have a substantial likelihood of
13 increasing public opprobrium of the accused. Nothing in this Rule is intended to restrict the
14 statements that a prosecutor may make that comply with Rule 3.6(b) or 3.6(c).

15 [6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to
16 responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's
17 office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection
18 with the unique dangers of improper extrajudicial statements in a criminal case. In addition,
19 paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or
20 associated with the prosecutor from making improper extrajudicial statements, even when such
21 persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care
22 standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement
23 personnel and other relevant individuals.

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
2 Committee on 09/20/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on
3 06/08/04; 03/18/05, 06/14/05.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDING

The Joint Committee proposes minor changes to the black-letter Rule to reflect the Model Rule. Language unique to the current Rule concerning *ex parte* communications with members of a legislative body is retained.

The Joint Committee proposes changes to the Comment to reflect the Model Rule Comment.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

1 A lawyer representing a client before a legislative body or administrative ~~body~~ agency in a
2 nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall
3 conform to the provisions of Rules 3.3(a) through ~~(e)~~ (d) and 3.4(a) through (c). A lawyer shall also
4 conform to the provisions of Rule 3.5, except the lawyer may participate in ex parte communications
5 with members of a legislative body regarding legislative matters but not adjudicative matters.

6 COMMENT

7 [1] In representation before bodies ~~engaged in rule-making or policy making~~, such as
8 legislatures, municipal councils, ~~or~~ and executive ~~or~~ and administrative agencies acting in a rule-
9 making or policy-making capacity, lawyers present facts, formulate issues and advance argument in
10 the matters under consideration. The decision-making body, like a ~~tribunal~~ court, should be able to
11 rely on the integrity of the submissions made to it. A lawyer appearing before such a body ~~should~~
12 must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a)
13 through (d), 3.4(a) through (c), and 3.5.

14 [2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do
15 before a ~~tribunal~~ court. The requirements of this Rule therefore may subject lawyers to regulations
16 inapplicable to advocates who are not lawyers. However, ~~legislative~~ legislatures and administrative
17 ~~bodies~~ agencies have a right to expect lawyers to deal with them as ~~lawyers are required to~~ they deal
18 with ~~tribunal~~ courts.

19 [3] This Rule only applies when a lawyer represents a client in connection with an official
20 hearing or meeting of a governmental agency or legislative body to which the lawyer or the lawyer's
21 client is presenting evidence or argument. It does not apply to representation of a client in a
22 negotiation or other bilateral transaction with a governmental agency or in connection with an
23 application for a license or other privilege or the client's compliance with generally applicable
24 reporting requirements, such as the filing of income tax returns. Nor does it apply to the

1 representation of a client in connection with an investigation or examination of the client's affairs
2 conducted by government investigators or examiners. Representation in such matters is governed
3 by Rules 4.1 through 4.4.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 09/20/85 and 01/10/86; Minutes of the Joint Committee on Attorney Standards Meeting of 12/01/95, 06/11/96, 06/08/04, 03/18/05, 06/14/05.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

The Joint Committee proposes no changes to Rule 4.1. The current Rule prohibits, as does the Model Rule, knowing falsehood in a statement made by a lawyer to a third person while the lawyer is representing a client. However, the Model Rule also prohibits the failure to disclose a material fact. The Joint Committee concluded materiality should not be, as it is not now, a factor in the prohibition against knowingly making a false statement of fact or law.

In light of no changes being proposed for the black-letter Rule, the Joint Committee proposes only minor additions to the Comment. Language is added further explaining that misrepresentation can also result from partially true but misleading statements or omissions. Language is also added concerning application of Rule 8.4 to statements by a lawyer other than in the course of representing a client. These additions reflect Model Rule Comment language but are consistent with the current black-letter Rule.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

1 In the course of representing a client a lawyer shall not make a statement to a third person
2 of fact or law that the lawyer knows to be false.

3 COMMENT

4 **Misrepresentation**

5 A lawyer is required to be truthful when dealing with others on a client's behalf, but generally
6 has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur
7 if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.
8 Misrepresentations can also occur by partially true but misleading statements or omissions that are
9 the equivalent of affirmative false statements. For misrepresentations by a lawyer other than in the
10 course of representing a client, see Rule 8.4.

11 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
12 Committee on 08/17/84, 09/13/84 and Approved on 10/19/84 and 10/18/85; Minutes of the Joint
13 Committee on Attorney Standards on 06/08/04; 04/08/05, 06/14/05.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

The Joint Committee proposes only minor changes to the black-letter Rule to reflect the Model Rule.

The Joint Committee proposes several changes to the Comment to reflect the Model Rule Comment. Particularly, Comment [1] states the purpose of the Rule and emphasizes the Rule contributes to the proper functioning of the legal system by protecting clients represented by a lawyer. Language in Comment [2] clarifies that the Rule does not preclude communicating with a represented person seeking a second opinion. Changes to Comment [3] clarify that communications authorized by law may include constitutionally protected communications with the government. The added language also emphasizes the extra obligation imposed when communicating with an accused in a criminal matter. Comment [4] explains two circumstances in which a lawyer may seek a court order authorizing a communication: where it is uncertain the communication is permitted by the rule, and where the communication is prohibited but there are exceptional circumstances. Comment [6] is modified to more clearly identify the constituents of a represented organization with whom a lawyer may not communicate without consent of the organization's lawyer. New Comment [8] makes clear that the Rule's protections may not be waived by the client. The Comment additionally reminds lawyers that they must terminate communication once it is learned the person is represented by counsel in a matter to which the communication relates.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

COMMENT

5
6 [1] This Rule contributes to the proper functioning of the legal system by protecting a person
7 who has chosen to be represented by a lawyer in a matter against possible overreaching by other
8 lawyers who are participating in the matter, interference by those lawyers with the lawyer-client
9 relationship, and the uncounseled disclosure of information relating to the representation.

10 [2] This Rule does not prohibit communication with a represented person, or an employee or
11 agent of such a person, concerning matters outside the representation. For example, the existence
12 of a controversy between a government agency and a private party, or between two organizations,
13 does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other
14 regarding a separate matter. Nor does this Rule preclude communication with a represented person
15 who is seeking advice from a lawyer who is not otherwise representing a client in the matter. Also,
16 parties Parties to a matter may communicate directly with each other and a lawyer having independent
17 justification or legal authorization for communicating with a represented person is permitted to do
18 so. Communications authorized by law include, for example, the right of a party to a controversy
19 with a government agency to speak with government officials about the matter.

20 [3] Communications authorized by law may include communications by a lawyer on behalf
21 of a client who is exercising a constitutional or other legal right to communicate with the government.
22 Communications authorized by law may also include constitutionally permissible investigative
23 activities of lawyers representing governmental entities, directly or through investigative agents, prior
24 to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial

1 ~~precedent that either has found the activity permissible under this Rule or has found this Rule~~
2 ~~inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by~~
3 ~~constitutional provisions~~ When communicating with the accused in a criminal matter, a government
4 lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.
5 The fact that a communication does not violate a state or federal constitutional right is insufficient
6 to establish that the communication is permissible under this Rule.

7 [4] A lawyer who is uncertain whether a communication with a represented person is
8 permissible may seek a court order. A lawyer may also seek a court order in exceptional
9 circumstances to authorize a communication that would otherwise be prohibited by this Rule, for
10 example, where communication with a person represented by counsel is necessary to avoid reasonably
11 certain injury.

12 [5] This Rule also applies to communications with any person, whether or not a party to a
13 formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning
14 the matter to which the communication relates.

15 [6] In the case of an a represented organization, this Rule prohibits communications ~~by a~~
16 ~~lawyer for another person or entity concerning the matter in representation~~ with persons ~~having a~~
17 ~~managerial responsibility on behalf~~ a constituent of the organization, ~~and with any other person whose~~
18 ~~who supervises, directs, or regularly consults with the organization's lawyer concerning the matter~~
19 ~~or who has authority to obligate the organization with respect to the matter or whose~~ act or omission
20 in connection with ~~that~~ the matter may be imputed to the organization for purposes of civil or criminal
21 liability ~~or whose statement may constitute an admission on the part of the organization.~~ If an ~~agent~~
22 ~~or employee~~ a constituent of the organization is represented in the matter by his or her own counsel,
23 the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare
24 Rule 3.4(f). The prohibition of this Rule does not apply to contact with an unrepresented former
25 ~~agents or employees~~ constituent of the represented organization (although Rule 4.3 does then apply);
26 however, the lawyer making the contact must take care not to seek to induce the former

1 ~~agent/employee~~ constituent to reveal information that may be protected by the privilege attached to
2 ~~attorney/client~~ lawyer-client communications to the extent of the person's contacts, while ~~an agent~~
3 ~~or employee~~ a constituent, with her or his former employer's counsel.

4 [7] The prohibition on communications with a represented person only applies, however, in
5 circumstances where the lawyer knows that the person is in fact represented in the matter to be
6 discussed. This means that the lawyer has actual knowledge of the fact of the representation; but
7 such actual knowledge may be inferred from the circumstances. See ~~Terms~~ Rule 1.0(g). ~~Such an~~
8 ~~inference may arise in circumstances where there is substantial reason to believe that the person with~~
9 ~~whom communication is sought is represented in the matter to be discussed~~. Thus, a lawyer cannot
10 evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

11 [8] This Rule applies even though the represented person initiates or consents to the
12 communication. A lawyer must immediately terminate communication with a person if, after
13 commencing communication, the lawyer learns that the person is one with whom communication is
14 not permitted by this Rule.

15 [9] In the event the person with whom the lawyer communicates is not known to be
16 represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

17 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 09/20/85 and 10/18/85; Minutes of the Joint Committee on Attorney Standards
19 Meeting of 12/12/97, 06/08/04, 04/08/05, 06/14/05.

RULE 4.3 DEALING WITH UNREPRESENTED PERSONS

The current Rule is the same as the first two sentences of the Model Rule. The Joint Committee proposes the addition of the last sentence from the Model Rule. The added language prohibits the giving of legal advice to an unrepresented person if the lawyer knows or reasonably should know there is a possibility of there being a conflict between the lawyer's client and the unrepresented person.

As the black-letter Rule, with the added language, would follow the Model Rule, the Joint Committee proposes revisions to the Comment to also follow the Model Rule Comment. Language in Comment [1] is deleted as the general substance has been elevated to the black-letter Rule. Language is added to Comment [1] to indicate that, in order to avoid misunderstanding, the lawyer will typically need to explain that the lawyer's client has interests opposed to those of the unrepresented person. Comment [2] is added to give guidance regarding what constitutes impermissible advice-giving.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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

8 COMMENT

9 [1] This Rule prohibits a lawyer from misleading an unrepresented person as to the lawyer's
10 role in a matter. An unrepresented person, particularly one not experienced in dealing with legal
11 matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the
12 law even when the lawyer represents a client. ~~A lawyer also has an affirmative duty to clarify the~~
13 ~~lawyer's role to an unrepresented person when the lawyer knows or reasonably should know that the~~
14 ~~person misunderstands that role. During the course of a lawyer's representation of a client, the lawyer~~
15 ~~should not give legal advice to an unrepresented person other than the advice to secure counsel. In~~
16 ~~order to avoid a misunderstanding, a lawyer will typically need to explain that the lawyer's client has~~
17 ~~interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise~~
18 ~~when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13 (f).~~

19 [2] This Rule distinguishes between situations involving unrepresented persons whose
20 interests may be adverse to those of the lawyer's client and those in which the person's interests are
21 not in conflict with the client's. In the former situation, the possibility that the lawyer will
22 compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any
23 advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may
24 depend on the experience and sophistication of the unrepresented person, as well as the setting in
25 which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the

1 terms of transaction or settling a dispute with an unrepresented person. So long as the lawyer has
2 explained that the lawyer represents an adverse party and is not representing the person, the lawyer
3 may inform the person of the terms on which the lawyer's client will enter into an agreement or settle
4 a matter, prepare documents that require the person's signature and explain the lawyer's own view
5 of the meaning of the document or lawyer's view of the underlying legal obligations.

6 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
7 Committee on 09/20/85 and 10/18/85; Minutes of the Joint Committee on Attorney Standards on
8 06/08/04, 04/08/05, 06/14/05, 09/09/05.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

The Joint Committee proposes the minor addition of a reference to delay in the black-letter Rule, which would follow the Model Rule.

The Joint Committee proposes a minor change to the Comment which also follows the Model Rule Comment.

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

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

4 COMMENT

5 [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those
6 of the client, but that responsibility does not imply that a lawyer ~~has no obligation to respect~~ may
7 disregard the rights of third persons. For example, a lawyer shall not: ask questions or otherwise
8 allude to matters not reasonably believed to be relevant with the intention of degrading a witness or
9 another; act on a client's behalf only to harass or maliciously injure another; or make comments to
10 or investigate jurors or members of the venire where those acts are calculated merely to harass,
11 embarrass, or vex jurors or members of the venire.

12 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
13 Committee on 09/20/85 and 10/18/85; Minutes of Joint Committee on Attorney Standards on
14 06/08/04, 04/08/05, 06/14/05.

NEW RULE 4.5 INADVERTENT TRANSMISSION

The Joint Committee proposes new Rule 4.5 governing circumstances in which a lawyer receives documents relating to representation of the lawyer's client which have been inadvertently sent. The new Rule is based in part on paragraph (b) of Model Rule 4.4. Particularly, the opening language of paragraph (a), and subparagraph (1), of the new Rule restate paragraph (b) of Model Rule 4.4. The Joint Committee concluded the Model Rule provision provided insufficient guidance with respect to what constitutes an inadvertently sent document and what the lawyer should do upon receiving the document. The Joint Committee also concluded provisions on inadvertent transmissions would be better placed in a separate rule than as part of Rule 4.4. In addition to promptly notifying the sender as required by paragraph (a)(1), the lawyer would be required by paragraph (a)(2) to comply within a reasonable time with a request for return of the document, provided the request is accompanied by a promise of reimbursement of any out-of-pocket expenses. Paragraph (b) defines an inadvertently sent document as one the sending of which was a deliberate though mistaken act or resulted from the ignorance, negligence, or inattention of the sender or sender's agent. Paragraph (d) shelters the lawyer receiving the inadvertently sent document from alleged violations of Rule 1.2 or 1.4 if the lawyer does not communicate to or consult with the client about the receipt or return of the document.

Comments [1] and [2], with some modifications, are based upon the related Comment language in Model Rule 4.4.

Proposed Rule

RULE 4.5 INADVERTENT TRANSMISSION

1 (a) A lawyer who receives a document relating to the representation of the lawyer's client and
2 knows or reasonably should know the document was inadvertently sent shall:

3 (1) promptly notify the sender, and

4 (2) comply within a reasonable time with the sender's request, if accompanied by a
5 promise of reimbursement of any out-of-pocket expense involved, that the lawyer
6 return the document.

7 (b) For purposes of this rule, "document" includes facsimile transmissions, electronically
8 received messages, and metadata retrievable from an electronic transmission.

9 (c) For purposes of this rule, a document was inadvertently sent if the sending was a
10 deliberate though mistaken act or resulted from the ignorance, negligence, or inattention of the
11 sender or the sender's agent.

12 (d) A lawyer who receives a document under the circumstances creating a duty under this rule
13 does not violate Rule 1.2 or Rule 1.4 by not communicating to or consulting with the client regarding
14 the receipt or the return of the document.

15 Comment

16 [1] This Rule recognizes that lawyers sometimes receive documents that were mistakenly
17 sent or produced by opposing parties or their lawyers, or by third parties. If a lawyer knows or
18 reasonably should know that such a document was sent inadvertently, then this Rule requires the

Rule 4.5

1 lawyer to promptly notify the sender in order to permit that person to take protective measures.
2 Whether the lawyer who receives a document that was sent inadvertently is required to take
3 additional steps, other than notification and return of the document if requested and reimbursement
4 of expenses is promised, is a matter of law beyond the scope of these Rules, as is the question of
5 whether the privileged status of a document has been waived.

6 [2] Some lawyers may choose to return a document unread. The decision to voluntarily
7 return such a document unread is a matter of professional judgment reserved to the lawyer, and the
8 lawyer is not required to communicate with or consult with the client about that decision.

9 Reference: Minutes of the Joint Committee on Attorney Standards on 08/06/04, 09/24/04,
10 06/14/05.

RULE 5.1 RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY ATTORNEYS (new title from Model Rule)

Rule 5.1 governs a lawyer's responsibilities for the actions of other lawyers in a law firm. The general approach under the current Rule is that every lawyer in the firm has some responsibility or potential responsibility for actions of other lawyers. The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule, which places the responsibility on lawyers who are partners or who are in a similar supervisory or managerial role. Proposed changes to paragraph (a) reflect this change in focus. Proposed changes to paragraph (c) further identify those circumstances under which a lawyer is otherwise responsible for another lawyer's violation of the rules.

The Joint Committee proposes several changes to the Comment to incorporate language from and delete language inconsistent with the Model Rule Comment.

**RULE 5.1 ~~RESPONSIBILITY FOR AN ASSOCIATED~~
~~LAWYER'S COMPLIANCE WITH RULES~~ RESPONSIBILITIES OF PARTNERS,
MANAGERS, AND SUPERVISORY LAWYERS**

1 (a) A ~~lawyer partner~~ in a firm, and a lawyer who individually or together with other lawyers
2 has comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the
3 firm has ~~put into in~~ effect measures giving reasonable assurance that all lawyers in the firm conform
4 to these ~~rules~~ Rules.

5 (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable
6 efforts to ensure that the other lawyer conforms to these ~~rules~~ Rules.

7 (c) A lawyer ~~in a firm~~ shall be responsible for ~~a violation of these rules by another lawyer in~~
8 the firm lawyer's violation of these Rules if ~~the lawyer knows or reasonably should know of the~~
9 violation at a time when its consequences can be avoided or mitigated, but fails to take reasonable
10 remedial action.

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

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

COMMENT

17
18 [1] ~~Paragraphs Paragraph (a) and (c) establish a responsibility for each lawyer employed in~~
19 ~~a private firm, a legal services organization, or legal department of a corporation or other~~
20 ~~organization~~ applies to lawyers who have managerial authority over the professional work of a firm.

1 This includes ~~members~~ partners of a partnership and₂ the shareholders in a law firm organized as a
2 professional corporation₃ and members of other associations authorized to practice law; lawyers in
3 ~~the~~ having comparable managerial authority in a legal services organization or a law department of
4 an enterprise or government agency; and lawyers who have intermediate managerial responsibilities
5 in a firm. Paragraph (b) ~~includes all of the foregoing~~ applies to lawyers who have ~~direct~~ supervisory
6 authority ~~over another lawyer as well as sole practitioners with such authority regardless of who~~
7 ~~employs the other lawyer~~ over the work of other lawyers in a firm. ~~Whether a lawyer has such~~
8 ~~supervisory authority in particular circumstances is a question of fact.~~

9 [2] ~~The extent of the duty to make reasonable efforts prescribed in paragraphs (a) and (b) can~~
10 ~~depend on the firm's structure, the nature of its practice, the nature of the relationship between~~
11 ~~lawyers not employed by the same firm, or the position of a lawyer within a firm. The duty of an~~
12 ~~associate or of a lawyer of less seniority in a firm may be minimal compared to the duty of a partner~~
13 ~~or a senior partner in a firm~~ Paragraph (a) requires lawyers with managerial authority within a firm
14 to make reasonable efforts to establish internal policies and procedures designed to provide
15 reasonable assurance that all lawyers in the firm will conform to these Rules. Such policies and
16 procedures include those designed to detect and resolve conflicts of interest, identify dates by which
17 actions must be taken in pending matters, account for client funds and property, and ensure that
18 inexperienced lawyers are properly supervised.

19 [3] ~~The~~ Other ~~measures to be put into effect in a firm also~~ that may be required to fulfill the
20 responsibility prescribed in paragraph (a) can depend upon its the firm's structure and the nature of
21 its practice. In a small firm of experienced lawyers, informal supervision and occasional admonition
22 ordinarily might be sufficient periodic review of compliance with the required systems ordinarily will
23 suffice. In a large firm₂ or in practice situations in which ~~intensely~~ difficult ethical problems frequently
24 arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure
25 whereby junior lawyers can make confidential referral of ethical problems directly to a designated
26 senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on
27 continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can

1 influence the conduct of all its members and ~~no lawyer~~ the partners may not assume that ~~another~~
2 ~~lawyer~~ all lawyers associated with the firm will inevitably conform to ~~the~~ these Rules.

3 [4] Paragraph (c) addresses when a lawyer is responsible for another lawyer's violation of
4 these Rules.

5 [5] Paragraph (c)(2) addresses defines the duty of a partner or other lawyer who knows of
6 a violation of these Rules in time to avoid or mitigate the effect of the violation. It presupposes that
7 the lawyer knows or reasonably should know that the conduct is a violation of these Rules. Thus,
8 if a lawyer knows that another lawyer in a firm misrepresented a matter to an opposing party in
9 negotiation, both lawyers have a duty to correct the resulting misapprehension. It does not address
10 a situation where the lawyer orders the misconduct of another. This is clearly addressed by Rule
11 8.4(a) having comparable managerial authority in a law firm, as well as a lawyer who has direct
12 supervisory authority over the performance of specific legal work by another lawyer. Whether a
13 lawyer has supervisory authority in particular circumstances is a question of fact. Partners and
14 lawyers with comparable authority have at least indirect responsibility for all work being done by the
15 firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory
16 responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action
17 by a lawyer would depend on the lawyer's position in the firm, the immediacy of the lawyer's
18 involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent
19 avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus,
20 if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in
21 negotiation, the supervisor as well as the subordinate has a duty to correct the resulting
22 misapprehension.

23 [7] Professional misconduct by a lawyer under supervision could reveal a violation of
24 paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of
25 paragraph (c) if because there was no direction, ratification, or knowledge of the violation. As used

1 in paragraph (c) "~~in a firm~~" means a member of a firm when the remedial action could be taken, not
2 when the violation occurred.

3 [7] Apart from this Rule ~~and Rules 5.2, 5.3~~ and Rule 8.4(a), a lawyer does not have
4 disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be
5 liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these
6 Rules.

7 [8] The duties imposed by this Rule on managing and supervising lawyers do not alter the
8 personal duty of each lawyer in a firm to abide by these Rules. See Rule 5.2(a).

9 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
10 Committee on 10/18/85, 11/08/85, 12/13/85 and 01/31/86; Minutes of the Joint Committee on
11 Attorney Standards on 08/06/04, 03/18/05, 06/14/05.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

In light of the proposed changes to Rule 5.1, the Joint Committee proposes the addition of paragraph (b) to black-letter Rule to follow the Model Rule. The added language provides that a subordinate lawyer does not violate the rules if the lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. The proposed change would result in the black-letter Rule being fully the same as the Model Rule.

The Joint Committee proposes changes to the Comment to incorporate language from and delete language inconsistent with the Model Rule Comment.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

1 (a) A lawyer is bound by these ~~rules~~ Rules notwithstanding that the lawyer acted at the
2 direction of another person.

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

5 COMMENT

6 [1] Although a lawyer is not relieved of responsibility for a violation by the fact that the
7 lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a
8 lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a
9 subordinate files a frivolous pleading at the direction of a supervisor, the subordinate would not be
10 guilty of a professional violation unless the subordinate knew of the document's frivolous character.

11 [2] When lawyers in a supervisor-subordinate relationship encounter a matter involving
12 professional judgment as to ethical duty, ~~each lawyer is responsible~~ the supervisor may assume
13 responsibility for making the ~~decision~~ judgment. Otherwise a consistent course of action or position
14 could not be taken. If the question can reasonably be answered only one way, the duty of both
15 lawyers is clear and they are equally responsible for fulfilling it. However, if the question is
16 reasonably arguable, someone has to decide upon the course of action. That authority ordinarily
17 reposes in the supervisor, and the subordinate may be guided accordingly. For example, if a question
18 arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable
19 resolution of the question should protect the subordinate professionally if the resolution is
20 subsequently challenged. ~~Although a lawyer is not relieved of responsibility for a violation by that~~
21 fact that the lawyer acted at the direction of another lawyer, the fact may be relevant in determining
22 whether a lawyer had the knowledge required to render conduct a violation of these Rules. In
23 addition, the nature of the ethical question presented, the relationship between the lawyers, whether

1 ~~other lawyers were consulted regarding the ethical question, and the position ultimately taken may~~
2 ~~be used, along with other relevant facts, to mitigate the discipline imposed for the violation.~~

3 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
4 Committee on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
5 08/06/04, 03/18/05, 06/14/05.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

Consistent with the proposed changes to Rules 5.1 and 5.2, the Joint Committee proposes changes to the black-letter Rule to require that lawyers with managerial authority within a firm make reasonable efforts to ensure that nonlawyers act in a manner compatible with the rules. Language similar to that added in Rule 5.1(c) is added to paragraph (c) to further identify circumstances in which a lawyer is responsible for the conduct of a nonlawyer.

The Joint Committee does not propose any changes to Comment [1], which is the same as the Model Rule Comment provision. Comment [2] is added from the Model Rule Comment and distinguishes the responsibility to create a system to ensure rule compliance [paragraph (a)] from the supervisory responsibility governed by paragraph (b) and the personal responsibility addressed in paragraph (c). The Joint Committee proposes only minor changes to the remainder of the Comment.

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

2 (a) ~~The a partner, and a lawyer who individually or together with other lawyers has~~
3 comparable managerial authority in a law firm, shall make reasonable efforts to ~~put into~~ ensure that
4 the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible
5 with the professional obligations of the lawyer;

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

9 (c) ~~The a~~ lawyer shall be responsible for conduct of a nonlawyer that would be a violation of
10 these rules by the nonlawyer if the lawyer knows of the violation at a time when its consequences can
11 be avoided or mitigated but fails to take reasonable remedial action Rules if:

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

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

18 (d) In addition to paragraphs (a), (b) and (c), the following apply with respect to a legal
19 assistant employed or retained by or associated with a lawyer:

1 (1) A lawyer may delegate to a legal assistant any task normally performed by the lawyer
2 except those tasks proscribed to one not licensed as a lawyer by statute, court rule,
3 administrative rule or regulation, controlling authority, or these ~~rules~~ Rules.

4 (2) A lawyer may not delegate to a legal assistant:

5 (i) responsibility for establishing ~~an attorney-client~~ a lawyer-client relationship;

6 (ii) responsibility for establishing the amount of a fee to be charged for a legal
7 service;

8 (iii) responsibility for a legal opinion rendered to a client; or

9 (iv) responsibility for the work product.

10
11 (3) The lawyer shall make reasonable efforts to ensure that clients, courts, and other
12 lawyers are aware that a legal assistant is not licensed to practice law.

13
14 COMMENT

15 [1] Lawyers generally employ nonlawyers in their practice, including secretaries, legal
16 assistants, investigators, law student interns, and paraprofessionals. These individuals, whether
17 employees or independent contractors, act for the lawyer in rendition of the lawyer's professional
18 services. A lawyer must give such nonlawyers appropriate instruction and supervision concerning
19 the ethical aspects of their employment, particularly regarding the obligation not to disclose
20 information relating to representation of the client, and is responsible for their work product. The

1 measures employed in supervising nonlawyers should take account of the fact that they do not have
2 legal training and are not subject to professional discipline.

3 [2] Paragraph (a) requires lawyers with managerial authority within a law firm to make
4 reasonable efforts to establish internal policies and procedures designed to provide reasonable
5 assurance that nonlawyers in the firm will act in a way compatible with these Rules. See Comment
6 to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a
7 nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct
8 of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer.

9 [3] While appropriate delegation of tasks to legal assistants is allowed, a lawyer may not
10 permit a legal assistant to engage in the "practice of law." The key to appropriate delegation is
11 proper supervision, which includes adequate instruction when assigning projects, monitoring of the
12 project, and review of the project. Lawyers should take care in hiring and choosing a legal assistant
13 to work on a specific project to ensure that the legal assistant has the education, knowledge, and
14 ability necessary to perform the delegated tasks competently.

15 [4] The following guidelines have been recognized as helpful in evaluating the education,
16 training or experience of a qualified legal assistant.

17 1) Graduation from one of the following ABA approved legal assistant/paralegal
18 programs: bachelor's degree, associate's degree, or a post-baccalaureate program. If not
19 ABA approved, graduation from a legal assistant/paralegal program that consists of a
20 minimum of 60 semester credit hours or the equivalent, of which ~~18~~ eighteen semester
21 credit hours are substantive ~~paralegal~~ legal assistant/paralegal courses.

22 2) A bachelor's degree in any field, and either one-year employer training as a legal
23 assistant/paralegal or ~~18~~ eighteen semester credit hours of legal assistant/paralegal
24 substantive courses.

1 3) Successful completion of a national certifying examination that is specifically designed
2 for legal assistants/paralegals and which includes continuing legal education for
3 maintenance of that certification status.

4 4) Seven years or more of experience working as a legal assistant/paralegal who has been
5 employer trained by and under the supervision of an attorney a lawyer.

6 [5] The essential elements of any lawyer-client relationship are the agreement to undertake
7 representation, the scope of that representation, and the fee arrangement relating to that
8 representation. In evaluating whether to undertake the representation, the lawyer must evaluate
9 whether any circumstances exist which would require that the representation be declined (See,
10 Rule 1.16). Rule 1.2 requires that the lawyer consult with the client regarding any limitations on the
11 scope of representation. The lawyer must further obtain the agreement of the client, and in some
12 cases written agreement, with respect to the fee arrangement relating to the presentation
13 representation (See, Rule 1.5). In addition, Rule 2.1 requires a lawyer to exercise independent
14 professional judgment and render candid advice. These matters are of such importance that they must
15 be handled personally by the lawyer. Regardless of how the legal assistant may be used in the initial
16 stages of establishing an attorney/client lawyer-client relationship, i.e., gathering background
17 information from the client and others, preparing initial drafts of fee arrangements, or performing
18 other incidental tasks, the lawyer may not delegate responsibility to a legal assistant or other
19 nonlawyer for deciding whether the representation will be undertaken or for any legal opinion
20 rendered to a client.

21 [6] Finally, nonlawyers may not hold themselves out as lawyers. It is the lawyer's
22 responsibility to see that communications about services rendered by the law firm and its nonlawyers
23 are not false, fraudulent, deceptive or misleading (See, Rule 7.1), and that nonlawyer employees of
24 the firm understand those limitations. If the lawyer or a legal assistant becomes aware that the role
25 of the legal assistant is unclear, the lawyer has an affirmative duty to clarify the legal assistant's role.

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
2 Committee on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards
3 Meetings of 06/13/95, 09/15/95, 12/01/95, 06/11/96, 08/06/04, 04/08/05, 06/14/05, 09/09/05.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

The Joint Committee proposes changes to the black-letter Rule to follow the Model Rule. Paragraph (a)(4) is added to allow a lawyer to share fees with a non-profit organization that employs or retains the lawyer. Language is added to paragraph (d)(2) to describe an additional situation in which a lawyer must not practice with or in the form of a professional corporation when a nonlawyer is involved. The language is more general in expression and expands the prohibition to include nonlawyers who occupy positions with responsibilities similar to those of corporate directors or officers.

The Joint Committee proposes the addition of Comment [2] to follow the Model Rule Comment. Comment [1] is the same as Model Rule Comment [1].

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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

2 (1) An agreement by a lawyer with ~~his~~ the lawyer's firm, partners, or associate may
3 provide for the payment of money, over a reasonable period of time after ~~his~~ the
4 lawyer's death, to ~~his~~ the lawyer's estate or to one or more specified persons;

5 (2) A lawyer who purchases the practice of a deceased, disabled, or disappeared
6 lawyer may, under Rule 1.17, pay to the estate or other representatives of that lawyer
7 the agreed-upon purchase price: ~~and~~

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

11 (4) A lawyer may share court-awarded legal fees with a nonprofit organization
12 that employed, retained, or recommended employment of the lawyer in the matter.

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

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

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

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

4 (2) A nonlawyer is a corporate director or officer thereof or holds a position of
5 similar responsibility in any form of association other than a corporation; or

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

8 COMMENT

9 [1] The provisions of this Rule express traditional limitations on sharing fees. These
10 limitations are to protect the lawyer's professional independence of judgment. Where someone other
11 than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that
12 arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such
13 arrangements should not interfere with the lawyer's professional judgment.

14 [2] This Rule also expresses traditional limitations on permitting a third party to direct or
15 regulate the lawyer's professional judgment in rendering legal services to another. See also Rule
16 1.8(f).

17 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 11/08/85 and 01/10/86; Minutes of the Joint Committee on Attorney Standards
19 Meetings of 09/15/95, 12/01/95, 06/11/96, 08/06/04, 03/18/05, 06/14/05.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

The Joint Committee does not propose any changes to the Rule, which was recently amended as part of the multijurisdictional practice rule changes.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

The Joint Committee proposes minor changes to the black-letter Rule to conform the Rule to the Model Rule. Language is added to paragraph (a) to include additional kinds of agreements that are prohibited under the rule, i.e., shareholders, operating, and other similar kinds of agreements. The reference in paragraph (b) to "controversy between private parties" is changed to "client controversy". This latter change clarifies that the Rule applies to settlements not only between private parties but also, for example, between a private party and the government. The reference to "retirement" is changed to "such termination" to encompass, as the Rule generally does, different kinds of terminations.

The Joint Committee proposes changes to Comment [1] in accordance with the Model Rule Comment. Replacing "partners and associates" with "lawyers" recognizes that lawyers associate together in organizations other than traditional law firm partnerships.

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

1 A lawyer shall not participate in offering or making:

2 (a) A partnership ~~or, shareholders, operating,~~ employment, or other similar type of
3 agreement that restricts the ~~rights~~ right of a lawyer to practice after termination of the relationship,
4 except an agreement concerning benefits upon ~~retirement~~ such termination; or

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

7 COMMENT

8 [1] An agreement restricting the right of ~~partners or associates~~ lawyers to practice after
9 leaving a firm not only limits their professional autonomy but also limits the freedom of clients to
10 choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to
11 provisions concerning ~~retirement~~ benefits ~~for service~~ after termination of a relationship with the firm.

12 [2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in
13 connection with settling a claim on behalf of a client.

14
15 [3] This Rule does not prohibit restrictions that may be included in the terms of the sale of
16 a law practice under Rule 1.17 as long as the restrictions are otherwise consistent with state law.

17 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
18 Committee on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards
19 Meetings of 09/15/95, 12/01/95, 06/11/96, 08/06/04, 03/18/05, 06/14/05.

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

The current Rule and the Model Rule are nearly identical and the Joint Committee proposes minor changes to fully follow the Model Rule.

The Joint Committee proposes changes to the Comment to follow the Model Rule Comment. Language added to Comment [1] clarifies that a lawyer can provide law-related services in circumstances that are distinct from the lawyer's provision of legal services. Language added to Comment [2] clarifies that paragraph (a)(2) of the Rule applies in all cases in which provision of law-related services is distinct from the provision of legal services within the meaning of paragraph (a)(1), regardless of whether the law-related services are provided directly by the lawyer, the lawyer's firm, or by a separate entity controlled by the lawyer or law firm.

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

1 (a) A lawyer is subject to ~~the Rules of Professional Conduct~~ these Rules with respect to the
2 provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

3
4 (1) by the lawyer in circumstances that are not distinct from the lawyer's provision
5 of legal services to clients; or

6 (2) in other circumstances by ~~a separate~~ an entity controlled by the lawyer individually
7 or with others if the lawyer fails to take reasonable measures to assure that a person
8 obtaining the law-related services knows that the services ~~of the separate entity~~ are
9 not legal services and that the protections of the client-lawyer relationship do not
10 exist.

11
12 (b) The term "law-related services" denotes services that might reasonably be performed
13 in conjunction with and in substance are related to the provision of legal services, and that are not
14 prohibited as unauthorized practice of law when provided by a nonlawyer.

15 COMMENT

16 [1] When a lawyer performs law-related services or controls an organization that does so,
17 there exists the potential for ethical problems. Principal among these is the possibility that the person
18 for whom the law-related services are performed fails to understand that the services may not carry
19 with them the protections normally afforded as part of the client-lawyer relationship. The recipient
20 of the law-related services may expect, for example, that the protection of client confidences,
21 prohibitions against representation of persons with conflicting interests, and obligations of a lawyer
22 to maintain professional independence apply to the provision of law-related services when that may
23 not be the case. Rule 5.7 applies to the provision of law-related services by a lawyer even when the
24 lawyer does not provide any legal services to the person for whom the law-related services are

1 performed and whether the law-related services are performed through a law firm or a separate entity.

2 The Rule identifies the circumstances in which all of the these Rules of Professional Conduct apply
3 to the provision of law-related services. Even when those circumstances do not exist, however, the
4 conduct of a lawyer involved in the provision of law-related services is subject to those Rules that
5 apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal
6 services. See, e.g., Rule 8.4.

7 [2] When law-related services are provided by a lawyer under circumstances that are not
8 distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related
9 services must adhere to the requirements of the these Rules of Professional Conduct as provided in
10 Rule 5.7 paragraph (a)(1). Even when the law-related and legal services are provided in
11 circumstances that are distinct from each other, for example through separate entities or different
12 support staff with the law firm, these Rules apply to the lawyer as provided in paragraph (a)(2) unless
13 the lawyer takes reasonable measures to assure that the recipient of the law-related services knows
14 that the services are not legal services and that the protections of the lawyer-client relationship do not
15 apply.

16 [3] Law-related services also may be provided through an entity that is distinct from that
17 through which the lawyer provides legal services. If the lawyer individually or with others has control
18 of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that
19 each person using the services of the entity knows that the services provided by the entity are not
20 legal services and that the Rules of Professional Conduct that relate relating to the client-lawyer
21 lawyer-client relationship do not apply. A lawyer's control of an entity extends to the ability to direct
22 its operation. Whether a lawyer has such control will depend upon the circumstances of the particular
23 case.

24 [4] When a client-lawyer relationship exists with a person who is referred by a lawyer to a
25 separate law-related service entity controlled by the lawyer, individually or with others, the lawyer
26 must comply with Rule 1.8(a).

1
2 [5] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person
3 using law-related services understands the practical effect or significance of the inapplicability of ~~the~~
4 these Rules of Professional Conduct, the lawyer should communicate to the person receiving the
5 law-related services, in a manner sufficient to assure that the person understands the significance of
6 the fact, that the relationship of the person to the business entity will not be a client-lawyer
7 relationship. The communication should be made before entering into an agreement for provision of
8 or providing law-related services, and preferably should be in writing.

9
10 [6] Regardless of the sophistication of potential recipients of law-related services, a lawyer
11 should take special care to keep separate the provision of law-related and legal services in order to
12 minimize the risk that the recipient will assume that the law-related services are legal services. The
13 risk of such confusion is especially acute when the lawyer renders both types of services with respect
14 to the same matter. Under some circumstances the legal and law-related services may be so closely
15 entwined that they cannot be distinguished from each other, and the requirement of disclosure and
16 consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be
17 responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that
18 of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with
19 the these Rules of Professional Conduct.

20 [7] A broad range of economic and other interests of clients may be served by lawyers
21 engaging in the delivery of law-related services. Examples of law-related services include providing
22 ADR services, title insurance, financial planning, accounting, trust services, real estate counseling,
23 legislative lobbying, economic analysis, social work, tax return preparation, and patent, medical or
24 environmental consulting. When a lawyer is obliged to accord the recipients of such services the
25 protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special
26 care to heed the proscriptions of the Rules addressing conflict of interest [Rule 1.7 through 1.11,
27 especially Rules 1.7(b) and 1.8(a), (b) and (f)], and to scrupulously adhere to the requirements of
28 Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services

1 must also in all respects comply with Rules 7.1 and ~~7.2~~ 7.3, dealing with advertising and solicitation.
2 In that regard, lawyers should take special care to identify the obligations that may be imposed as a
3 result of a jurisdiction's decisional law.

4 [8] When the full protections of all of ~~the~~ these Rules of Professional Conduct do not apply
5 to the provision of law-related services, principles of law external to ~~the~~ these Rules, for example, the
6 law of principal and agent, govern the legal duties owed to those receiving the services. Those other
7 legal principles may establish a different degree of protection for the recipient with respect to
8 confidentiality of information, conflicts of interest and permissible business relationships with clients.
9 See also Rule 8.4 (Misconduct).

10 *Reference:* Minutes of the Joint Committee on Attorney Standards Meetings of 03/31/95,
11 06/13/95, 09/15/95, 08/06/04, 03/18/05, 06/14/05.

RULE 6.1 PRO BONO PUBLICO SERVICES

The Joint Committee does not propose any changes to the black-letter Rule. The Joint Committee reviewed several issues regarding the Rule and its Model Rule counterpart and concluded that, in light of the current practice and the history of the Rule, changes are not warranted.

The Joint Committee does propose a minor change adding Comment [4], from the Model Rule Comment, to emphasize that law firms should act reasonably to enable and encourage all lawyers in the firm to provide pro bono legal services.

RULE 6.1 PRO BONO PUBLICO SERVICE

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

COMMENT

6
7 [1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each
8 lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a
9 substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public
10 rights law, charitable organization representation and the administration of justice. This Rule
11 expresses that policy but is not intended to be enforced through disciplinary process.

12 [2] The rights and responsibilities of individuals and organizations in the United States are
13 increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of
14 statutes, rules and regulations is imperative for persons of modest and limited means, as well as for
15 the relatively well-to-do.

16 [3] The basic responsibility for providing legal services for those unable to pay ultimately rests
17 upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be
18 one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of
19 professional prominence or professional workload, should find time to participate in or otherwise
20 support the provision of legal services to the disadvantaged. The provision of free legal services to
21 those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the
22 profession generally, but the efforts of individual lawyers are often not enough to meet the need.
23 Thus, it has been necessary for the profession and government to institute additional programs to
24 provide legal services. Accordingly, legal aid offices, lawyer referral services and other related

1 programs have been developed, and others will be developed by the profession and government.
2 Every lawyer should support all proper efforts to meet this need for legal services.

3 [4] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide
4 the pro bono legal services called for by this Rule.

5 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
6 Committee on 10/18/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on
7 04/08/05, 06/14/05.

RULE 6.2 APPOINTMENT BY A TRIBUNAL

The Joint Committee proposes only minor structural changes to the black-letter Rule. There are no proposed changes to the Comment language.

RULE 6.2 APPOINTMENT BY A TRIBUNAL

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

3 (a) ~~Representing~~ representing the client is likely to result in violation of these ~~rules~~ Rules or
4 other law;

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

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

9 COMMENT

10 [1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer
11 regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have
12 a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer
13 fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular
14 clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons
15 unable to afford legal services.

16 **Appointed Counsel**

17 [2] For good cause a lawyer may seek to decline an appointment to represent a person who
18 cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could
19 not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in
20 an improper conflict of interest, for example, when the client or the cause is so repugnant to the
21 lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the

1 client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably
2 burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

3 [3] An appointed lawyer has the same obligations to the client as retained counsel, including
4 the obligations of loyalty and confidentiality, and is subject to the same limitations on the
5 client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the
6 Rules.

7 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
8 Committee on 10/18/85, 11/08/85 and 01/10/86; Minutes of the Joint Committee on Attorney
9 Standards on 08/06/04, 04/08/05, 06/14/05.

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

The current Rule and the Model Rule are identical except for the references to "action" in Model Rule paragraphs (a) and (b), which the Joint Committee proposes adding to the current Rule.

The Joint Committee does not propose any changes to the Comment language.

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

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

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

7 (b) Where the decision or action could have a material adverse effect on the representation
8 of a client of the organization whose interests are adverse to a client of the lawyer.

9 COMMENT

10 [1] Lawyers should be encouraged to support and participate in legal service organizations.
11 A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer
12 relationship with persons served by the organization. However, there is potential conflict between
13 the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict
14 disqualified a lawyer from serving on the board of a legal services organization, the profession's
15 involvement in such organizations would be severely curtailed.

16 [2] It may be necessary in appropriate cases to reassure a client of the organization that the
17 representation will not be affected by conflicting loyalties of a member of the board. Established,
18 written policies in this respect can enhance the credibility of such assurances.

19 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
20 Committee on 10/18/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on
21 08/06/04, 04/08/05, 06/14/05.

RULE 6.4 REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

The Joint Committee does not propose any changes to the Rule or Comment language.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

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

6 COMMENT

7 [1] Lawyers involved in organizations seeking law reform generally do not have a
8 client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not
9 be involved in a bar association law reform program that might indirectly affect a client. See also
10 Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as
11 disqualified from participating in drafting revisions of rules governing that subject. In determining
12 the nature and scope of participation in such activities, a lawyer should be mindful of obligations to
13 clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the
14 integrity of the program by making an appropriate disclosure within the organization when the lawyer
15 knows a private client might be materially benefitted.

16 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
17 Committee on 10/18/85 and 11/08/85; Minutes of the Joint Committee on Attorney Standards on
18 08/06/04; 04/08/05, 06/14/05.

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

The current Rule and the Model Rule are identical. The Joint Committee does not propose and changes to the Rule.

The Joint Committee proposes a minor change to Comments [1] and [3] to fully follow the Model Rule Comment.

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

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

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

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

8 COMMENT

9 [1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as
10 to lawyers. Hence, if a person makes a material false statement in connection with an application for
11 admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any
12 event may be relevant in a subsequent admission application. The duty imposed by this Rule applies
13 to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional
14 offense for a lawyer to knowingly make a misrepresentation or omission in connection with a
15 disciplinary investigation of the lawyer's own conduct. This Paragraph (b) of this Rule also requires
16 correction of any prior misstatement in the matter that the applicant or lawyer may have made and
17 affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority
18 of which the person involved becomes aware.

19 [2] This Rule is subject to the provisions of the Fifth Amendment of the United States
20 Constitution and corresponding provisions of state constitutions. A person relying on such a
21 provision in response to a question, however, should do so openly and not use the right of
22 nondisclosure as a justification for failure to comply with this Rule.

1 [3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who
2 is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the
3 ~~client-lawyer~~ lawyer-client relationship, including Rule 1.6 and, in some cases, Rule 3.3.

4 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
5 Committee on 12/13/85; Minutes of the Joint Committee on Attorney Standards on 09/24/04,
6 04/08/05, 06/14/05.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

The Joint Committee does not propose any changes to the language of the Rule or Comment.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

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

4 (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions
5 of the code of judicial conduct.

6 COMMENT

7 [1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of
8 persons being considered for election or appointment to judicial office and to public legal offices, such
9 as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions
10 on such matters contributes to improving the administration of justice. Conversely, false statements
11 by a lawyer can unfairly undermine public confidence in the administration of justice.

12 [2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations
13 on political activity.

14 [3] To maintain the fair and independent administration of justice, lawyers are encouraged to
15 continue traditional efforts to defend judges and courts unjustly criticized.

16 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
17 Committee on 12/13/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
18 09/24/04, 04/08/05, 06/14/05.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

The Joint Committee proposes minor changes to paragraphs (a) and (b) to substitute "who knows" for "having knowledge", which follows the Model Rule construction.

The Joint Committee proposes changes to the Comment to include language from and delete language inconsistent with the Model Rule Comment.

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

1 (a) A lawyer ~~having knowledge~~ who knows that another lawyer has committed a violation
2 of these rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness
3 as a lawyer in other respects shall initiate proceedings under the North Dakota Rules of Disciplinary
4 Procedure for Lawyer Discipline.

5 (b) A lawyer ~~having knowledge~~ who knows that a judge has committed a violation of the
6 North Dakota ~~Rules Code~~ Code of Judicial Conduct that raises a substantial question as to the judge's
7 honesty, trustworthiness, or fitness for judicial office in other respects shall initiate proceedings under
8 the Rules of the North Dakota Judicial Conduct Commission.

9 (c) This rule does not require disclosure of information protected by Rule 1.6 or information
10 gained by a lawyer or judge while participating as a committee member, peer counselor, or program
11 staff in a lawyer assistance program established under Administrative Rule 49.

12 COMMENT

13 [1] Self-regulation of the legal profession requires that members of the profession initiate
14 disciplinary investigation when they know of a violation of these Rules. Lawyers have a similar
15 obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern
16 of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially
17 important where the victim is unlikely to discover the offense. A report should be made to the
18 Disciplinary Board of the North Dakota Supreme Court.

19 [2] A report about misconduct is not required ~~where making the report if it~~ would involve the
20 ~~reporting lawyer~~ in a violation of Rule 1.6 by the reporting lawyer. However, a lawyer ~~excused from~~
21 ~~reporting a violation on that ground~~ should encourage the a client to consent to disclosure where
22 prosecution would not substantially prejudice the client's interests.

1 [3] If a lawyer were obliged to report every violation of these Rules, the failure to report ~~even~~
2 ~~technical or insubstantial violations would itself be a violation of these Rules~~ any violation would itself
3 be a professional offense. This Rule limits the reporting obligation to those offenses that a
4 self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore,
5 required in complying with the provisions of this Rule. ~~Whether a violation is~~ The term "substantial"
6 ~~depends on~~ refers to the seriousness of the possible offense and not the quantum of evidence of which
7 the lawyer is aware. Similar considerations apply to the reporting of judicial misconduct.

8 [4] The duty to report professional misconduct does not apply to a lawyer retained to
9 represent a lawyer whose professional conduct is in question. Such a situation is governed by the
10 rules applicable to the ~~client-lawyer~~ lawyer-client relationship.

11 [5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer
12 in the course of that lawyer's participation in a lawyer assistance program established under
13 Administrative Rule 49. In that circumstance, providing for an exception to the reporting
14 requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment
15 through such a program. Conversely, without such an exception lawyers and judges may hesitate to
16 seek assistance from the program, which may result in additional harm to their professional careers
17 and additional injury to the welfare of clients and the public. These Rules do not otherwise address
18 the confidentiality of information received by a lawyer or judge participating in a an approved lawyer
19 assistance program. ~~Confidentiality~~ ; such an obligation may, however, be imposed by the rules of
20 the program or other law or rule.

21 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
22 Committee on 12/13/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
23 06/11/02, 11/15/02, 02/28/03, 09/25/03, and 11/14/03, 09/24/04, 04/08/05, 06/14/05, 09/09/05.

RULE 8.4 MISCONDUCT

The Joint Committee proposes adding paragraphs (b) and (c) from the Model Rule which address, as forms of misconduct, criminal acts that adversely reflect on the lawyer's honesty, trustworthiness, or fitness and conduct that involves dishonesty, fraud, deceit, or misrepresentation. New language from the Model Rule is also added to paragraph (e) additionally identifying as misconduct stating or implying an ability to achieve results that violate the rules or other law. To clarify the scope of paragraph (c), language is also added describing the identified conduct as reflecting on the lawyer's fitness as a lawyer

The Joint Committee proposes adding Comment [1] and changing Comment [2] in conformance with the Model Rule Comment. Comment [3], also in the Model Rule Comment, more fully explains paragraph (f) regarding manifesting bias or prejudice as a form of misconduct. Comment [4] is changed for readability.

RULE 8.4 MISCONDUCT

1 It is professional misconduct for a lawyer to:

2 (a) violate or attempt to violate these ~~rules~~ Rules, knowingly assist or induce another to do
3 so, or do so through the acts of another;

4 (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or
5 fitness as a lawyer in other respects;

6 (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects
7 adversely on the lawyer's fitness as a lawyer;

8 ~~(b)~~ (d) knowingly assist a judge or judicial officer in conduct that is a violation of applicable
9 ~~rules~~ canons of judicial conduct or other law;

10 ~~(c)~~ (e) state or imply an ability to influence improperly a government agency or official or to
11 achieve results by means that violate these Rules or other law;

12 ~~(d)~~ (f) engage in conduct that is prejudicial to the administration of justice, including to
13 knowingly manifest through words or conduct in the course of representing a client, bias or prejudice
14 based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties,
15 witnesses, counsel, or others, except when those words or conduct are legitimate advocacy because
16 race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding;
17 or

18 ~~(e)~~ (g) engage in other conduct that is enumerated in the North Dakota Century Code as a
19 basis for revocation or suspension of a lawyer's certificate of admission.

20 COMMENT

1 [1] Lawyers are subject to discipline when they violate or attempt to violate these Rules,
2 knowingly assist or induce another to do so or do so through acts of another, as when they request
3 or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a
4 lawyer from advising a client concerning action the client is lawfully entitled to take.

5 [2] Many kinds of wrongful illegal conduct reflect adversely on fitness to practice law, such
6 as offenses involving fraud and the offense of willful failure to file an income tax return. However,
7 some kinds of offenses carry no such implication. Some kinds, however, do not. In the past
8 Traditionally, the distinction between these two types of wrongful conduct was made on the basis of
9 was drawn in terms of offenses involving "moral turpitude." That test has been abandoned in favor
10 of a more functional analysis. The concept of "moral turpitude" may be construed to include offenses
11 concerning some matters of personal morality, such as adultery and comparable offenses, that had
12 have no specific connection to fitness for the practice of law. Although a lawyer is personally
13 answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses
14 that indicate lack of those characteristics necessary for the responsible practice of the profession
15 relevant to law practice. Offenses involving violence, dishonesty or breach of trust, or serious and
16 unjustifiable interference with the administration of justice, are likely to be in fall within that category.
17 A pattern of repeated offenses, even ones of minor significance when considered separately, that can
18 indicate indifference to legal obligations.

19 [3] A lawyer who, in the course of representing a client knowingly manifests by words or
20 conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual
21 orientation violates paragraph (f) when such actions are prejudicial to the administration of justice.
22 Legitimate advocacy respecting the foregoing factors does not violate paragraph (f). For example,
23 a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not
24 alone establish a violation of this Rule.

25 [4] The legislature has adopted the functional test; it has provided, in N.D.C.C. Section
26 27-14-02 of the North Dakota Century Code, provides for the revocation or suspension of the

1 certificate of admission of any lawyer who has committed an offense determined by the North Dakota
2 Supreme Court to have a direct bearing on the lawyer's ability to serve the public as ~~an attorney a~~
3 lawyer and counselor at law. ~~The legislature has Statutes~~ also ~~provided~~ provide for revocation or
4 suspension in ~~circumstances of a failure to perform the duties of the office and several specific other~~
5 instances of conduct, ~~these are identified in the balance of Section 27-14-02, and in the sections~~
6 ~~referred to generally or by number in that section~~ misconduct, including 27-13-01 (duties of
7 attorneys), 27-13-08 (misconduct of attorneys), 27-13-09 (permitting use of the ~~lawyer's~~ attorney's
8 name), 27-13-11 (involvement in the defense while a partner of the prosecutor), and 27-13-12
9 (involvement in the defense after ~~action is state's attorney~~ involvement as state's attorney or other
10 public prosecutor).

11 [5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief
12 that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to
13 the validity, scope, meaning or application of the law apply to challenges to the regulation of the
14 practice of law.

15 [6] Lawyers holding public office assume legal responsibilities going beyond those of other
16 citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of
17 ~~attorney a lawyer~~. The same is true of abuse of positions of private trust such as trustee, executor,
18 administrator, guardian, agent, and officer, director or manager of a corporation or other
19 organization.

20 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
21 Committee on 12/13/85, 01/10/86 and 01/31/86; Minutes of the Joint Committee on Attorney
22 Standards on 09/24/04, 04/08/05, 06/14/05, 09/09/05.

RULE 8.5 JURISDICTION

The Joint Committee does not propose any changes to the language of the Rule or Comment, which was recently reviewed and slightly amended as part of the multijurisdictional practice rule revision.

RULE 8.5 JURISDICTION

1 (a) A lawyer admitted to practice in this jurisdiction is subject to disciplinary action in this
2 jurisdiction even though the conduct of the lawyer giving rise to the discipline may have occurred
3 outside of this jurisdiction and even when that conduct may subject or has subjected the lawyer to
4 discipline by another jurisdiction.

5 (b) Persons not licensed to practice law in this jurisdiction, but eligible to practice elsewhere
6 who actually engage in this jurisdiction in the practice of law, are subject to the disciplinary authority
7 of this jurisdiction.

8 COMMENT

9 [1] In modern practice lawyers frequently act outside the territorial limits of the jurisdiction
10 in which they are licensed to practice, either in another state or outside the United States. In doing
11 so, they remain subject to the governing authority of the jurisdiction in which they are licensed to
12 practice and may also become subject to the authority of the other jurisdiction. Their activity in
13 another jurisdiction may also constitute the unauthorized practice of law in that jurisdiction. See Rule
14 5.5. When this jurisdiction exercises its authority over persons eligible to practice elsewhere but not
15 here, although there is no license or certificate of admission against which to act the disciplinary
16 authority may enter findings of violations of these rules and enter, as relief, prohibitions from applying
17 for admission here, pro hac vice or otherwise, for a period, and report the action to the jurisdiction
18 in which the person is eligible.

19 [2] Lawyers not licensed here may lawfully practice here within the safe harbors identified in
20 Rule 5.5 or when registered or admitted pro hac vice pursuant to applicable rules. Such lawyers are
21 not, by virtue of that limited admission, licensed to practice law in this jurisdiction, but are
22 nonetheless subject to discipline here.

1 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
2 Committee on 12/13/85 and 01/10/86; Minutes of the Joint Committee on Attorney Standards on
3 06/24/03, 09/25/03, 11/14/03, 04/16/04, 08/06/04, 09/24/04, 04/08/05.