THE SUPREME COURT *of* OHIO

REPORT OF THE SUPREME COURT

Task Force on Rules of Professional Conduct

October 2005

REPORT OF

The Supreme Court *of* Ohio

TASK FORCE ON RULES OF PROFESSIONAL CONDUCT

Honorable Peggy L. Bryant, *chair*

October 2005

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Court of Appeals of Ohio

TENTH APPELLATE DISTRICT
FRANKLIN COUNTY
COURTHOUSE
373 SOUTH HIGH STREET
COLUMBUS, OHIO 43215-6313
(614) 462-3580
FAX (614) 462-7249

June 9, 2005

Chief Justice Thomas J. Moyer
Supreme Court of Ohio
65 S. Front Street
Columbus, OH 43215-3431

Dear Chief Justice Moyer:

As a result of your appointing me to serve as chair of the Task Force on Rules of Professional Conduct, I have had the pleasure and privilege of working with the members of the Task Force, a highly motivated, hard working, and intelligent group of lawyers, judges, legal educators and non-lawyers.

In accordance with our charge, the Task Force first met in March 2003 to consider initially the question of whether Ohio should revise its legal ethics to more closely parallel the American Bar Association's Model Rules of Professional Conduct. With our decision to proceed in that direction and your tentative approval, the Task Force examined each of the Model Rules to determine whether amendments to those rules were appropriate for their application in Ohio.

To accomplish that end, I divided the Task Force into three committees and assigned rules to each committee for its consideration. At the Task Force meetings, each committee presented its recommendations regarding the rules assigned to it, and after vigorous debate the Task Force voted on any recommended amendments to the rules.

As groups of rules were completed, they were submitted on the Supreme Court website, as well as mailed directly to interested groups, for public comment. At the conclusion of the comment period, the comments were distributed to the committees responsible for the respective rules, where the committee members debated the issues raised in the comments. At the next Task Force meeting, each committee noted the substance of the comments, as

well as its recommendation regarding the comments. The Task Force once again debated any changes the committee proposed and conditionally approved for a second time the language agreeable to a majority of the members. The results are in the Final Report accompanying this letter.

Some of the rules are a departure from current Ohio ethics under the Code of Professional Responsibilities; others are nearly a verbatim recitation of current ethical standards in Ohio. The Task Force submits them for your consideration and the consideration of other members of the Ohio Supreme Court. We have enjoyed the challenge of the project, the vigor of the debates and the camaraderie that arose out of the process. On behalf of all of the Task Force members, I thank you for the opportunity to serve.

Should you need any additional information, please do not hesitate to contact me or Rick Dove.

Sincerely,

Peggy Bryant, Chair

Enclosure
cc: Rick Dove

MEMBERS OF THE SUPREME COURT
TASK FORCE ON RULES OF PROFESSIONAL CONDUCT

Chair	
Honorable Peggy L. Bryant	Columbus
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Bernard K. Bauer, Esq.	Findlay
Professor William C. Becker[1]	Akron
James D. Caruso, Esq.[2]	Toledo
Deborah A. Coleman, Esq.	Cleveland
Jonathan E. Coughlan, Esq.	Columbus
Jack A. Guttenberg, Esq.	Columbus
Samuel J. Halkias	Columbus
Jonathan Hollingsworth, Esq.	Dayton
Charles W. Kettlewell, Esq.[3]	Worthington
P. Eugene Long, Esq.	Circleville
Honorable Sara E. Lioi	Canton
Jonathan W. Marshall, Esq.	Columbus
Professor Susan R. Martyn	Toledo
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Theresa B. Proenza	Akron
Heather G. Sowald, Esq.	Columbus
Robin G. Weaver, Esq.	Cleveland
Brian D. Weaver, Esq.	Dayton
Task Force Reporter and Staff	
Richard A. Dove, Esq.	Columbus
Cindy L. Johnson	Columbus

[1]Professor Becker served on the Task Force from its inception until his death in July 2003.

[2]Mr. Caruso was appointed to the Task Force in August 2003.

[3]Mr. Kettlewell served on the Task Force from its inception until his death in February 2005.

IN MEMORIAM

Professor William C. Becker
(1929-2003)

Charles W. Kettlewell, Esq.
(1941-2005)

The Task Force on Rules of Professional Conduct remembers two colleagues who served on this Task Force from its inception until their deaths.

William C. Becker, Professor Emeritus at the University of Akron Law School, was a moving force in the development of legal ethics in Ohio and nationwide, all the while emphasizing to his students and fellow members of the legal profession the importance of establishing and maintaining high, ethical standards. Professor Becker was an inspiration and advisor to many law students, lawyers, and judges, including members of this Task Force, who came to rely on his integrity, judgment, and keen legal analysis. Although his tenure on this Task Force was all too brief, Bill's many contributions to the field of legal ethics are reflected throughout this report.

Charles W. Kettlewell was a nationally recognized expert in the field of legal ethics as well as an able counselor and advocate for many Ohio lawyers. Mr. Kettlewell gave generously of his time and talent as an active participant in national debates to craft legal ethics standards, an instructor at the Moritz College of Law, a developer and presenter of international legal ethics programs, and a co-founder and president of the national Association of Professional Responsibility Lawyers. Chuck's quick wit enlivened the Task Force meetings, and his experience and insight shaped the content of many of our recommendations.

We honor and pay tribute to the legacy of these gentlemen by respectfully dedicating this report to them.

I. INTRODUCTION

Chief Justice Thomas J. Moyer appointed the Task Force on Rules of Professional Conduct in March 2003. The Task Force appointees included a diverse group of judges, lawyers from a wide variety of practice experience, law professors, and nonlawyers. Honorable Peggy L. Bryant, a Franklin County jurist, was selected to chair the Task Force.

Chief Justice Moyer charged the Task Force with considering the threshold question of whether Ohio should revise its legal ethics rules to conform more closely to the American Bar Association Model Rules of Professional Conduct. Since 1983, the ABA Model Rules have been the standard for lawyer ethics codes adopted throughout the United States. As of June 2005, only California, Maine, New York, and Ohio premise their ethics rules on provisions other than the ABA Model Rules. Regardless of the Task Force's conclusion about the ABA Model Rules, Chief Justice Moyer directed the Task Force to consider revisions to Ohio rules that would "enhance consumer protection and ensure the proper and professional delivery of legal services."

With this direction in mind, the Task Force began its work on March 13, 2003.

II. MOVEMENT TO THE MODEL RULES

At its initial meeting, the Task Force discussed the threshold question Chief Justice Moyer posed—specifically whether Ohio should join the ranks of Model Rule states or engage in a comprehensive update of the Ohio Code of Professional Responsibility. Task Force members suggested valid reasons for pursuing each approach, although an early consensus developed in support of adopting some form of the ABA Model Rules. The Task Force cited the following reasons in support of adopting the ABA Model Rules:

- The Model Code of Professional Responsibility, which is the basis for the Ohio Code of Professional Responsibility, was adopted in 1969 and has not been updated since the ABA adopted the Model Rules in 1983. By contrast, the ABA undertakes a regular review of the Model Rules in an attempt to ensure the rules reflect current practices and ethical standards.

- The Supreme Court of Ohio has cited the Model Rules in disciplinary opinions and incorporated provisions of the Model Rules in recent revisions to the Ohio Code of Professional Responsibility. For example, the adoption in early 2003 of a rule governing the sale of a law practice (DR 2-111) was based, in large part, on ABA Model Rule 1.17.

- By adopting the Model Rules, Ohio will become more relevant in national discussions on the subject of legal ethics. Moreover, Ohio practitioners will have the benefit of case law and advisory opinions from other jurisdictions that have interpreted and applied the Model Rules.

- Adoption of the Model Rules will facilitate the ability of lawyers who practice in Ohio and other jurisdictions to understand and comply with ethical standards of the various jurisdictions in which they practice.

- Adoption of the Model Rules will facilitate legal ethics instruction in Ohio law schools. Currently, Ohio law schools must teach both the Model Rules, which are tested on the Multistate Professional Responsibility Examination, and the Ohio Code, which is addressed in the essay portion of the Ohio Bar Examination.

Although the Task Force concluded that Ohio should join the ranks of states that rely on the ABA Model Rules as the basis for their standards of professional conduct, it neither endorsed nor pursued a wholesale adoption of the ABA Model Rules. To the knowledge of the Task Force, no jurisdiction has adopted the ABA Model Rules in their entirety. Rather, each state has altered the Model Rules by including provisions that it believes are necessary to govern more effectively the conduct of lawyers within its jurisdiction. Similarly, the Task Force determined it should engage in a detailed evaluation of the ABA Model Rules and existing Ohio law. The Task Force anticipated that this evaluation would result in the development of Ohio rules that, although based largely on the Model Rules, would also incorporate three key elements:

- Applicable decisions from the Supreme Court of Ohio.

- Unique provisions of the Code of Professional Responsibility or the legal ethics rules of another state, either of which were considered preferable or superior to the Model Rules.

- Advisory opinions from the Board of Commissioners on Grievances & Discipline.

III. THE TASK FORCE WORK PLAN

Once it determined to proceed with a comprehensive review of the Model Rules, the Task Force developed a plan and process for conducting its work. At the time the Task Force was formed, three other states—Iowa, Oregon, and Tennessee—were engaged in efforts to adopt, for the first time, some version of the ABA Model Rules. The Task Force contacted representatives of the review committees in each of these states and received valuable advice about the manner in which the Task Force could proceed with its review.

The Task Force also was fortunate to have available, throughout its review, the resources of the ABA Center for Professional Responsibility. Susan Campbell and Becky Stretch of the Center's staff responded to countless requests for information, and the resource materials made available were of significant assistance to the Task Force.

Relying on the advice and information provided, the Task Force developed a procedure for conducting its review of the Model Rules and obtaining input from interested parties before it finalized its recommendations for the Supreme Court's consideration. The chair formed three committees to which rules were assigned for initial consideration. Each committee was charged with conducting a comprehensive review of the Model Rules assigned to it and recommending a proposed rule and comment to the Task Force. The Task Force debated the committee recommendation, made any necessary revisions, and ultimately gave each rule and comment the "conditional approval" of the Task Force.

In addition to its review and recommendations regarding the ABA Model Rules and comments, the Task Force prepared a code comparison for each rule in order to provide interested parties with more background regarding each recommended rule. Each code comparison consists of two parts—a comparison of the Task Force rule to current Ohio law and a comparison of the Task Force rule to the ABA Model Rule. Some code comparisons contain references to Ohio cases, rules, statutes, or advisory opinions applicable to the corresponding rule.

As it completed its initial review of the Model Rules, the Task Force, with the consent of Chief Justice Moyer, circulated drafts of conditionally approved rules for public comment in January, July, and November 2004. Notices were sent in advance of each publication to more than 200 state and local bar associations and other interested parties. All proposed rules, comments, and code comparisons were made available on the Task Force web site for a 90-day comment period.

At the conclusion of the comment period, the Task Force committees revisited each proposed rule in light of the comments received and presented further recommendations to the Task Force. The Task Force's consideration of the proposed rules and comments yielded a "second conditional approval" of each rule. The second conditionally approved version of each rule is set forth in Appendix A of this report.

The Task Force recognizes the contributions to this final report of each individual and organization that commented on the proposed rules. These individuals and organizations are listed in Appendix D of this report. The comments received during each publication period were vital to the work of the Task Force, and the Supreme Court would have received a substantially different report had the Task Force not been authorized to employ a public comment process during its review. Some comments reinforced the position of the Task Force on a particular point; others cast a different light on an issue, prompted further discussion and debate, and resulted in substantial changes to the published version of the proposed rule. To each commenter the Task Force expresses its appreciation for the time spent reviewing proposals and assisting the Task Force in its work.

IV. TASK FORCE RECOMMENDATIONS ON SPECIFIC ISSUES

The process of reviewing the Model Rules of Professional Conduct, the Ohio Code of Professional Responsibility, and the law that has developed around each, produced 54 separate rules that are recommended to the Supreme Court for adoption. Each rule and accompanying comment contains terminology and language that is new to Ohio legal ethics, and some rules incorporate provisions that reflect substantial changes in current Ohio law. The above-described code comparisons are intended to assist the bench, bar, and public in a better understanding of the recommended changes.

There are, however, specific subjects addressed by the Task Force recommendations that require treatment beyond that readily provided in a comment or code comparison. To promote a greater understanding of these issues, the Task Force has prepared the following reports on six topics that address multiple rules. These areas have been selected because they represent one or more of the following: an area or issue to which the Task Force devoted substantial debate; an area or issue on which the Task Force received substantial public comment; or an area in which the recommendations of the Task Force represent a significant change or addition to Ohio law.

A. WRITING AND RECORD-KEEPING REQUIREMENTS—Rules 1.0, 1.2, 1.5, 1.7-1.12 and 1.15

Engagement agreements

The Task Force is aware that clients often are unsure of the terms of the fee or the scope of the representation. Rules 1.2(c) and 1.5(b) establish two new writing requirements to assist clients and lawyers in defining the terms of the engagement. These provisions require that fee agreements set forth in writing the terms of the fee and the nature and scope of the representation. The only exceptions to these rules are instances in which the fee is $500 or less or the lawyer has regularly represented the client. The $500 threshold was inserted to exempt pro bono and relatively limited representations from the writing requirement.

Rule 1.5(c) requires all contingency fees to be in writing and requires lawyers utilizing contingency fees to prepare and provide the client with a detailed closing statement. This proposed rule incorporates the requirements for closing statements found in R.C. 4705.15.

Conflicts waivers

Rules 1.7 to 1.12 require lawyers who obtain informed consent to conflicts to confirm the consent in writing. Rule 1.0(b) provides that the writing may consist of a document signed by the client or one that records a client's oral consent.

In recommending these requirements, the Task Force follows the Model Rule adopted in an increasing number of jurisdictions. The Task Force recognizes the ABA Ethics 2000 Commission found that this requirement has not been overly burdensome or impractical.

Trust account records

Rule 1.15 creates a record-keeping requirement for all lawyer trust accounts. The rule requires lawyers to utilize and retain for seven years all of the following:

- Copies of fee agreements;
- Individual client ledgers, which identify the client, the date, amount, and source of all client funds received and disbursed;

- A journal for each trust account showing all debits and credits;
- All bank statements, deposit slips, and cancelled checks, if provided by the financial institution.

Rule 1.15 also requires lawyers to perform and retain monthly reconciliations of the listed items. The Task Force recognizes that the listed records are now necessary for proper compliance with DR 9-102. Unfortunately, too many lawyers are unaware of what records are needed to satisfy this significant fiduciary duty to their clients. Specifying the records and requiring reconciliation educates lawyers and further safeguards client funds.

The Task Force reviewed Rule 1.15 as adopted in other jurisdictions. There are sixteen jurisdictions, including New York, California, Illinois, Indiana, and Florida, that similarly require lawyers to maintain specific records. By listing the required records and by creating the seven-year retention period, Rule 1.15 parallels other jurisdictions, enhances protection to clients, and provides guidance to Ohio lawyers.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is preferable to the present rule in DR 9-102(A) that precludes a lawyer from placing advances for expenses in the lawyer's trust account. The proposal is consistent with the Model Rule and other jurisdictions.

Rule 1.15(d) directs the lawyer handling of third-person funds, Rule 1.15(e) directs the handling of funds in which two or more persons claim an interest, and Rule 1.15(f) designates persons responsible for distributing client funds and maintaining financial records upon the dissolution of a law firm. There are no provisions comparable to these in the Ohio Code of Professional Responsibility.

Rule 1.15(g) provides for the handling of funds upon the sale of a law practice.

B. CLIENT-LAWYER CONFIDENTIALITY—Rule 1.6

A hallmark of the client-lawyer relationship is the requirement that a lawyer hold client information as confidential. The requirement of confidentiality promotes a meaningful and productive relationship between the client and his or her lawyer. By protecting client communications, the confidentiality requirement encourages a client to seek legal assistance and communicate fully and frankly with the lawyer, even as to embarrassing or legally damaging subject-matter. In turn, this open communication allows the lawyer to provide informed legal advice and appropriate counsel to the client. See *Akron Bar Assn v. Holder* (2004), 102 Ohio St.3d 307, 315, citing *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, 4 and *Lightbody v. Rust* (2000), 137 Ohio App.3d 658, 663.

Rule 1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. The rule recognizes that, with limited exceptions, a fundamental principle in the client-lawyer relationship is that the lawyer must not reveal information, absent the client's informed consent or other compelling reasons. The Task Force spent considerable time on this rule and attempted to update it consistent with current Ohio law on the subject.

Rule 1.6 replaces portions of current Canon 4 of the Ohio Code of Professional Responsibility, including DR 4-101(B)(1) and Ethical Considerations 4-1 to 4-6, which deal with prohibitions relative to revealing client information. [Prohibitions regarding the use of client information, which are found in DR 4-101(B)(2), are addressed in Rule 1.8(b).] The rule also expands on the provisions of DR 7-102(B)(1) and, consistent with current Ohio ethical requirements, mandates that a lawyer reveal client information, even if it is privileged, to the extent necessary to comply with Rules 3.3 and 4.1.

General rule of confidentiality

Rule 1.6(a) is broad in its scope and provides that, unless an exception applies, all information regarding the representation of a client, including what the Code of Professional Responsibility refers to as "the confidences and secrets of a client," is protected from disclosure. To clarify that Rule 1.6(a) includes privileged information, the Task Force added the phrase "including information protected by the attorney-client privilege under applicable law."

Rule 1.6(a) recognizes three categories of exceptions that permit disclosure of information relating to the representation of a client: (1) the client gives informed consent to the disclosure;

(2) the disclosure is impliedly authorized by law in order to carry out the representation; or (3) the disclosure is permitted pursuant to Rule 1.6(b) or required by Rule 1.6(c).

Permissive disclosure

Rule 1.6(b) recognizes five situations in which a lawyer may disclose otherwise confidential information. Rule 1.6(b)(1) contains the traditional "future crime" exception, embodied in DR 4-101(C)(3), that permits a lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent the crime. Additionally, Rule 1.6(b)(1) of the rule expands upon the existing exception by permitting a lawyer to disclose the intention of a third party to commit a crime, even when knowledge is obtained in the course of representing a client.

In retaining the "future crime" exception, the Task Force rejected the disclosure exceptions contained in the Model Rule that are tied to "reasonably certain death or substantial bodily harm" or "reasonably certain * * * substantial injury to the financial interest or property of another." The Task Force believes that, unlike the Model Rule exceptions, the "future crime" exception provides a "bright-line" rule for lawyers by limiting disclosure to future acts that public policy has determined should be codified as crimes. Such a step is consistent with many jurisdictions that have retained the "future crime" exception rather than creating exceptions that hinge on the nature of the harm threatened. In addition, the Task Force concluded that adoption of the Model Rule exceptions would create a chilling effect relative to the client-lawyer relationship. At a time when frank consultation with a lawyer is perhaps most needed, a client may avoid disclosure of information to a lawyer so as to avoid disclosure by the lawyer of the client information.

In its discussion, the Task Force noted that retention of the "future crime" exception yields a rule that is both broader and narrower than the Model Rule exceptions noted in the preceding paragraph. The provision is broader because it permits disclosure of client information relative to the intention of a client or third party to commit any crime, whereas the Model Rule exceptions would permit disclosure of a crime only when the crime would result in reasonably certain death or substantial bodily harm. At the same time, the "future crime" exception is narrower because the Model Rule exceptions would permit disclosure if the client's conduct would result in reasonably certain death or substantial bodily harm, regardless of whether it rose to the level of a criminal act.

Rule 1.6(b)(2) permits a lawyer to reveal client information, including privileged information, that is necessary to mitigate a substantial injury to the financial interests or property of another that is caused by the commission of an illegal or fraudulent act of a client. The lawyer's ability to disclose is limited to circumstances in which the client used the lawyer's services to further the commission of the illegal or fraudulent act. Rule 1.6(b)(2) expands on the provisions of DR 7-102(B)(1).

Rule 1.6(b)(3) is a new provision that permits a lawyer to reveal client information, including privileged information, to the extent the lawyer reasonably believes necessary, in order to obtain advice about the lawyer's compliance with the Ohio Rules of Professional Conduct.

Rule 1.6(b)(4) permits a lawyer to reveal client information, including privileged information, to the extent the lawyer reasonably believes necessary, in order to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client and to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved. The rule also permits a lawyer to reveal information, to the extent the lawyer reasonably believes necessary, to respond to allegations in any proceeding concerning the lawyer's representation. This provision tracks DR 4-101(C)(4) and expressly states that disciplinary proceedings against the lawyer are included in this exception.

Rule 1.6(b)(5) permits disclosure to comply with other law or court order and is comparable to DR 4-101(C)(2).

Mandatory disclosure

Rule 1.6(c) requires a lawyer to reveal client information, including privileged information, to the extent the lawyer reasonably believes is necessary to comply with Rule 3.3 (Candor Toward a Tribunal) or Rule 4.1 (Truthfulness in Statements to Others).

C. PROHIBITING FRAUD BY LAWYERS AND THEIR CLIENTS—Rules 1.2, 1.6, 1.16, 3.3, 4.1, and 8.4

The Task Force views fraud as one of the major issues facing lawyers and clients and has produced rules that it believes are equitable, clear, and consistent with Ohio law. The rules addressing fraudulent conduct were developed in two stages. First, the Task Force individually addressed each Model Rule, comparing it to analogous provisions of the Ohio Code of Professional

Responsibility. Once a proposed rule was developed, circulated for comment, and further refined based on the comments received, the Task Force formed a "fraud harmonization work group." This work group was charged with reviewing all fraud-related provisions and ensuring a coordinated and consistent treatment of the issue throughout the Task Force recommendations. Substantively, the fraud rules recommended by the Task Force fall into two categories: rules that prohibit lawyer fraud; and rules that prohibit lawyer assistance in client fraud.

Rules that prohibit lawyer fraud

The following rules address fraudulent conduct by a lawyer. These provisions are substantially unchanged from existing Ohio rules:

- Rule 3.3(a)—prohibiting knowingly false statements of fact or law to a tribunal;
- Rule 4.1(a)—prohibiting knowingly false statements of material fact or law to a third person in representing a client;
- Rule 8.4(c)—prohibiting any conduct involving dishonesty, fraud, deceit, or misrepresentation.

Rules 3.3(a) and 4.1(a) prohibit lawyers from knowingly making false statements in the representation of clients, whether before a tribunal [Rule 3.3(a)] or not [Rule 4.1(a)]. These provisions track current DR 7-102(A)(5), which prohibits lawyers from knowingly making false statements of fact or law in all client representations. The only change in existing Ohio law occurs in Rule 4.1(a), which prohibits knowingly false statements of material facts, but not all facts, in transactions outside of court. The Task Force believes limiting the application of Rule 4.1(a) to material facts is necessary to allow room for expressions of price or value that are common to negotiations. See Rule 4.1, Comment [2]. Rule 8.4(c) reproduces the language of current DR 1-102(A)(4), which applies to all dishonest lawyer conduct, whether or not it occurs in the course of representing a client.

Rules that prohibit lawyer assistance in client fraud

The following rules prohibit a lawyer from assisting a client in perpetrating a fraud and are substantially unchanged from current law.

- Rule 1.2(d)—prohibiting a lawyer from counseling or assisting client conduct that the lawyer knows is illegal or fraudulent [corresponds exactly to DR 7-102(A)(7)];
- Rule 1.6(b)(1)—allowing disclosure of client confidential information reasonably necessary to prevent future crimes [corresponds to DR 4-101(C)(3)];
- Rule 1.6(b)(2)—allowing disclosure of client confidential information reasonably necessary to mitigate substantial financial injury resulting from the client's commission of an illegal or fraudulent act using the lawyer's services [corresponds to DR 7-102(B)(1)];
- Rule 1.16(d)(1)—requiring withdrawal where the Rules of Professional Conduct, such as Rule 1.2(d) or 4.1(b), will be violated [substantially tracks DR 2-110(B)(2)];
- Rule 1.16(e)(2)—allowing withdrawal where the lawyer reasonably believes the client persists in illegal or fraudulent conduct [corresponds to DR 2-110(C)(1)(b), (c), and (e), and (C)(2)];
- Rule 3.3(a)(3)—prohibiting lawyers from knowingly offering false evidence [substantially the same as DR 7-102(A)(4) and (5)].

The Task Force has altered the details of two other provisions but intends no change in the purpose of the rules:

- Rule 3.3(b)—requiring reasonable remedial measures when a lawyer knows that a person has engaged or will engage in criminal or fraudulent conduct before a tribunal;
- Rule 4.1(b)—requiring disclosure when necessary to avoid knowingly assisting a client's illegal or fraudulent act.

Rules 3.3(b) and 4.1(b) reflect two changes in current law:

- Rule 3.3(b) requires a lawyer to take "reasonable remedial measures," when the lawyer is confronted with a future, ongoing, or past fraud on a tribunal. DR 7-102(B)(1) and (2) require disclosure to the tribunal in all cases of past frauds. The Task Force believes that requiring effective remediation is more important than prescribing the exact method of remediation. For example, if correction of false testimony in a deposition can be accomplished without disclosure to the tribunal, such an action could be considered a reasonable remedial measure [Comment 10].

- DR 7-102(B)(1) also requires disclosure to rectify past client frauds outside of tribunals. Rule 4.1(b) addresses this issue, requiring disclosure only if the client seeks to use the lawyer's services to further an illegal or fraudulent act. With respect to completed past frauds, Rule 1.6(b)(2) allows, but does not require, disclosure. The Task Force found no authority applying DR 7-102(B)(1) to past frauds outside of tribunals, and opted for lawyer discretion regarding disclosure, consistent with the rule adopted by a majority of jurisdictions.

With respect to the scope of all of these provisions, the Task Force stayed very close to or retained the language of the Ohio Code of Professional Responsibility. In Rule 3.3(b), the Task Force adopted the phrase "criminal or fraudulent," consistent with DR 7-102(B), which requires lawyers to disclose client "frauds" on tribunals. Here, the Task Force retained "crime," consistent with Model Rule 3.3(b). In many situations, a fraud on a tribunal may well be criminal, such as perjury or bribery. The Model Rule extends slightly further, say to a crime such as perjury that might not be a fraud on the court. At the same time, it does not always require disclosure, but would allow other reasonable remedial measures, such as correction of the record or withdrawal where the crime does not amount to a fraud.

In other provisions, the Task Force rejected the ABA recommended language of "criminal or fraudulent," electing instead to retain the phrase "illegal and fraudulent" used in DR 7-102(A)(7). The Task Force has defined "illegal" in Rule 1.0(e) to include criminal conduct as well as violations of all applicable statutes and administrative regulations. For example, a labor law lawyer who advises a client about whether proposed conduct constitutes an unfair labor practice under federal or state law usually advises about law that provides for civil sanctions but no criminal penalties. The Model Rule provisions on fraud would not apply to such a

lawyer because the lawyer would not be advising the client about either potentially criminal or fraudulent activity. The Task Force's provisions apply to such a lawyer because the lawyer is advising the client about potentially illegal, but not criminal, activity.

Taken together, these rules work together by encouraging lawyers to counsel clients to avoid illegal and fraudulent activities, requiring lawyers to extricate themselves from client representations when clients will not desist, and requiring lawyers to disclose client confidential information when necessary to avoid furthering a client's illegal or fraudulent activity.

Rule 1.2(d) requires a lawyer who advises a client about proposed conduct to determine whether all or some of it might constitute illegal or fraudulent activity. Rule 1.2(d) further requires a lawyer to advise a client not to cross these legal limits. If the lawyer knows that the client persists in illegal or fraudulent conduct and that the lawyer's continued representation will facilitate or promote that conduct, Rule 1.16(d)(1) requires the lawyer to withdraw from further representation. If the lawyer reasonably believes but does not know that the conduct is illegal or fraudulent, Rule 1.16(e)(2) permits, but does not require, the lawyer to withdraw.

If proposed criminal or fraudulent activity involves a tribunal, including ancillary proceedings conducted pursuant to the tribunal's authority, such as depositions, the lawyer has several distinct duties under Rules 3.3(a)(3) and (b):

- The lawyer cannot knowingly offer false evidence.
- If the lawyer learns later that a client has offered false material evidence, the lawyer must take reasonable measures to remedy the situation, including if necessary, disclosure to the tribunal.
- If a lawyer knows that a person in a matter before a tribunal, including depositions, has or will engage in other criminal or fraudulent activity related to the proceeding, the lawyer must take reasonable remedial measures, including if necessary, disclosure to the tribunal. Rule 1.6(c) also requires this disclosure to the extent the lawyer reasonably believes necessary to comply with Rule 3.3.
- The duty to take reasonable remedial measures is unlimited in time.

Rule 3.3, Comment [10] indicates that remedial measures include steps such as confidential remonstration with the client, seeking the client's consent to withdraw from the matter, or seeking the client's consent to correct the false statement or evidence. If these measures fail to remedy the situation, the lawyer must disclose information to the tribunal to remedy the situation.

If the lawyer knows of proposed or ongoing illegal or fraudulent activity by a client that does not involve a tribunal:

- The lawyer must avoid counseling or assisting the client's illegal or fraudulent conduct as required by Rules 1.2(d) and 4.1(b).

- Further, if the lawyer's representation will facilitate or promote the client's illegal or fraudulent activity, Rule 1.16(d)(1) requires the lawyer to withdraw. In most circumstances, withdrawal will suffice to prevent the lawyer's assistance of the client's illegal or fraudulent activity.

- In a limited number of situations, disclosure of material facts also may be necessary to avoid assisting the client's illegal or fraudulent conduct. For example, if the lawyer knows that the client seeks to use the lawyer's previously prepared work product to further illegal conduct or a fraud, the lawyer's withdrawal alone may not prevent the client's use of the lawyer's work product to assist the illegality or fraud. If that occurs, the lawyer is required to disclose to prevent the use of the document, for example by disaffirming the document or legal opinion, in addition to withdrawing from the matter [Rules 4.1(b) and 1.6(c)].

D. CONFLICTS OF INTEREST—Rules 1.7-1.12 and 6.5

With few exceptions, the recommendations of the Task Force on rules addressing conflicts of interest are consistent with present Ohio law. The rules concerning conflicts of interest include Rules 1.7 to 1.12 and Rule 6.5. Canon 5 of the Code of Professional Responsibility treats the lawyer who must testify in a client's case as a conflict of interest issue. The Task Force follows the ABA model by placing the rules on lawyer as witness as Rule 3.7 within the group of rules dealing with lawyer as advocate. Rule 3.7 replaces DR 5-101(B) and 5-102, but is substantively the same as those existing rules.

General rule regarding conflicts

Rule 1.7 states the general rules for identifying and evaluating all potential conflicts of interest. It recognizes that a conflict of interest can arise from (1) the fact that two clients are directly adverse in a matter, or (2) a circumstance in which the lawyer's ability to serve one client loyally and effectively may be limited by the lawyer's duties to a current client, a former client or a third party, or by the lawyer's personal interests. The representation, in the same litigated case, of two clients who are adverse parties is absolutely prohibited by Rule 1.7(c)(2). All other conflicts can be waived if the lawyer determines that the lawyer can competently, diligently, and loyally represent each affected client, the conflict is not otherwise prohibited by law or Rule 1.7(c)(2), and each client gives informed consent.

The main substantive difference between Rule 1.7 and the analogous provisions of DR 5-101(A)(1) and DR 5-105 is that Rule 1.7 requires written confirmation of a conflict waiver.

Current clients

Rule 1.8 guides the conduct of lawyers in a number of specific conflict situations. With the exception of Rule 1.8(f)(4), which mandates certain disclosures for insurance defense lawyers, each part of Rule 1.8 corresponds to an existing Ohio Disciplinary Rule or decided case. With few exceptions, the Task Force recommends the adoption of Model Rule 1.8 without change, despite slight differences between the Model Rule and existing Ohio law. The following provisions of Rule 1.8 differ from current Ohio rules in the respect noted.

Rule 1.8(a) corresponds in substance to DR 5-104(A) and the ruling in *Cincinnati Bar Assn. v. Hartke* (1993), 67 Ohio St.3d 65 and adds a requirement that the client must consent in writing to a conflict. The writing requirement is consistent with the Task Force's requirement for confirmation of conflict waivers in Rule 1.7.

Rule 1.8(d) corresponds to DR 5-104(B) but gives a lawyer greater latitude to enter a contract for publication or media rights with a client. Rule 1.8(d) prohibits making such an arrangement only during the representation and only if the portrayal or account would be based in substantial part on information relating to the representation. In contrast, DR 5-104(B) forbids a lawyer to make any such arrangement during the pendency of the matter, even if the representation has ended.

Rule 1.8(e) corresponds to DR 5-103(B) but expressly permits a lawyer to pay court costs and expenses on behalf of an indigent client. The Task Force debated at length but rejected a proposal that would have allowed a lawyer, in limited instances, to advance living expenses for a client during the pendency of litigation.

Rule 1.8(j), prohibiting a sexual relationship with a client (other than one preexisting the representation) is new but consistent with the rulings in *Cleveland Bar Assn v. Feneli* (1999), 86 Ohio St.3d 102 and *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261.

The Task Force proposes the addition of Rule 1.8(f)(4) and a "Statement of Insured Client's Rights," based on a recommendation from the Ohio State Bar Association (OSBA). The Task Force is well aware that the defense provided to an insured by a lawyer retained by an insurer is the most frequent situation in which a lawyer is paid by someone other than the lawyer's client. In crafting division (f)(4) and the related Comment [12A], the Task Force considered Opinions 2000-2 and 2000-3 of the Board of Commissioners on Grievances & Discipline, as well as the Report of the OSBA House Counsel Task Force, as adopted by the OSBA Council of Delegates in November 2002, and the Report of the OSBA Insurance and Audit Practices and Controls Committee, as adopted by the OSBA Council of Delegates in May 2004.

Former clients

Rule 1.9, governing conflicts arising from duties to former clients, fills a gap in the Disciplinary Rules. The rule comports in substance with the decision in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1 and lower court decisions on the topic. The only change from current Ohio law is the requirement that a conflict waiver be confirmed in writing.

Former and current government lawyers

Rule 1.11 spells out, in more detail than DR 9-101(B), special conflict of interest rules for lawyers who are current or former government employees. The movement of lawyers between public service and private practice and their subsequent involvement in the same or similar issues and controversies requires rules of professional ethics that expressly spell out when a disqualifying conflict exists and permit such representation if certain conditions are met, including appropriate screening. This provision supplements the obligations imposed on government lawyers by state law.

Former judges and third-party neutrals

Rule 1.12 codifies the aspirational goal of EC 5-21 and creates a standard for disqualification of a lawyer who "personally and substantially" participated in the "same" matter while serving as a judge, mediator, arbitrator, or third-party neutral. The rule also establishes a process by which the lawyer may avoid personal disqualification and imputed disqualification to the disqualified lawyer's entire firm.

Imputation of conflicts

The imputation of one lawyer's conflict to others in the firm is governed by four rules, each applicable to a different type of conflict: Rule 1.10 [conflicts arising under Rule 1.7 and 1.9]; Rule 1.8(k) [conflicts arising under Rule 1.8]; Rule 1.11(b) [conflicts of former or current government lawyers]; and Rule 1.12(c) [conflicts of former judge or third-party neutral]. Collectively, these rules replace DR 5-105.

DR 5-105 expressly imputes to other lawyers in a firm only conflicts arising from a lawyer's representation of multiple current clients. In contrast, Rules 1.8(k) and 1.10 also address the imputation of conflicts arising from a lawyer's personal interests, and Rule 1.10 addresses the imputation of a conflict arising from a duty to a former client or another person. In addition, Rule 1.10 speaks in detail to two aspects of the imputation of conflicts arising from duties that a lawyer has to a former client whom the lawyer represented while associated with a previous firm. Rule 1.10(b) clarifies that imputation of a lawyer's former client conflict to the lawyer's present firm ends when the personally disqualified lawyer leaves the firm, if no lawyer remaining has confidential information about the lawyer's former client. Rules 1.10(c) and (d) express the understanding of a majority of the Task Force of the rule announced in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1 concerning screening. Although the views of members of the Task Force differed, the majority construed *Kala* to prohibit the use of a screen to avoid the disqualification of an entire firm when a lawyer who had been its opposing counsel in an on-going matter joins the firm. Thus, Rule 1.10(c) imputes the disqualification of an individual lawyer to the firm when the lawyer has switched sides in the same matter, but Rule 1.10(d) permits screening to prevent disqualification of a firm representing a client in a substantially related matter to the one on which its new lawyer was adverse.

E. ADVERTISING AND SOLICITATION—Rules 7.1 to 7.5

Rules 7.1 to 7.5 address the communication of legal services and largely follow the Model Rules on advertising and solicitation in form and content. Although some of the existing prohibitions contained in the Ohio Code of Professional Responsibility have found their way into Rules 7.1 to 7.5, many of the existing prohibitions have been removed in deference to constitutional concerns about the regulation of commercial speech. Further, both the Model Rules and the proposed rules bring Ohio's standards of conduct into step with today's world by providing sufficient flexibility to encompass changes in technology that impact on electronic and recorded communications.

Communications concerning a lawyer's services

Rule 7.1 deals with communications concerning a lawyer's services and provides the general standards applicable to advertising, solicitation, and other information that the lawyer may communicate in his or her practice. The rule is not limited only to the lawyer making a false, misleading, or nonverifiable communication, but also to the use of any material that would contain such information.

Rule 7.1 does not contain the prohibitions currently found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the existing prohibition on unverifiable claims, which is not present in the Model Rule. In addition, the rule does not contain any of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see Rule 7.1, Comment [2]), or the directives found in DR 2-101(D), (E), and (G).

Advertising

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from Ohio's advertising and solicitation rules (DR 2-101 to 2-104), thereby instructing the reader of the new rule to look at those rules as well as Rule 7.2.

The following are portions of DR 2-101 that have not been included in Rule 7.1, 7.2, or 7.3:

- The prohibition in DR 2-101(A)(2) against advertising for a matter where the law firm intends to refer the matter, rather than work on the case;

- The specific reference to types of fees or descriptions, such as "give-away" or "below cost" found in DR 2-101(A)(5), though Rule 7.1, at Comment [4], specifically indicates that such characterizations are misleading;

- Specific references to media types and words, as set forth in DR 2-101(B)(1) and (2);

- Specific reference that brochures or pamphlets can be disclosed to "others" as set forth in DR 2-101(B)(3);

- The list of items that were permissible for inclusion in advertising, contained in DR 2-101(D).

Rule 7.2(b) retains the existing prohibitions of DR 2-103 regarding reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional. The Task Force elected to retain this prohibition over Model Rule 7.2(b)(4), which allows reciprocal referral agreements in some circumstances.

Direct contact with prospective clients

Rule 7.3 embraces the provisions of DR 2-104(A), 2-101(F), and 2-101(H), with modifications.

First, Rule 7.3(c) broadens the types of communications that are permitted by authorizing the use of recorded telephone messages and electronic communication via the Internet. Further, in keeping with the new methods of communication that are authorized, the provisions of DR 2-101(F) regarding disclosures have been incorporated and modified to apply to all forms of permissible direct solicitations.

Second, the provisions of DR 2-101(F)(2) have been incorporated in Rule 7.3(c) and modified to reduce the micromanagement of lawyer contact, which previously had been the subject of abuse, by requiring that the disclaimers "ADVERTISEMENT ONLY" and "ADVERTISING MATERIAL" be "conspicuously" displayed. The requirements contained in DR 2-101(F)(2)(b) regarding disclaimers of prior acquaintance or contact with the addressee and avoidance of personalization have not been retained.

The provisions of DR 2-101(F)(4) [pre-service solicitation of defendants in civil actions] have been inserted as Rule 7.3(d), and the provisions of DR 2-101(H) [solicitation of accident or disaster victims] have been inserted as Rule 7.3(e).

Communication of fields of practice and specialization
Rule 7.4 is comparable to DR 2-105 and does not depart substantively from that rule.

Firm names and letterheads
With the exception of DR 2-102(E) and (F), Rule 7.5 is comparable to DR 2-102.

DR 2-102(E) [a lawyer engaged in the practice of law and another profession shall not so indicate on the lawyer's letterhead, office sign, or professional card, nor identify himself or herself as a lawyer in connection with the lawyer's other profession or business] prohibits truthful statements about a lawyer's actual businesses and professions. The Task Force believes the Ohio Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees and has elected to not retain DR 2-102(E). DR 2-102(F) is an exception to DR 2-102(E) and, therefore, unnecessary in light of the elimination of DR 2-102(E).

Comment [3] of Rule 7.5 is substantially the same as DR 2-102(A)(4) regarding use of the "of counsel" designation. Comment [4] addresses the restrictions of DR 2-102(G) relative to operating a legal clinic and using the designation "legal clinic."

F. NEW PROVISIONS

At its initial meeting, the Task Force identified six primary benefits that would result from adoption of professional responsibility rules that are based on the ABA Model Rules. One of the most frequently cited benefits is the substantial reliance on a body of rules that are a better reflection of the current practice of law and that are the subject of frequent updates. By relying on the Model Rules, the Ohio Rules of Professional Conduct includes several provisions that are new to Ohio professional responsibility law. The provisions noted below are in addition to those new provisions referenced elsewhere in this report.

Scope of representation—Rule 1.2
Rule 1.2 includes several new, yet fundamental principles regarding the allocation of authority between lawyer and client and the scope of representation. In stating that a lawyer must abide by client decisions concerning the objectives of the representation and consult with the client as

to means to be used, Rule 1.2(a) codifies the advisory provisions of EC 7-7. The last sentence of Rule 1.2(a) recognizes that professionalism is not inconsistent with a lawyer's duties to a client, a recognition that is expressed in DR 7-101(A)(1).

As noted above, the requirement of a written engagement letter for most representations is new. Consistent with the Model Rule, Rule 1.2(c) also permits a lawyer to agree to limit the scope of a new or existing representation, if the limitation is reasonable under the circumstances and communicated to the client in writing. For example, a litigator's declining to advise a client on the taxability of the client's recovery is likely a reasonable and appropriate limitation on the scope of an existing representation, if communicated in writing. On the other hand, it would be unreasonable for a lawyer handling a claim on a contingent fee basis to decline to represent the client in an appeal from an adverse judgment, unless the fee agreement specifically expressed the limitation. Defining what is a reasonable limitation, particularly in the context of an existing representation, will occur through advisory opinions and case law.

Rule 1.2(c) would also permit the Supreme Court to set forth the circumstances in which a lawyer may ethically provide "unbundled" legal services—that is, to assist a client with only one portion of a single case or transaction. In transactional practice, it is not unusual for sophisticated parties to agree that the lawyer should serve solely as a scrivener of a contract whose terms the parties have negotiated themselves, and the propriety of this practice has not been addressed in Ohio. Nationally, "unbundling" of legal services has been proposed, and, in some states, adopted, as a means to increase the affordability of legal services. See, e.g. Althoff, *"Ethical Issues Posed by Limited-Scope Representation—the Washington Experience,"* The Professional Lawyer 67 (2004 Symposium Issue). Rule 6.5 contemplates a form of "unbundling"—that is, "short-term limited legal services"—without expectation of continuing representation, provided under the auspices of a nonprofit organization or court.

Communication—Rule 1.4

The lack of clear and consistent communication with the client is the source of many grievances. However, the importance of communication is now expressed only in the aspirational provisions of the Ethical Considerations and in the Statements on Professionalism issued by the Supreme Court. Rule 1.4 fills that gap, stating the minimum required communication between lawyer and client.

Particular client relationships—Rules 1.13, 1.14 and 1.18

The Ohio Rules of Professional Conduct include three new rules concerning the duties of lawyers to particular types of clients—organizational clients, clients with disabilities, and prospective clients.

Organizational client. Rule 1.13, addressing the duties of a lawyer for an organization, is new. In stating that a lawyer for an organization owes duties to the organization, and not to any of its constituents, Rule 1.13 draws substantially upon Ethical Consideration 5-19. Rule 1.13(b) describes when a lawyer must report information about actual or threatened constituent wrong-doing "up the ladder" within the organization. The Task Force does not recommend the special "whistle-blowing" provisions of Model Rule 1.13 adopted by the ABA in 2002. Instead, the Task Force proposes that a lawyer for an organization have the same "reporting out" discretion or duty that other lawyers have under Rules 1.6(b) and (c). The Task Force does not anticipate that Rule 1.13 will present any unique issues for lawyers for publicly held companies who are required to comply with the Sarbanes-Oxley regulations.

Client with a disability. Rule 1.14, addressing the duties of a lawyer for a client with diminished capacity, is new. The rule is both broader and narrower than EC 7-12, which treats the same subject-matter. Rule 1.14 is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, take reasonably necessary protective action, and disclose confidential information to the extent necessary to protect the client's interest. Rule 1.14 is narrower than EC 7-12 to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making as was addressed in the Ethical Consideration, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

Prospective clients. Although new, Rule 1.18, addressing the duty of a lawyer to a prospective client who does not engage the lawyer, does not materially change the

law of Ohio. The rule clarifies the directives set forth by the Supreme Court in *Cuyahoga Bar Assn v. Hardiman* (2003), 100 Ohio St.3d 260.

Special duties associated with certain roles—Rules 2.3, 2.4, 3.8 and 3.9

Evaluation for third party. Rule 2.3 outlines the ethical obligations of a lawyer who is asked to provide to a third party an evaluation of a matter related to a client representation. No current Ethical Consideration or Disciplinary Rule expressly addresses this scenario, examples of which include audit requests and a lender's request for a legal opinion from borrower's counsel.

Lawyer acting as neutral. Rule 2.4 requires a lawyer acting as neutral to inform unrepresented parties that the lawyer does not represent them and explain, if necessary, the difference between a lawyer's role as a neutral and an advocate.

Lawyer as prosecutor. Rules 3.8(b), (c), (e), and (f), concerning special obligations of prosecutors, are new. Ohio recognizes the distinctive role of prosecutors in EC 7-13, but Ohio currently has no disciplinary rules, other than DR 7-103, concerning the unique ethical obligations of prosecutors. Moreover, there are few cases on prosecutorial misconduct other than improper comment at trial. Rules 3.8(b), (c), and (f) have their roots in the *ABA Standards for Criminal Justice: Prosecution Function*, which have been cited with approval by the Supreme Court and the Board of Commissioners on Grievances & Discipline.

Lawyer as advocate before law- or rule-making body. Rule 3.9 recognizes that law- and rule-making bodies may be uncertain as to whether a presenting lawyer speaks personally or on behalf of a client and that this distinction may be significant to the body. The rule therefore requires a lawyer to disclose that the lawyer appears in a representative capacity, if that is the case. Rule 3.9 does not require the lawyer to disclose the client's identity, but does make applicable, to the lawyer–lobbyist, Rule 3.3(a), prohibiting false or misleading statements, and Rule 3.4(a), prohibiting obstruction of access to evidence.

Responsibility of lawyers in firms—Rules 5.1 to 5.3

Rules 5.1 to 5.3 concern the responsibility of lawyers in a firm for ethical practice of others in the firm. The rules expand on the limited provision of DR 4-101(D), which addresses a lawyer's duty to ensure that employees, associates, and others preserve client confidences and secrets, and the holding in *Disciplinary Counsel v. Ball* (1993), 67 Ohio St. 3d 401.

Rule 5.1 requires law firm partners and supervising lawyers to make reasonable efforts to ensure that the firm has measures in place for assuring that all lawyers in the firm conform to the rules of ethics. Rule 5.1 also states that a partner, manager, or supervising lawyer is responsible for the unethical conduct of a subordinate lawyer if the supervisor orders, ratifies, or fails to intervene to prevent or mitigate the consequences of the subordinate's unethical conduct. Rule 5.2 states that each lawyer is responsible for adhering to the rules, but that a subordinate lawyer does not violate the rules by acting in accordance with a supervisor's reasonable resolution of a question of duty. Rule 5.3 parallels Rule 5.1 and addresses the responsibilities of a lawyer with regard to the conduct of nonlawyer assistants.

Multi-disciplinary practice—Rules 5.4 and 5.7

Two rules govern the conduct of lawyers who engage in professional or business activities that are different from, and perhaps related to, the practice of law. Together, these rules recognize that lawyers may engage in business and professional pursuits that are related to the provision of legal services, while incorporating safeguards that promote a lawyer's professional independence and protect the lawyer's clients and the clients and customers of the related businesses and professions.

Rule 5.4 promotes the continued professional independence of a lawyer by prohibiting a lawyer from sharing fees with nonlawyers, except in five limited circumstances, barring a lawyer from forming a partnership with a nonlawyer if the partnership's activities will consist of the practice of law, preventing a lawyer from having his or her professional judgment directed by a third party who recommends, employs, or pays the lawyer to render legal services, and prohibiting a lawyer from entering into a practice relationship wherein a nonlawyer will have an ownership interest, is corporate director or officer, or has the right to direct or control the lawyer's professional judgment. The rule corresponds substantially to DR 3-102(A), 3-103, and 5-107(B) and (C).

Rule 5.7 is new to Ohio, although the Board of Commissioners on Grievances & Discipline has twice cited Model Rule 5.7 in addressing a lawyer's involvement in ancillary or law-related

business. See Advisory Opinions 94-7 and 2000-4. Rule 5.7 recognizes that lawyers often simultaneously engage in the practice of law and provide certain law-related services, such as title insurance, financial planning, or lobbying and states that if a lawyer provides law-related services in conjunction with the rendering of legal services, the lawyer is governed by the Rules of Professional Conduct in providing those law-related services. Rule 5.7 prohibits a lawyer from conditioning the provision of legal services on a client's use of the lawyer's law-related business, or from requiring a customer of a law-related business to agree to legal representation by the lawyer. In these circumstances, the lawyer must disclose his or her ownership or control of the law-related business and inform the client or customer that the legal services or law-related services, as applicable, may be obtained elsewhere.

Multi-jurisdictional practice—Rule 5.5

To provide complete client service, a lawyer occasionally may be required to perform work in a jurisdiction in which the lawyer is not admitted. In most instances, this work is unlikely to implicate the public policy against the unauthorized practice of law. The Task Force endorses the adoption of ABA Model Rule 5.5, with slight modifications, to establish certain safe harbors from charges of unauthorized practice of law for lawyers admitted elsewhere than Ohio. Model Rule 5.5(c), which was adopted by the ABA in 2002, has already been adopted in fifteen jurisdictions and fairly balances the public interest in regulation of the practice of law with the multi-jurisdictional scope of many clients' businesses and legal matters. Rule 5.5 incorporates a reference to the corporate registration requirements of Gov. Bar R. VI, Section 4. The creation of additional safe harbors, for which a basis cannot be found in present Ohio law, may be also appropriate—for example, for in-house counsel who work only part-time—but were not considered by the Task Force. Pursuant to Rule 8.5, out-of-state lawyers relying on a safe harbor under Rule 5.5 would be subject to the disciplinary authority of Ohio, as well as of their home jurisdiction.

Pro bono legal services—Rules 6.2 and 6.5

As noted below, the Task Force defers a recommendation on adoption of Model Rule 6.1. Whether the Supreme Court ultimately adopts a version of Model Rule 6.1, the Task Force recommends adoption of two Model Rules relevant to the provision of legal services to those who cannot afford them. Rule 6.2 forbids a lawyer from seeking to avoid serving as court-appointed counsel without good cause. Rule 6.5 permits a lawyer to provide short term legal

services without regard to imputed conflicts of which the lawyer may be unaware. Rule 6.5 facilitates and encourages lawyers to participate in "walk-in" pro bono programs sponsored by a nonprofit association or court.

Lawyer discipline—Rules 8.1 to 8.5

Rules 8.1 to 8.5 pertain to discipline and other aspects of maintaining the integrity of the profession. Together, these rules replace DR 1-101 to 1-103 and introduce new provisions concerning a lawyer's duty in providing information in connection with a bar admission application, the Supreme Court's plenary jurisdiction in disciplinary matters, and choice of law in disciplinary matters. Following the Model Rule, Rule 8.3 narrows the scope of an Ohio lawyer's required reporting of violations of the professional conduct rules to violations "that raise a question as to a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." However, unlike the ABA Model Rule, Rule 8.3 requires self-reporting of rule violations.

Rule 8.5 is significant in two respects. First, the rule declares that lawyers admitted in another state who practice within the safe harbors of Rule 5.5 are subject to discipline in Ohio. Second, the rule outlines choice of law principles for discipline.

V. MODEL RULES NOT RECOMMENDED BY THE TASK FORCE

The Task Force considered and recommends against adopting four Model Rules of Professional Conduct. The Task Force concluded that the provisions of Model Rules 3.2 [Expediting Litigation], 6.3 [Membership in Legal Services Organization], 6.4 [Law Reform Activities Affecting Client Interests], and 7.6 [Political Contributions to Obtain Legal Engagements or Appointments by Judges] are encompassed either in Ohio statutes or elsewhere in the Ohio Rules of Professional Conduct. These recommendations are spelled out in a Reporter's Note that the Task Force has inserted in place of those Model Rules and comments.

The Task Force tabled and thus makes no recommendation to the Supreme Court regarding adoption of Model Rule 6.1 [Voluntary Pro Bono Publico Service]. At the same time as the Task Force was considering Model Rule 6.1, the Supreme Court Task Force on Pro Se and Indigent Litigants and the Ohio Legal Assistance Foundation board of trustees were engaged in a detailed review of Model Rule 6.1 and the state of pro bono activities in Ohio. In light of these ongoing reviews, and in deference to the subject-matter expertise possessed by the members

of these two entities, the Task Force concluded the Supreme Court would be better served by considering the recommendations regarding Model Rule 6.1 that those two entities will present to the Court. Nonetheless, some members of the Task Force question whether a nonbinding, hortatory standard regarding the participation in and delivery of pro bono services should be included in Ohio Rules of Professional Conduct. These members expressed the view that such a provision, if the Court ultimately adopts it, would be more appropriately included in the Lawyer's Creed and Aspirational Ideals issued by the Court or in the Rules for the Government of the Bar of Ohio.

The Task Force also declined to propose a Rule of Professional Conduct that incorporates the provisions of DR 7-111 [Confidential Information]. The Task Force believes the subject-matter of that rule is addressed in Rules 8.4(b) and (d) as well as R.C. 102.03(B).

VI. OTHER TASK FORCE RECOMMENDATIONS

In addition to the rules recommended for the Court's adoption, the Task Force submits the following recommendations for the Court's consideration.

A. LAWYER REFERRAL AND INFORMATION SERVICES—GOV. BAR R. XVI

In 1996, the Supreme Court amended DR 2-103 to establish standards for the operation of lawyer referral and information services in Ohio. Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio supplements these provisions, and the Court's Committee for Lawyer Referral and Information Services administers them. The provisions contained in DR 2-103 have the salutary purpose of ensuring that Ohioans who are in need of legal services will receive appropriate and quality referrals from an entity that satisfies or exceeds certain minimum standards. However, because these provisions focus on the operation of the referral services themselves, rather than the conduct of participating lawyers, the Task Force suggests that these provisions are misplaced in the Rules of Professional Conduct.

In addition, the Task Force recommends that in adopting Rule 7.2, which addresses the obligation of an Ohio lawyer when participating in a lawyer referral service, the Court include a cross-reference to the requirements of Gov. Bar R. XVI. The Task Force further recommends that the Supreme Court amend Gov. Bar R. XVI to incorporate the provisions currently found in DR 2-103(C) that regulate the manner in which the lawyer referral services operate.

B. SUCCESSION PLANS FOR SOLE PRACTITIONERS

According to the Ohio State Bar Association, approximately one out of every three Ohio lawyers identifies himself or herself as a sole practitioner. These lawyers provide a variety of essential and affordable legal services to individuals and organizations throughout Ohio. Yet, when a sole practitioner dies, becomes permanently or temporarily disabled, or abandons his or her practice, the lawyer's clients can be left without representation, perhaps at a crucial point of litigation or negotiation.

Comment [5] to Rule 1.3 suggests that a sole practitioner can address the duty of diligence to client matters by designating a successor lawyer to take action when a sole practitioner is unable or unwilling to continue his or her practice. The Task Force recommends that the Court take additional steps to encourage sole practitioners to develop a succession plan that could be invoked in the event of their death, disability, or disappearance. To that end, the biennial attorney registration form should be amended to ask each sole practitioner to identify his or her successor lawyer. This step will underscore the importance of developing a succession plan and enable the appropriate authorities to readily identify and contact a successor lawyer, should it become necessary to do so. The Delaware Supreme Court has implemented a similar provision as part of the 2005 registration statement filed by each Delaware lawyer.

C. EFFORTS TO EDUCATE THE BAR, BENCH AND PUBLIC

The Task Force believes a comprehensive effort to educate lawyers, judges, and the public about the new rules will enhance acceptance and understanding of and compliance with the Ohio Rules of Professional Conduct. The Task Force recommends that the Supreme Court collaborate with bar associations, law schools, and continuing education providers to develop lawyer education programs regarding the Ohio Rules of Professional Conduct. The Ohio Judicial College should develop similar education programs that are designed to facilitate the understanding of the rules by judges, magistrates, and other court officials. The Supreme Court Public Information Office could enhance public understanding of ethical standards for lawyers through the development and publication of materials that focus on aspects of the rules that are of interest to consumers of legal services. Client-lawyer communications regarding fee arrangements and scope of representation, requirements of written fee agreements, advertising, and use of law-related services would be among the subjects addressed in these materials.

D. DELAYED EFFECTIVE DATE

The Task Force recommends that the Supreme Court delay the effective date of the new Rules of Professional Conduct for a minimum of three months and, ideally, up to six months, following the Court's final adoption of the rules. This delay is suggested and warranted for two primary reasons. First, this period will allow for the development of programs and materials for presentation to lawyers, judges, and the public. Second, lawyers and law firms will be able to use this period to incorporate changes in their practices that are necessary to ensure compliance with the new rules. Four states (Iowa, Nebraska, Oregon, and Tennessee) that recently replaced their legal ethics rules with a version of the Model Rules delayed the effective date of the new rules from two to six months following adoption.

VII. CONCLUSION

> *Integrity is the key to understanding legal practice.*
>
> — Ronald D. Dworkin, Professor of Philosophy, New York University

The Task Force on Rules of Professional Conduct was charged with developing a comprehensive collection of professional conduct standards that more closely reflect current practices and ethical standards in the legal profession, protect the rights of clients and the public, and ensure that Ohio lawyers are held to the highest standards of professional conduct. The recommendations contained in this report are submitted with understanding that ethics rules are a supplement to, and not a replacement for, the personal integrity and professionalism expected of each lawyer who takes the oath of office and enters the legal profession. By conducting himself or herself with personal integrity and adhering to the standards set forth in the Ohio Rules of Professional Conduct, each lawyer will remain faithful to the principles of a honorable and independent profession.

The Task Force respectfully submits this report to Chief Justice Thomas J. Moyer and stands ready to assist the Supreme Court and the bench, bar, and citizens of Ohio in implementing its recommendations.

APPENDIX A

Proposed Ohio Rules of Professional Conduct

Table of Contents

Reporter's Note: Except for Latin terms and case names, words and phrases that appear in italicized type in each rule denote terms that are defined in Rule 1.0.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] As an officer of the court, a lawyer not only represents clients but has a special responsibility for the quality of justice.

[2] In representing clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client and consistent with requirements of honest dealings with others. As an evaluator, a lawyer examines a client's legal affairs and reports about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. See, *e.g.,* Rules 1.12 and 2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

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

[5] Lawyers play a vital role in the preservation of society. A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjustified criticism. Although a lawyer, as a citizen, has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] A lawyer should seek improvement of the law, ensure access to the legal system, advance the administration of justice, and exemplify the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our

system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] [RESERVED]

[8] [RESERVED]

[9] The Ohio Rules of Professional Conduct often prescribe rules for a lawyer's conduct. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

[10] [RESERVED]

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

[12] [RESERVED]

[13] [RESERVED]

SCOPE

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

[15] The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the

moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

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

[18] Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental

legal controversies in circumstances where a private lawyer could not represent multiple private clients. These rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do

establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct.

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

RULE 1.0: TERMINOLOGY

As used in these rules:

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

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

(c) "Firm" or "law firm" denotes a lawyer or lawyers, including "of counsel" lawyers, in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation, governmental entity, or other organization. Two or more lawyers who office share or a lawyer who works for a firm on a limited basis may constitute a firm if there exists indicia sufficient to establish a *de facto* law firm between or among the lawyers involved.

(d) "Fraud" or "fraudulent" denotes conduct that has an intent to deceive and is either of the following:

(1) an actual or implied misrepresentation of a material fact that is made either with knowledge of its falsity or with such utter disregard and recklessness about its falsity that knowledge may be inferred;

(2) a knowing concealment of a material fact where there is a duty to disclose the material fact.

(e) "Illegal" denotes criminal conduct or violations of applicable statutes or administrative regulations.

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

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

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

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

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

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

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a matter of real importance or great consequence.

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

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

Comment

Confirmed in Writing

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

Firm

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

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

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

Fraud

[5] The terms "fraud" or "fraudulent" incorporate the primary elements of common law fraud. The terms do not include negligent misrepresentation or negligent

failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform. Under division (d)(2), the duty to disclose a material fact may arise under these rules or other Ohio law.

Informed Consent

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

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

Screened

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

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

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

Substantial

[11] The definition of "substantial" does not extend to "substantially" as used in Rules 1.9, 1.10, 1.11, 1.12, 1.16, 1.18, and 7.4. Rule 1.9, Comment [3] defines "substantially related" for purposes of Rules 1.9, 1.10, and 1.18. "Personally and substantially," as used in Rule 1.11, originated in 18 U.S.C. Sec. 207. Rule 1.12, Comment [1] defines "personally and substantially" for former adjudicative officers.

Ohio Code Comparison to Rule 1.0

Rule 1.0 replaces and expands significantly on the Definition portion of the Code of Professional Responsibility. Rule 1.0 defines thirteen terms that are not defined in the Code and alters the Code definitions of "law firm" and "tribunal."

ABA Model Rules Comparison to Rule 1.0

Rule 1.0 contains three substantive changes to the Model Rule terminology.

The definition in Model Rule 1.0(c) of "firm" and "law firm" is rewritten for clarity. Rule 1.0(c) provides that a "firm" or "law firm" includes individuals who are in "of counsel" status. The definition also expressly includes legal aid, public defender offices, and lawyers who work together in a governmental entity such as the Attorney General's office or county prosecutor's office. Rule 1.0(c) also indicates that two or more lawyers who have office-sharing or other limited arrangements may, under certain circumstances, be considered a "firm" or "law firm" for purposes of the Rules of Professional Conduct. These revisions place, in the rule, what is discussed in Comments [2] and [3].

The Model Rule 1.0(d) definition of "fraud" or "fraudulent" is amended to replace the phrase "under the substantive or procedural law of the applicable jurisdiction" with the elements of fraud that have been established by Ohio law. See e.g., *Domo v. Stouffer* (1989), 64 Ohio App.3d 43, 51 and Ohio Jury Instructions, Sec. 307.03. Comment [5] is revised accordingly.

Added to Rule 1.0 is a definition of "illegal" in division (e). This definition clarifies that provisions referring to "illegal or fraudulent conduct" applies to statutory and regulatory prohibitions that are not classified as crimes.

Similarly, Model Rule 1.0(l), which defines "substantial," is relettered as Rule 1.0(m) and revised to incorporate a definition from Ohio case law. See *State v. Self* (1996), 112 Ohio App.3d 688, 693. A new Comment [11] is added to state that the definition of "substantial" does not extend to the term "substantially," as used in various rules, and to reference specific definitions in Rules 1.9, 1.11, and 1.12.

RULE 1.1: COMPETENCE

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

Comment

Legal Knowledge and Skill

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

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

[3] [RESERVED]

[4] A lawyer may accept representation where the requisite level of competence can be achieved through study and investigation, as long as such additional work would not result in unreasonable delay or expense to the client. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and

procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c). The lawyer should consult with the client about the degree of thoroughness and the level of preparation required, as well as the estimated costs involved under the circumstances.

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Ohio Code Comparison to Rule 1.1

Rule 1.1, requiring a lawyer to handle each matter competently, replaces DR 6-101(A)(1) and DR 6-101(A)(2). The rule eliminates the existing tension between DR 6-101(A)(1), which forbids a lawyer to handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle the matter, and EC 6-3, which suggests that a lawyer can accept a matter that the lawyer is not initially competent to handle "if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client." Rule 1.1 does not confine a lawyer to associating with competent counsel in order to satisfy the lawyer's duty to provide competent representation. As highlighted by the addition to Comment [4], no matter how a lawyer gains the necessary competence to handle a matter, the lawyer must be diligent and may charge no more than a reasonable fee.

ABA Model Rules Comparison to Rule 1.1

Rule 1.1 is identical to Model Rule 1.1. Certain comments have been revised.

Comment [3] is stricken. The rule itself recognizes that competence is evaluated in the context of what is reasonably necessary under the circumstances. To the extent that Comment [3] was intended to affirm that this test would apply in an emergency situation, it does not add to the rule. On the other hand, Comment [3], as written, could erroneously be understood by practitioners to create an exception to the duty of competence.

Comment [4] is amended to incorporate language of EC 6-3. EC 6-3 cautions that if a lawyer intends to achieve the requisite competence to handle a matter through study

and investigation, the lawyer's additional work must not result in unreasonable delay or expense to the client.

Although a lawyer must always perform competently, a lawyer can provide competent assistance within a range of thoroughness and preparation. Comment [5] is revised to suggest that a lawyer consult with a client regarding the costs and extent of work to be performed.

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

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process.

(1) A lawyer shall abide by a client's decision whether to settle a matter.

(2) In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer who undertakes representation of a client, other than by court appointment, shall *confirm in writing*, within a *reasonable* time, the nature and scope of the representation, unless the lawyer has regularly represented the client or the anticipated fee from the representation is $500.00 or less. A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client in *writing*.

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

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Comment

Allocation of Authority between Client and Lawyer

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

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

Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(d)(3).

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

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[4A] Division (a) makes it clear that regardless of the nature of the representation the lawyer does not breach a duty owed to the client by maintaining a professional and civil attitude toward all persons involved in the legal process. Specifically, punctuality, the avoidance of offensive tactics, and the treating of all persons with courtesy are viewed as essential components of professionalism and civility, and their breach may not be required by the client as part of the representation.

Independence from Client's Views or Activities

[5] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Retention Agreements and Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] [RESERVED]

[7A] A writing that confirms the nature and scope of the lawyer-client relationship and the fees to be charged is an important means of clarifying the client-lawyer relationship and removing much misunderstanding that may arise during the course of the relationship. The detail and specificity of the writing confirming the nature and scope of the representation will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis and rate of the fee. See Rule 1.5. Nothing in this rule prohibits a lawyer from creating a form or checklist that specifies the nature and scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the nature and scope of that representation.

[7B] Although this rule affords the lawyer and client substantial latitude in defining the nature and scope of the representation, such agreement must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such an agreement would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1. One element of whether it is reasonable for a lawyer to limit the scope of a new or existing representation is whether the client has given informed consent. See Rule 1.0(e).

[7C] Written confirmation of a limitation of an existing representation may be any writing that is presented to the client that reflects the limitation such as a letter or electronic transmission addressed to the client or a court order.

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

Illegal, Fraudulent and Prohibited Transactions

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

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

proper but then discovers is illegal or fraudulent. The lawyer shall comply with Rules 3.3(b) and 4.1(b).

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

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

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

Ohio Code Comparison to Rule 1.2

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(b) has been reserved for future use.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

ABA Model Rules Comparison to Rule 1.2

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules. Rule 1.2(a)(1) and (2) are the same as the third sentence in Model Rule 1.2(a), but are broken into subdivisions.

Model Rule 1.2(b) has been moved to Comment [6] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs considerably from Model Rule 1.2(c). Model Rule 1.2(c) does not contain the first sentence of Rule 1.2(c). The first sentence of Rule 1.2(c) was added to avert a great deal of confusion and harm to clients by requiring the nature and scope of the representation to be reduced to writing within a reasonable time period after the client-lawyer relationship begins. The $500 threshold was inserted to exempt pro bono and relatively limited representations from the writing requirement.

Rule 1.2(c) is similar to Model Rule 1.2(c) in that it permits a lawyer to limit the scope of a representation, but differs in that it requires the limitation be confirmed in writing. The Model Rule requires only that the client give informed consent to the limitation.

Rule 1.2(d) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language "criminal" was changed to "illegal" in Rule 1.2(d), and Model Rule 1.2(d) was split into two sentences in Rule 1.2(d).

Rule 1.2(e) does not exist in the Model Rules.

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. A lawyer also must act with commitment and dedication to the interests of the client.

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

[3] Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

[4] A lawyer should carry through to conclusion all matters undertaken for a client, unless the client-lawyer relationship is terminated as provided in Rule 1.16. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about post-trial alternatives including the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to pursue those alternatives or prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* Rule V, Section 8(F) of the Supreme Court Rules for the Government of the Bar of Ohio.

Ohio Code Comparison to Rule 1.3

Rule 1.3 replaces both DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him) and DR 7-101(A)(1) (with limited exceptions, a lawyer shall not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules).

Neither Model Rule 1.3 nor any of the Model Rules on advocacy states a duty of "zealous representation." The reference to acting "with zeal in advocacy" is deleted from Comment [1] because "zeal" is often invoked as an excuse for unprofessional behavior. Despite the title of Canon 7 of the Ohio Code of Professional Responsibility and the content of EC 7-1, no disciplinary rule requires "zealous" advocacy. Moreover, the disciplinary rules recognize that courtesy and punctuality are not inconsistent with diligent representation [DR 6-101(A)(3)], that a lawyer, where permissible, may exercise discretion to waive or fail to assert a right or position [DR 7-101(B)(1)], and that a lawyer may refuse to aid or participate in conduct the lawyer believes to be unlawful, even though there is some support for an argument that it is lawful [DR 7-101(B)(2)].

ABA Model Rules Comparison to Rule 1.3

There is no change to the text of Model Rule 1.3.

The reference in Comment [1] to a lawyer's use of "whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and the last three sentences of the comment have been stricken. The choice of means to accomplish the objectives of the representation are governed by the lawyer's professional discretion, and the lawyer's duty to communicate with the client, as specified in Rules 1.2(a) and 1.4(a)(2).

The reference to a lawyer's duty to act "with zeal in advocacy upon the client's behalf" also is deleted. Zealous advocacy is often invoked as an excuse for unprofessional behavior.

Comment [3] is revised to state more concisely the consequences of lawyer delay and neglect in handling a client matter and explain when charges of neglect are likely to be the subject of professional discipline.

The first sentence of Comment [4] is reworded and the balance of that sentence and the second sentence are deleted. The content of the deleted language is addressed in Rule 1.2.

Comment [5] is revised to refer to Gov. Bar R. V, Section 8(F). That rule authorizes Disciplinary Counsel or the chair of a certified grievance committee to appoint

a lawyer to inventory client files and protect the interests of clients when a lawyer does not or cannot (because of suspension or death) attend to clients and no partner, executor, or other responsible party capable of conducting the lawyer's practice is available and willing to assume responsibility.

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

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

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

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

(4) comply as soon as practicable with *reasonable* requests for information from the client;

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

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

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Client's Signature

_____
Date

Comment

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

Communicating with Client

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

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

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

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer

should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

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

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or registered partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Ohio Code Comparison to Rule 1.4

With the exception of the new division (c), Rule 1.4 does not have a specific counterpart in the Code of Professional Responsibility. Rule 1.4(c) replaces DR 1-104.

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rule 1.4(a)(2) corresponds to several sentences in EC 7-8. Rule 1.4(a)(3) corresponds to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any existing DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

ABA Model Rules Comparison to Rule 1.4

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions. One exception is division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

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

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

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

(4) the amount involved and the results obtained;

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

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

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

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged or the fee is $500.00 or less. Any change in the basis or rate of the fee

or expenses is subject to division (a) of this rule and shall also be promptly communicated to the client in *writing*.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

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

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

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

(3) a fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in *writing* that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation pursuant to division (a) of this rule.

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) if the fee is contingent, the *written* closing statement shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is *reasonable*.

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.

Comment

Reasonableness of Fee

[1] Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

Basis or Rate of Fee and Expenses

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Unless the situation involves a regularly represented client or the fee is $500.00 or less, the lawyer shall furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable cost of services performed in-house, such as copying. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of division (a) of this rule. In determining whether a particular contingent fee is

reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

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

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

Prohibited Contingent Fees

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

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set

amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [e.g., factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial lawyer. Division (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must give prior written approval after disclosure of the identity of each lawyer, that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. Contingent fee agreements and closing statements must be in a writing signed by the client and each lawyer and must otherwise comply with division (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1 and Rule 1.17.

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

Disputes over Fees

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

[10] A procedure has been established for resolution of fee disputes between lawyers who are sharing a fee pursuant to division (e) of this rule. This involves use of an arbitration or mediation procedure established by a local bar association or the Ohio State Bar Association. The lawyer must comply with the procedure. A dispute between lawyers who are splitting a fee shall not delay disbursement to the client. See Rule 1.15.

Ohio Code Comparison to Rule 1.5

Rule 1.5 replaces DR 2-106 and DR 2-107; makes provisions of EC 2-18 and EC 2-19 mandatory, as opposed to aspirational, with substantive modifications; and makes the provisions of R.C. 4705.15 mandatory, with technical modifications.

Rule 1.5(a) adopts the language contained in DR 2-106(A) and (B), which prohibits illegal or clearly excessive fees and establishes standards for determining the reasonableness of fees. Eliminated from Rule 1.5(a) is language regarding expenses.

Rule 1.5(b) expands on EC 2-18 by mandating that the scope of the representation and the arrangements for fees and expenses shall promptly be communicated to the client. It modifies existing EC 2-18 by requiring that in matters in which the anticipated fees will be in excess of $500.00 the agreement between the lawyer and the client shall be promptly communicated to the client in writing to avoid potential disputes, unless the situation involves a regularly represented client who will be represented on the same basis as in the other matters for which the lawyer is regularly engaged. Recognizing the exigencies of the everyday world, the proposed rule does not require a formalized contract to satisfy the requirements of a writing. Rather it contemplates that compliance with the rule may be by a simple memorandum or copy of the lawyer's customary fee arrangements.

Rule 1.5(c)(1) also expands on EC 2-18 and R.C. 4705.15(B) by requiring that all contingent fee agreements shall be reduced to a writing signed by the client and the lawyer. Rule 1.5(c)(2) directs that a closing statement shall be prepared and signed by

both the lawyer and the client in matters involving contingent fees. It closely parallels the current R.C. 4705.15(C).

Rule 1.5(d) prohibits the use of a contingent fee arrangement when the contingency is securing a divorce, spousal support, or property settlement in lieu of support. It finds its basis in EC 2-19, which provides that "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." Rule 1.5(d)(2) prohibits the use of contingent fee arrangements in criminal cases and parallels DR 2-106(C).

Rule 1.5(d)(3) prohibits fees arrangements denominated as "earned upon receipt," "nonrefundable," or other similar terms that imply the client may never be entitled to a refund, unless the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund so the client is not misled by such terms. The rationale for this rule is contained in Comment [7].

Rule 1.5(e) deals with the division of fees among lawyers who are not in the same firm. Rule 1.5(e)(1) restates the provisions of DR 2-107(A)(1), with the additional requirement that in the event the division of fees is on the basis of joint responsibility, each lawyer must be available for consultation with the client. Rule 1.5(e)(2) clarifies DR 2-107(A)(2) and Advisory Opinion 2003-3 of the Board of Commissioners on Grievances and Discipline regarding the matters that must be disclosed in writing to the client.

Rule 1.5(e)(3) is a new provision directing that the closing statement contemplated by division 1.5(c)(2) must be signed by the client and all lawyers who are not in the same firm who will share in the fees and expenses. Rule 1.5(e)(4) is a restatement of DR 2-107(A)(3) regarding the requirement that the total fee must be reasonable.

Rule 1.5(f) is a restatement of DR 2-107(B) requiring mandatory mediation or arbitration regarding disputes between lawyers sharing a fee under this rule.

ABA Model Rules Comparison to Rule 1.5

Model Rule 1.5 is amended to conform to disciplinary rules and ensure a better understanding of the relationship between the client and the lawyers representing the client, thereby reducing the likelihood of future disputes. Also, the comments are modified to bring them into conformity with the proposed changes to the ABA Model Rule and clarify certain aspects of fees for the benefit of the bench, bar, and the public.

Although ABA Model Rule 1.5(a) directs that a lawyer shall not charge "unreasonable" fees or expenses, the terminology in DR 2-106 (A) prohibiting "illegal or clearly excessive" fees is more encompassing and better suited to use in Ohio. Charging

an "illegal fee" differs from charging an "unreasonable fee" and, accordingly, the existing Ohio language is retained.

The only changes made to ABA Model Rule 1.5(b) involve the requirement that when it is contemplated that a fee will be greater than $500.00 the agreement must be reduced to writing. The likelihood of fee disputes and malpractice claims will be reduced by having the lawyer take fundamental steps to ensure that the lawyer and the client are in agreement about exactly what the lawyer intends to do for the client and how the client will be charged for such services. Even if the fee that the lawyer will realize from a tort claim taken on a contingent fee basis is less than $500.00, the lawyer is required to reduce the agreement to writing under R.C. 4705.15, so there already is authority to require written confirmation of the agreement in smaller undertakings. However, recognizing the fact that it would not be economical for lawyers to reduce fee arrangements to writing when the undertaking involves the preparation of a simple will, deed, or the like, it was arbitrarily determined that matters in which the anticipated fee would be greater that $500.00 would be more serious undertakings in which the potential for disputes would be more likely to occur. The rule strikes an appropriate balance between the economic exigencies of the practice of law and the protection of the client and lawyer.

ABA Model Rule 1.5(c), while dealing with contingent fees, is expanded and clarified. The closing statement provisions of the ABA Model Rule are expanded to bring them in line with existing R.C. 4705.15(C). Additionally, the ABA Model Rule is divided into two parts, the first dealing with the lawyer's obligations at the commencement of the relationship and the second dealing with the lawyer's obligations at the time a fee is earned.

The provisions of ABA Model Rule 1.5(d) are modified to add division (d)(3) and Comment [6A] in light of the number of disciplinary cases involving "retainers."

ABA Model Rule 1.5(e) and Comment [7] dealing with division of fees are modified to bring both the requirements of the rule and the commentary into line with existing practice in Ohio.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* any of the following is necessary:

(1) to reveal the intention of the client or other person to commit a crime and the information necessary to prevent the crime;

(2) mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

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

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

(5) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

Comment

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

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

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

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery

of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

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

Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the traditional "future crime" exception, which permits lawyers to reveal the intention of their client to commit a crime and the information necessary to prevent the crime, and expands on this exception to permit lawyers to disclose the intention of third parties to commit a crime, even when such knowledge is information obtained in representing a client. The future crime exception provides a bright-line test for lawyers by limiting disclosure to future acts that public policy has determined should be codified as crimes.

[7] [RESERVED]

[8] Division (b)(2) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(2) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct.

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

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

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

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, division (b)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

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

[15] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (b)(1) through (b)(5). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by division (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by division (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

Acting Competently to Preserve Confidentiality

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

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

Former Client

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

Ohio Code Comparison to Rule 1.6

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by proposed Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent", including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is the future crime exception, identical to DR 4-101(C)(3), with the addition of "or other person" to correspond to the Model Rule. Rule 1.6(b)(2) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client's illegal or fraudulent act and the client has used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(3) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(4) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. An exception to confidentiality is created in a disciplinary matter when the grievant is the lawyer's client or when a third person has filed a grievance. This distinction requires the lawyer to claim the client's privilege when a third person has initiated a disciplinary grievance. Rule 1.6(b)(5) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

ABA Model Rules Comparison to Rule 1.6

The text of Model Rule 1.6 is altered to reflect Ohio law.

The additions to Rule 1.6(a) are intended to clarify that "information relating to the representation" includes information protected by the attorney-client privilege.

The Task Force recommends a future crime exception in Rule 1.6(b)(1) instead of an exception tied to threats of "reasonably certain death or substantial bodily harm" in Model Rule 1.6(b)(1) and the exception tied to "reasonably certain * * * substantial injury to the financial interest or property of another" in Model Rule 1.6(b)(2) and (3). Many jurisdictions have retained the future crime exception rather than creating exceptions that hinge on the nature of the harm threatened. A bright line rule triggered by the criminality of the conduct more effectively captures the reason for an exception because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(2) is added to permit a lawyer to reveal information, including privileged information, that is necessary to mitigate a substantial injury to the financial interests or property of another that is caused by the commission of an illegal or fraudulent act of a client. The lawyer's ability to disclose is limited to circumstances in which the client used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) corresponds to Model Rule 1.6(b)(5), with the addition of "disciplinary matter" to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a significant risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent, diligent, and loyal representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Comment

General Principles

[1] The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule. In addition, a lawyer must consider whether any of the specific rules in Rule 1.8, regarding certain conflicts of interest involving current clients, applies. For former clients, see Rule 1.9; for conflicts involving those who have consulted a lawyer about representation but did not retain that lawyer, see Rule 1.18. [analogous to Model Rule Comment 1]

[2] In order to analyze and resolve a conflict of interest problem under this rule, a lawyer must: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation is barred by either criteria of division (c); (4) evaluate, under division (b)(1), where the lawyer can competently and diligently represent all clients affected by the conflict of interest, and 4) if representation is otherwise permissible, consult with the clients affected by the conflict and obtain the informed consent of each of them, confirmed in writing. [analogous to Model Rule Comment 2]

[3] To determine whether a conflict of interest would be created by accepting or continuing a representation, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, for collecting and reviewing information about the persons and issues in all matters handled by the lawyer. See also Comment to Rule 5.1. Ignorance caused by a failure to institute or follow such procedures will not excuse a lawyer's violation of this rule. [derived from Model Rule Comment 3]

[4] A lawyer must decline a new representation that would create a conflict of interest, unless representation is permitted under division (b)(1), not precluded by division (c) and the lawyer obtains informed consent, confirmed in writing, of each affected client under the conditions of division (b)(2). [derived from Model Rule Comment 3]

[5] If unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, create a conflict of interest during a representation, the lawyer must withdraw from representation unless continued representation is permissible under divisions (b)(1) and (c) and the lawyer obtains informed consent, confirmed in writing, of each affected client under the conditions of division (b)(2). See Rule 1.16. [analogous to a portion of Model Rule Comment 4]

[6] Just as conflicts can emerge in the course of a representation, the nature of a known conflict of interest can change in the course of a representation. For example, the proposed joint representation of a driver and her passenger to sue a person believed to have caused a traffic accident may initially present only material limitation conflict, as to which the proposed clients may give informed consent. However, if the lawyer's investigation suggests that the driver may be at fault, the interests of the driver and the passenger are then directly adverse, and the joint representation cannot be continued. A lawyer must be alert to the possibility that newly acquired information requires reevaluating of a conflict of interest, and taking different steps to resolve it. [derived from Model Rule Comment 5]

[7] When a lawyer withdraws from representation in order to avoid a conflict, the lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must also continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c). [analogous to a portion of Model Rule Comment 5]

[8] When a conflict arises from a lawyer's representation of more than one client, whether the lawyer must withdraw from representing all affected clients or may continue to represent one or more of them depends upon (a) whether the lawyer can both satisfy the duties owed to the former client and adequately represent the remaining client or clients, given the lawyer's duties to the former client (see Rule 1.9), and (b) whether any necessary client consent is obtained. [analogous to a portion of Model Rule Comment 4]

Identifying the Client

[9] In large part, principles of substantive law outside these rules determine whether a client-lawyer relationship exists or is continuing. See Scope [17]. These rules, including Rules 1.2, 1.8(f)(2), 1.13, and 6.5, must also be considered.

Identifying Conflicts of Interest: Directly Adverse Representation

[10] The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest. A directly adverse conflict can occur in a litigation or transactional setting. [derived from Model Rule Comment 6]

[11] *In litigation.* The representation of one client is directly adverse to another in litigation, when one of the lawyer's clients is asserting a claim against another client of the lawyer. A directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit. A lawyer may not

represent, in the same proceeding, clients who are directly adverse in that proceeding. See Rule 1.7(c)(2). Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. [derived from Model Rule Comment 6]

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

[13] *In transactional and counseling practice.* The representation of one client can be directly adverse to another in a transactional matter. For example, a buyer and a seller or a borrower and a lender are directly adverse with respect to the negotiation of the terms of the sale or loan. [*Stark County Bar Assn v. Ergazos* (1982), 2 Ohio St. 3d 59; *Columbus Bar v. Ewing* (1992), 63 Ohio St. 3d 377]. If a lawyer is asked to represent the seller of a business in negotiations with a buyer whom the lawyer represents in another, unrelated matter, the lawyer cannot undertake the new representation without the informed, written consent of each client. [analogous to Model Rule Comment 7]

Identifying Conflicts of Interest: Material Limitation Conflicts

[14] Even where clients are not directly adverse, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. The mere possibility of subsequent harm does not, itself, require disclosure and consent. The critical questions are: (a) whether a difference in interests between the client and lawyer or between two clients exists or is likely to arise; and (2) if it does, whether this difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of any affected client. [analogous to Model Rule Comment 8]

Lawyer's Responsibility to Current Clients-Same Matter

[15] *In litigation.* A "material limitation" conflict exists when a lawyer represents co-plaintiffs or co-defendants in litigation and there is a substantial discrepancy in the clients' testimony, incompatible positions in relation to another party, potential cross-claims, or substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for

conflict of interest in representing multiple defendants in a criminal matter is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. [analogous to Model Rule Comment 23]

[16] *In transactional practice.* In transactional and counseling practice, the potential also exists for material limitation conflicts in representing multiple clients in regard to one matter. Depending upon the circumstances, a material limitation conflict of interest may be present. Relevant factors in determining whether there is a material limitation conflict include the nature of the clients' respective interests in the matter, the relative duration and intimacy of the lawyer's relationship with each client involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to each client from the conflict. These factors and others will also be relevant to the lawyer's analysis of whether the lawyer can competently and diligently represent all clients in the matter, and whether the lawyer can make the disclosures to each client necessary to secure each client's informed consent. See Comments 24-30. [analogous to a portion of Model Rule Comment 26]

Lawyer's Responsibility to Current Client-Different Matters

[17] A material limitation conflict between the interests of current clients can sometimes arise when the lawyer represents each client in different matters. Simultaneous representation, in unrelated matters, of clients whose business or personal interests are only generally adverse, such as competing enterprises, does not present a material limitation conflict. Furthermore, a lawyer may ordinarily take inconsistent legal positions at different times on behalf of different clients. However, a material limitation conflict of interest exists, for example, if there is a significant risk that a lawyer's action on behalf of one client in one case will materially limit the lawyer's effectiveness in concurrently representing another client in a different case. For example, there is a material limitation conflict if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to seriously weaken the position taken on behalf of another client in another case. Factors relevant in determining whether there is a material limitation of which the clients must be advised and for which consent must be obtained include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. [derived from Model Rule Comments 6 and 24]

Lawyer's Responsibilities to Former Clients and Other Third Persons

[18] A lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other

persons, such as family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties. [Model Rule Comment 9]

[19] If a lawyer for a corporation or other organization serves as a member of its board of directors, the dual roles may present a "material limitation" conflict. For example, a lawyer's ability to assure the corporate client that its communications with counsel are privileged may be compromised if the lawyer is also a board member. Alternatively, in order to participate fully as a board member, a lawyer may have to decline to advise or represent the corporation in a matter. Before starting to serve as a director of an organization, a lawyer must take the steps specified in division (b), considering whether the lawyer can adequately represent the organization if the lawyer serves as a director and, if so, reviewing the implications of the dual role with the board and obtaining its consent. Even with consent to the lawyer's acceptance of a dual role, if there is a material risk in a given situation that the dual role will compromise the lawyer's independent judgment or ability to consider, recommend, or carry out an appropriate course of action, the lawyer should abstain from participating as a director or withdraw as the corporation's lawyer as to that matter. [analogous to Model Rule Comment 35]

Personal Interest Conflicts

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

[21] *Related lawyers.* When lawyers who are closely related by blood or marriage represent different clients in the same matter or in substantially related matters, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, *e.g.*, as parent, child, sibling, or spouse, ordinarily may not represent a client in a matter where the related lawyer represents another party, unless each client gives informed, written consent. The disqualification arising from a close family relationship is personal and ordinarily is not

imputed to members of firms with whom the lawyers are associated. See Rule 1.10. [Model Rule Comment 11]

[22] *Sexual relations with clients.* A lawyer is prohibited from engaging in sexual relationships with a current client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j). [Model Rule Comment 12]

Interest of Person Paying for a Lawyer's Service

[23] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f), and the special notice requirement for insured clients in Rule 1.8(f)(4). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of division (b) before accepting the representation. [analogous to Model Rule Comment 13]

Adequacy of Representation Burdened by a Conflict

[24] After a lawyer determines that accepting or continuing a representation entails a conflict of interest, the lawyer must assess whether the lawyer can provide competent and diligent representation to each affected client consistent with the lawyer's duties of loyalty and independent judgment. When the lawyer is representing more than one client, the question of adequacy of representation must be resolved as to each client. [derived from Model Rule Comment 15]

Special Considerations in Common Representation

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

whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties. [Model Rule Comment 29]

[26] Particularly important factors in determining the appropriateness of common representation are the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation does later occur between the clients, the privilege will not protect communications made on the subject of the joint representation, while it is in effect, and the clients should be so advised. [Model Rule Comment 30]

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

[28] Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation and confirmed in writing. See Rule 1.2(c). Subject to such limitations, each client in a common representation has the right to loyal and diligent representation and to the protection of Rule 1.9 concerning the obligations to a former client. Each client also has the right to discharge the lawyer as stated in 1.16. [analogous to Model Rule Comments 32 and 33]

Informed Consent

[29] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that a conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent).

The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the advantages and risks of the common representation, including possible effects on loyalty, confidentiality, and the attorney-client privilege. [Model Rule Comment 18]

[30] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. [analogous to Model Rule Comment 19]

Consent Confirmed in Writing

[31] Division (b)(2) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document signed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b) and (o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). Written confirmation of consent does not supplant the need, in most cases, for the lawyer to talk with the client: (a) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (b) to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of written consent. [Model Rule Comment 20]

Revoking Consent

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

Consent to Future Conflict

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

Prohibited Representations

[34] Often, clients may be asked to consent to representation notwithstanding a conflict. However, as indicated in divisions (c)(1) and (2) some conflicts cannot be waived as a matter of law, and the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. [analogous to Model Rule Comment 14]

[35] Before requesting a conflict waiver from one or more clients in regard to a matter, a lawyer must determine whether either division (c)(1) or (2) bars the representation, regardless of waiver.

[36] As provided by division (c)(1), certain conflicts cannot be waived as a matter of law. For example, the Supreme Court of Ohio has ruled that regardless of client consent, a lawyer may not represent both husband and wife in the preparation of a separation agreement. [*Columbus Bar Ass'n v. Grelle* (1968), 14 Ohio St.2d 208] Similarly, federal criminal statutes prohibit certain representations by a former government lawyer, despite the informed consent of the former client. [analogous to Model Rule Comment 16]

[37] Division (c)(2) bars representation, in the same proceeding, of clients who are directly adverse because of the institutional interest in vigorous development of each client's position. A lawyer may not represent both a claimant and the party against whom

the claim is asserted whether in proceedings before a tribunal or in negotiations or mediation of a claim pending before a tribunal. [derived from Model Rule Comment 17]

[38] Division (c)(2) does not address all nonconsentable conflicts. Some conflicts are nonconsentable because a lawyer cannot represent both clients competently, diligently, and loyally or both clients cannot give informed consent. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic, regardless of their consent. [derived from Model Rule Comment 28]

Ohio Code Comparison to Rule 1.7

Rule 1.7 replaces DR 5-101(A)(1) and 5-105(A), (B), and (C). Some of the Ethical Considerations in Canon 5 have direct parallels in the proposed comments to proposed Rule 1.7, although no effort has been made to conform the text of any comment to the analogous ethical consideration.

No change in the substance of the referenced Ohio rules on conflicts and conflict waivers is intended, except the requirement that conflict waivers be confirmed in writing. Specifically, the current "obviousness" test for the representation of multiple clients and the tests of Rule 1.7(b) and (c) are the same. In both instances, a lawyer must consider whether the lawyer can adequately represent all affected clients, whether there are countervailing public policy considerations against the representation, and whether the lawyer must obtain informed consent. Unlike current DR 5-101(A)(1), Rule 1.7 makes clear that this same analysis must be applied when a lawyer's personal interests create a conflict with a client's interests.

Client consent is not required for every conceivable or remote conflict, as stated in Comment [14]. On the other hand, practicing lawyers recognize many situations require the lawyer to evaluate the adequacy of representation and request client consent, not only those in which an adverse effect on the lawyer's judgment is patent or inevitable, as DR 5-105(B) can be interpreted to state. Rule 1.7 will more effectively guide lawyers in practice than DR 5-105(B) and anticipates that a lawyer will be subject to discipline for assuming or continuing a representation burdened by a conflict of interest only when a lawyer has failed to recognize a clear present or probable conflict and has not obtained informed consent, or where the conflict is not consentable. Nonconsentable conflicts include: (1) those where a lawyer could not possibly provide competent, diligent, and loyal representation to the affected clients; (2) those where a lawyer cannot, because of conflicting duties, fully inform one or more affected clients of the implications of representation burdened by a conflict; and (3) representations prohibited under Rule 1.7(c).

ABA Model Rules Comparison to Rule 1.7

Model Rule 1.7 is revised for clarity. Division (a) states the two broad circumstances in which a conflict of interest exists between the interests of two clients or the interest of a lawyer and a client. Division (b) prohibits a lawyer from accepting or continuing a representation that creates a conflict of interest unless certain conditions are satisfied. Division (c) defines certain conflicts of interest that are not waivable as a matter of public policy, even if clients consent. Lawyers are reminded that a conflict of interest may exist at the time that a representation begins or may arise later. The term "concurrent conflict," which was introduced in the most recent ABA revisions of Model Rule 1.7, is stricken as unnecessary. In division (a)(2), the Task Force has used phrases borrowed from Model Rule 1.7, Comment [8] and DR 5-101 to explain the nature of a "material limitation" conflict.

Rule 1.7 differs in substance from both the Model Rule and the Ohio Code in its requirement that a client's consent to a conflict be confirmed in writing. Although the rule requires only the client's consent, and not the lawyer's disclosure to be confirmed in writing, the writing requirement will remind the lawyer to communicate to the client the information necessary to make an informed decision about this material aspect of the representation.

Division (c) has no parallel in the Code or Ohio law, except to the extent that it would be "obvious," under DR 5-105(C), that a lawyer could not engage in a representation prohibited by law or represent two parties in the same proceeding whose interests are directly adverse. The principles of division (c), which are drawn from Model Rule 1.7(a)(3), are unexceptional, and their inclusion in the rule is appropriate. Note, however, that unlike Rule 1.7(c)(2), Model Rule 1.7(a)(3) was drafted to permit a lawyer to represent two parties with directly opposing interests in a mediation, although simultaneous representation of such parties in a related proceeding is prohibited. (See Model Rule 1.7, Comment [17]). Such a distinction is unacceptable.

The comments to Model Rule 1.7 are rewritten for clarity and conciseness and are reordered to help practitioners find relevant comments. Portions of Comments [28] and [34] have been deleted because they appear to state conclusions of law for which we have found no precedent in Ohio law or advisory opinions of the Board of Commissioners on Grievances and Discipline.

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

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

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

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

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

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives *informed consent*, except as permitted or required by these rules.

(c) A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule:

(1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

(2) "gift" includes a testamentary gift.

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

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

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

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

(f) A lawyer shall not accept compensation for representing a client from someone other than the client unless all of the following apply:

(1) the client gives *informed consent*;

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

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

(4) if the lawyer is selected and paid by an insurer to represent an insured, the lawyer delivers a copy of the following Statement of Insured Client's

Rights to the client in person at the first meeting or by mail within ten days after the lawyer receives notice of retention by the insurer:

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation.

1. Your Lawyer: Your lawyer has been selected by the insurance company under the terms of your policy. If you have questions about the selection of the lawyer, you should discuss the matter with the insurance company or the lawyer.

2. Directing the Lawyer: Your policy may provide that the insurance company can reasonably control the defense of the lawsuit. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest, because you are the lawyer's client.

3. Litigation Guidelines: Insurance companies establish guidelines governing how lawyers are to proceed in defending you. You are entitled to know what those guidelines are. If the insurance company denies the lawyer authorization to provide a service or undertake an action that the lawyer believes necessary to your defense, your lawyer must tell you.

4. Communications: Your lawyer should keep you informed about your case and respond to your reasonable requests for information.

5. Confidentiality: Although a lawyer has a duty of confidentiality to a client, your lawyer will have to disclose information to the claimant in the course of defending you and your lawyer will be making regular reports about the case to the insurance company. Your lawyer may not disclose to the insurance company information that the lawyer has learned from you that is prejudicial to your case or policy coverage unless you give your consent or the information has been disclosed in a deposition or in response to written discovery requests.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer cannot fairly represent you because of a conflict of interest (for example, because the insurance company has raised a question of whether there is insurance coverage for the claim against you) you should discuss your concern with the lawyer. If a conflict of interests exists that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. Settlement: Many insurance policies state that the insurance company alone may make a decision regarding settlement of a claim. Some policies, however, require your consent. You should discuss with your lawyer your rights under the policy regarding settlement. No settlement requiring you to pay money in excess of your policy limits can be reached without your agreement.

8. Fees and Costs: As provided in your insurance policy, the insurance company usually pays all of the fees and costs of defending the claim. If you are responsible for paying the lawyer any fees and costs, your lawyer must promptly inform you of that.

9. Reporting Violations: If at any time, you believe your lawyer has acted in violation of your rights, your have the right to report the matter to the Office of Ohio Disciplinary Counsel, or a Certified Grievance Committee of your local Bar Association.

10. Hiring your own Lawyer: The lawyer hired by the insurance company is only representing you in defending the claim brought against you. If you desire to pursue a claim against someone, you will need to hire your own lawyer. You may also wish to hire your own lawyer if there is a risk that there might be a judgment entered against you for more than the amount of your insurance. Your lawyer has a duty to inform you of this risk and other reasonably foreseeable adverse results.

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

(h) A lawyer shall not do either of the following:

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

(2) settle a claim or potential claim for such liability unless all of the following apply:

(i) the settlement is not unconscionable, inequitable, or unfair;

(ii) the client or former client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel in connection therewith;

(iii) the client or former client gives *informed consent* after full disclosure.

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

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

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

(j) A lawyer shall not solicit or engage in sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a *firm*, a prohibition in divisions (a) to (i) of this rule that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of division (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in division (a) are unnecessary and impracticable.

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

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of division (a), but also with the requirements of Rule 1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the

transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

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

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Division (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Division (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3.

Gifts to Lawyers

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

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

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

Literary Rights

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

Financial Assistance

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

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including

interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

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

[12A] With limited exceptions, divisions (f)(1) to (f)(3) apply to insurance defense counsel appointed and paid by an insurer to defend an insured. Insurance defense counsel owes the insured the same duties to avoid conflicts, keep confidences, exercise independent judgment and communicate as a lawyer owes any other client. These duties are subject only to the rights of the insurer, if any, pursuant to the policy contract with its insured, to control the defense, receive information relating to the defense or settlement of the claim, and settle the case. Insurance defense counsel may not permit an insurer's right to control the defense to compromise the lawyer's independent judgment, for example, regarding the legal research or factual investigation necessary to support the defense. The lawyer may not permit an insurer's right to receive information to result in the disclosure to the insurer, or its agent, of confidences of the insured. Although the insured's consent to the insurer's payment of defense counsel can be inferred from the policy contract, an insured may not understand how defense counsel's relationship with and duties to the insurer will affect the representation. Therefore, a lawyer who undertakes defense of an insured at the request and expense of an insurer should clarify to the insured the parameters of the lawyer's relationship with the insured and the insurer at the beginning of the engagement by providing to the client insured, at the commencement of representation, the "Statement of Insured Client's Rights."

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(f) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

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

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this rule. However, the settlement may not be unconscionable, inequitable, or unfair, and, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a

settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Division (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like division (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The rule is subject to specific exceptions developed in decisional law and continued in these rules. The exception for certain advances of the costs of litigation is set forth in division (e). In addition, division (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of division (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

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

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

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

Imputation of Prohibitions

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

Ohio Code Comparison to Rule 1.8

With the exception of division (f)(4), each part of Rule 1.8 corresponds to an Ohio disciplinary rule or decided case, as stated below.

Rule 1.8(a) corresponds, in substance, to DR 5-104(A) and the ruling in *Cincinnati Bar Assn v. Hartke* (1993), 67 Ohio St.3d 65, except for the addition of a requirement that the client's consent be in writing. This writing requirement is consistent with the requirement for confirmation of conflict waivers in Rule 1.7.

Rule 1.8(b) is identical to DR 4-101(B)(2).

Rule 1.8(c) has been revised principally to conform it to the absolute ban, now stated in DR 5-101(A)(2), upon a lawyer's preparing an instrument for a client by which a gift would be made to the lawyer, or a relative or colleague of the lawyer. DR 5-101(A)(2) does not prohibit a lawyer from soliciting a gift.

Rule 1.8(d) is similar to DR 5-104(B), but creates greater latitude for a lawyer to enter a contract for publication or media rights with a client because Rule 1.8(d) prohibits making such an arrangement only during the representation, and only if the

portrayal or account would be based, in substantial part, on information relating to the representation. In contrast, DR 5-104(B) forbids a lawyer to make any such arrangement during the pendency of the matter, even if the representation has ended.

Rule 1.8(e) is similar to DR 5-103(B). Unlike DR 5-103(B), Rule 1.8(e) expressly permits a lawyer to pay court costs and expenses on behalf of an indigent client.

Rule 1.8(f)(1), (2), and (3) use different terms, but are virtually identical to DR 5-107(A) and (B). Rule 1.8(f)(4) and the "Statement of Insured Client's Rights" is new and is based on the reports of the Ohio State Bar Association's House Counsel Task Force and the Insurance and Audit Practices and Controls committee. Both reports were accepted by the House of Delegates of the Ohio State Bar Associations.

Rule 1.8(g) is identical DR 5-106.

Rule 1.8(h) corresponds to DR 6-102, as interpreted by the Supreme Court in *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431.

Rule 1.8(i) corresponds to DR 5-103(A).

Rule 1.8(j) has no analogue in the Disciplinary Rules, but is consistent with the Supreme Court's rulings in *Cleveland Bar Assn v. Feneli* (1999), 86 Ohio St.3d 102 and *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261.

ABA Model Rules Comparison to Rule 1.8

Rule 1.8 contains three changes from the Model Rule. Rule 1.8(c) is revised to conform to DR 5-101(A)(2). Rule 1.8(f)(4) references specific obligations of insurance defense counsel. Rule 1.8(h) conforms the rule—on the circumstances in which a lawyer may enter into an agreement with a client settling a claim against the lawyer—with Ohio law as stated in *Clavner*. The first portion of Rule 1.8(c) addresses a matter not specifically addressed in the Ohio Code in that Rule 1.8(c) would permit a lawyer to solicit an insubstantial gift from a client. This rule would permit, for example, a lawyer to request that a client make a small gift to a charity on whose board the lawyer serves, but not to abuse the attorney-client relationship by requesting a substantial gift.

Division (f)(4) and a "Statement of Insured Client's Rights" is added based on a recommendation from the Ohio State Bar Association's House Counsel Task Force. Comment [12A] also is added to correspond to speak directly to the insurance defense lawyer's ethical duties. The defense provided to an insured by a lawyer retained by an insurer is the most frequent situation in which a lawyer is paid by someone other than the lawyer's client. The comment is based on Advisory Opinions 2000-2 and 2000-3 of the Board of Commissioners on Grievances and Discipline, as well as the Report of the House

Counsel Task Force of the Ohio State Bar Association, as adopted by the OSBA House of Delegates at its November 2002 meeting, which the Supreme Court charged the Task Force to review, and the Report of the OSBA's Insurance and Audit Practices and Controls Committee, as adopted by the OSBA House of Delegates in May 2004.

RULE 1.9: DUTIES TO FORMER CLIENTS

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

(b) Unless the former client gives *informed consent, confirmed in writing*, a lawyer shall not *knowingly* represent a person in the same or a *substantially* related matter in which a *firm* with which the lawyer formerly was associated had previously represented a client where both of the following apply:

(1) the interests of the client are materially adverse to that person;

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

(c) A lawyer who has formerly represented a client in a matter or whose present or former *firm* has formerly represented a client in a matter shall not thereafter do either of the following:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally *known*;

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this rule. Under this rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent, confirmed in writing. See Comment [9]. Current and former government lawyers must comply with this rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question. For a former government lawyer, "matter" is defined in Rule 1.11(e).

[3] Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the

passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

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

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

[6] Application of division (b) depends on a situation's particular facts, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients

and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the lawyer whose disqualification is sought.

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

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

[9] The provisions of this rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under divisions (a) and (b). See Rule 1.0(f). With regard to the effectiveness of an advance waiver, see Comment [33] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Ohio Code Comparison to Rule 1.9

Rule 1.9 addresses the lawyer's continuing duty of client confidentiality when the lawyer-client relationship ends. The rule articulates the substantial relationship test adopted by the Supreme Court in *Kala v. Aluminum Smelting & Refining Co. Inc.* (1998), 81 Ohio St. 3d 1, citing with approval Advisory Opinion 89-013 of the Board of Commissioners on Grievances and Discipline, which also relied on the substantial relationship test to judge former client conflicts.

In *Kala,* the Court extended the confidentiality protection of DR 4-101 to former clients by creating a presumption of shared confidences between the former client and lawyer [Rule 1.9(a)]. It further held that this presumption could be rebutted by evidence that the lawyer had no personal contact with or knowledge of the former client matter [Rule 1.9(b)]. In doing so it clarified that the DR 4-101(B) prohibition against using or revealing client confidences or secrets without consent applied to former clients [Rule 1.9(c)].

Kala did not address the issue of what constitutes a substantial relationship, because the lawyer in question switched sides in the same case. The comments are consistent with appellate decisions, as well as with the Restatement (Third) of the Law Governing Lawyers §132 (2000). The only change from current Ohio law is the

requirement that conflict waivers be "confirmed in writing," consistent with other conflict provisions such as Rules 1.7 and 1.8.

Division (a) restates the substantial relationship test, which extends confidentiality protection to clients the lawyer has formerly represented. This test presumes that the lawyer obtained but cannot use information relating to the representation of the former client in the same or substantially related matters, the first prong of the *Kala* test.

Division (b) applies where the lawyer's firm (but not the lawyer personally) represented a client, and requires that the former client show that the lawyer in question actually acquired confidential information, the second prong of the *Kala* test.

Division (c) provides that in either actual or law firm prior representation, the prohibitions against use [Model Rule 1.8(b)] and disclosure (Model Rule 1.6) that protect current clients also extend to former clients. This is the foundation of the *Kala* opinion, which extended the prohibitions against use or disclosure of client confidences or secrets in DR 4-101(B) to former clients.

ABA Model Rules Comparison to Rule 1.9

Rule 1.9 is substantively identical to Model Rule 1.9.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a *firm*, none of them shall *knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

(b) When a lawyer is no longer associated with a *firm*, the *firm* is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the *firm*, unless both of the following apply:

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

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

(c) When a lawyer who has had a *substantial* role in a matter becomes associated with a *firm*, no lawyer in the *firm* shall *knowingly* represent another person in the same matter in which that person's interests are materially adverse to the interests of the former client.

(d) When a lawyer becomes associated with a *firm*, no lawyer in the *firm* shall *knowingly* represent a person in a matter *substantially* related to a matter from which the newly associated lawyer is disqualified under Rule 1.9 unless both of the following apply:

(1) the *firm* timely *screens* the personally disqualified lawyer from any participation in the *substantially* related matter, and the personally disqualified lawyer is apportioned no part of the fee from that matter;

(2) the *firm* provides *written* notice as soon as practicable to any affected former client or, if represented, to the former client's counsel, to enable the former client to ascertain compliance with the provisions of this rule.

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

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

Comment

Definition of "Firm"

[1] For purposes of the Ohio Rules of Professional Conduct, the term "firm" denotes lawyers associated, including of counsel, in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in division (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Division (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in division (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where the usual concerns justifying imputation are not present, the rule eliminates imputation in the case of conflicts between the interests of a client and a lawyer's own personal interest. Note that the specific personal conflicts governed by Rule 1.8 are imputed to the firm by Rule 1.8(k). Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in division (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does division (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(l) and 5.3.

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

Removing Imputation

[5A] Divisions (c) and (d) address imputation when a personally disqualified lawyer moves from one law firm to another. Division (c) imputes the conflict of a personally disqualified lawyer under division (a) to a new law firm and prohibits the new law firm from assuming or continuing the representation of a client in the same matter in which the personally disqualified lawyer had a substantial role. Division (d) provides for removal of imputation where the personally disqualified lawyer is properly screened from participation in any substantially related matter.

[5B] Where the conditions of division (d) are met, imputation is removed, and consent to the new representation is not required. Screening is not effective to avoid imputed disqualification of other lawyers in the firm if the personally disqualified lawyer participated substantially in representing the former client in the same matter in which the lawyer's new firm represents an adversary of the former client. Determining whether a lawyer's role in representing the former client was substantial involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the matter.

[5C] Requirements for screening procedures are stated in Rule 1.0(l). Division (d) does not prohibit the screened lawyer from receiving compensation established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5D] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

[6] Rule 1.10(e) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the lawyer can represent all affected clients competently, diligently, and loyally, that the representation is not prohibited by Rule 1.7(c), and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [33]. For a definition of informed consent, see Rule 1.0(f).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

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

Ohio Code Comparison to Rule 1.10

Rule 1.10 governs imputed conflicts of interest and replaces Ohio DR 5-105(D), which imputes the conflict of any lawyer in the firm to all others in the firm. Rule 1.10(a) embodies this rule. The text of DR 5-105(D) lacks clarity about whether its provisions extended to all conflicts. Rule 1.10(b) clarifies that imputation ends when the personally disqualified lawyer leaves the firm, so long as no other lawyer in the firm has confidential information about the former client.

Divisions (c) and (d) are added to codify the rule in *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, where the Supreme Court allowed law firm screens in some cases when personally disqualified lawyers change law firms. Rule 1.10(c) is consistent with the general rule of *Kala* that the lawyer with a substantial role in a matter remains personally disqualified, and imputes that disqualification to a new law firm. Rule 1.10(d) embodies the *Kala* exception, which allows for the presumption of shared confidences with the new firm to rebutted in substantially related matters when the personally disqualified lawyer is properly screened.

ABA Model Rules Comparison to Rule 1.10

Rule 1.10 is identical to the Model Rule, with the addition of divisions (c) and (d), which separately address the issue of removing imputation when lawyers change law firms and no longer represent former clients. The rule requires the use of law firm screens in substantially related cases to remove imputation, consistent with *Kala*. Comments [5A] to [5D] explain these provisions, including a cross-reference to Rule 1.0(l), which defines the requirements for proper screening procedures. Comments [5A] and [5B] are added to explain the *Kala* rule. Comments [5C] and [5D] were part of the original ABA Ethics 2000 proposal. Comment [6] is revised to reflect the Task Force's revisions to Rule 1.7.

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) A lawyer who has formerly served as a public officer or employee of the government shall comply with both of the following:

(1) all applicable laws and these rules regarding conflicts of interest;

(2) not otherwise represent a client in connection with a matter in which the lawyer participated personally and *substantially* as a public officer or employee, unless the appropriate government agency gives its *informed consent, confirmed in writing*, to the representation.

(b) When a lawyer is disqualified from representation under division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in such a matter unless both of the following apply:

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

(2) *written* notice is given as soon as practicable to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer *knows* is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential

government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public. A *firm* with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely *screened* from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee shall comply with both of the following:

(1) Rules 1.7 and 1.9;

(2) shall not do either of the following:

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

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

(e) As used in this rule, the term "matter" includes both of the following:

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

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

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Ohio Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 and provisions regarding former client conflicts contained in Rule 1.9. For purposes of Rule 1.9, which applies to former government lawyers, the definition of "matter" in division (e) applies. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See R.C. 102.03 and 2921.42. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See Rule 1.0(e) for the definition of informed consent.

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

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

[4] This rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in division (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

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

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

[7] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

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

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

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

Ohio Code Comparison to Rule 1.11

Rule 1.11 spells out special conflict of interest rules for lawyers who are current or former government employees. The movement of lawyers from public service and practice to private practice and involvement in the same or similar issues and controversies requires rules that expressly spell out when a conflict exists that prevents representation or permits such representation if certain conditions are met, including screening where appropriate. The rule likewise governs the conduct of lawyers moving from private practice into the public sector. DR 9-101(B) includes only a broad prohibition forbidding a lawyer from accepting private employment in a matter in which he or she had substantial responsibility while a public employee. This prohibition is based on avoiding the appearance of impropriety and gives no specific guidance to former government lawyers.

ABA Model Rules Comparison to Rule 1.11

Rule 1.11 reflects the Model Rule except for minor changes. The rule makes clear that a lawyer subject to these special rules on conflicts shall comply with all the conditions set forth in Rule 1.11(a), (b), and (d). Also division (a)(1) requires compliance with all applicable laws and the Ohio Rules of Professional Conduct regarding conflicts of interest. This includes provisions of the Ohio Ethics Law contained in R.C. 102.03 and 2921.42 as well as the regulations of the Ohio Ethics Commission. These statutes and regulations include specific definitions of a prohibited conflict of interest and language forbidding the same for present and former government employees.

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

(a) Except as stated in division (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and *substantially* as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator, or other third-party neutral, unless all parties to the proceeding give *informed consent, confirmed in writing*.

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

(c) If a lawyer is disqualified by division (a), no lawyer in a *firm* with which that lawyer is associated may *knowingly* undertake or continue representation in the matter unless both of the following apply:

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

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

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

Comment

[1] This rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, magistrates, special masters, hearing officers, and other parajudicial officers, and also lawyers who serve as part-time judges. Divisions (B) and (C) of the Compliance provisions of the Ohio Code of Judicial Conduct provide that a part-time judge or judge pro tempore shall not "act as a lawyer in any proceeding in which he or she has served as a judge or in any other related proceeding." Although phrased differently from this rule, those rules correspond in meaning.

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

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

[4] Requirements for screening procedures are stated in Rule 1.0(l). Division (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice of the screened lawyer's prior representation and that screening procedures have been employed, generally should be given as soon as practicable after

the need for screening becomes apparent. When disclosure is likely to significantly injure the current client, a reasonable delay may be justified.

Ohio Code Comparison to Rule 1.12

Rule 1.12 addresses the duty of arbitrators, mediators, other third-party neutrals, and former judges to promote public confidence in our legal system and in the legal profession. DR 9-101(A) and (B) prohibit a lawyer from accepting private employment in a matter upon the merits of which the lawyer acted in a judicial capacity or the lawyer had substantial responsibility while the lawyer was a public employee. Because the same potential for misunderstanding exists with respect to lawyers acting as arbitrators or mediators, EC 5-21 recommends that lawyers be prohibited from thereafter representing in the dispute any of the parties involved in the mediation or arbitration. R.C. 2317.02(H) prohibits a mediator from disclosing communications made during the mediation. Rule 1.12 codifies the aspirational goal of EC 5-21, creates a standard for disqualification of a lawyer who "personally and substantially" participated in the "same" matter while serving as a judge/mediator/arbitrator/third party neutral, and establishes a process by which the lawyer may avoid personal disqualification and imputed disqualification to the disqualified lawyer's entire firm.

ABA Model Rules Comparison to Rule 1.12

Rule 1.12 is substantively identical to Model Rule 1.12.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows* or *reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that *reasonably* might be imputed to the organization and that is likely to result in *substantial* injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).

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

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

Comment

The Entity as the Client

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

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

[3] Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Division (b) makes clear, however, that when the lawyer knows or reasonably should know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of law that might be

imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining whether "up-the-ladder" reporting is required under division (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

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

Relation to Other Rules

[6] Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6 (b) and (c) (which incorporates Rules 3.3 and 4.1 by reference). There is no requirement that the lawyer report "up-the-ladder" within the organization before revealing information as permitted by Rule 1.6(b) or required by Rule 1.6(c). As stated in Comment [13] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(c) would advance or interfere with the purpose of the disclosure.

[7] [RESERVED]

[8] [RESERVED]

Government Agency

[9] The duty to "report up the ladder" defined in this rule also applies to lawyers for governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. See Scope.

Clarifying the Lawyer's Role

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

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

Dual Representation

[12] Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have

essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

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

Ohio Code Comparison to Rule 1.13

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

ABA Model Rules Comparison to Rule 1.13

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2002. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects:

- Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.

- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. The Task Force instead proposes that a lawyer for an organization have the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). The Task Force concluded that Model Rule 1.13(d) and Comments [6] and [7] were unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

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

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

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

Comment

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

advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

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

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

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

Taking Protective Action

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

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

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

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

Disclosure of the Client's Condition

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

Emergency Legal Assistance

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

and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

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

Ohio Code Comparison to Rule 1.14

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provision is EC 7-12, which discusses the representation of a client with a mental or physical disability that renders the client incapable of making independent decisions.

Rule 1.14 is both broader and narrower than EC 7-12. It is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, it explicitly permits the lawyer to take reasonably necessary protective action, and it explicitly permits the disclosure of confidential information to the extent necessary to protect the client's interest.

Rule 1.14 is narrower to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

ABA Model Rules Comparison to Rule 1.14

Rule 1.14 is identical to the ABA Model Rule.

RULE 1.15: SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest bearing account in a financial institution permitted under Ohio law and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a journal that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

(1) maintain a copy of the fee agreement with each client;

(2) maintain a ledger for each client on whose behalf funds are held that sets forth all of the following:

(i) the name of the client;

(ii) the date, amount, and source of all funds received on behalf of such client;

(iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;

(iv) the current balance for such client.

(3) maintain a journal for each bank account that sets forth all of the following:

(i) the name of such account;

(ii) the date, amount, and client affected by each credit and debit;

(iii) the balance in the account.

(4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;

(5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

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

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

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

(e) When in the course of representation a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.

(g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm* purchasing the law practice at the time client files are transferred.

(h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a business that provides a law-related service shall:

(1) maintain funds of clients or third-persons that cannot earn any net income for the clients or third persons in an interest bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

(2) notify the Ohio Legal Assistance Foundation, in a manner required by rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

(3) comply with the reporting requirement contained in Gov. Bar R. VI, Section 1(F).

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if moneys, in one or more trust accounts. A lawyer should maintain separate trust accounts when administering estate moneys. A lawyer must maintain the records listed in division (a)(1) to (5) of this rule to effectively safeguard client funds and fulfill the role of professional fiduciary.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, division (b) provides that it is permissible when necessary to pay or obtain a waiver of bank service charges on that account. The following charges or fees assessed by an IOLTA depository may be deducted from account proceeds: (1) bank transaction charges (*i.e.*, per check, per deposit charge); and (2) standard monthly maintenance charges. The following charges or fees assessed by a client trust account depository may not be deducted from account proceeds: (1) check printing charges; (2) not-sufficient-funds charges; (3) stop payment fees; (4) teller and ATM fees; (5) electronic fund transfer fees (i.e., wire transfer fees); (6) brokerage and credit card charges; and (7) other business-related expenses, which are not part of the two permissible types of fees. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3A] Client funds shall be deposited in a lawyer's or law firm's IOLTA account unless the funds can otherwise earn income for the client in excess of the costs incurred to secure such income (*i.e.*, net income). In determining whether a client's funds can earn income in excess of costs, the lawyer or law firm shall consider the following factors: (1) the amount of the funds to be deposited; (2) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; (3) the rates of interest or yield at the financial institutions where the funds are to be deposited; (4) the cost of establishing and administering non-IOLTA accounts for the client's benefit, including service charges, the costs of the lawyer's services, and the costs of preparing any

tax reports required for income accruing to the client's benefit; (5) the capability of financial institutions, lawyers or law firms to calculate and pay income to individual clients; (6) any other circumstances that affect the ability of the client's funds to earn a net return for the client. The lawyer or law firm should review its IOLTA account at reasonable intervals to determine whether changed circumstances require action with respect to the funds of any client.

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

[5] [RESERVED]

[6] [RESERVED]

[7] A lawyer's fiduciary duties are independent of the lawyer's employment at a particular firm or the rendering of legal services. Law firms frequently merge or dissolve. Division (f) provides that whenever a law firm dissolves, the former partners, managing partners, or supervisory lawyers must appropriately account for all client funds. This responsibility may be satisfied by an appropriate designee.

[8] All lawyers involved in the sale or purchase of a law practice as provided by Rule 1.17 should make reasonable efforts to safeguard and account for client property. Division (g) requires the lawyer, lawyer firm or estate of a deceased lawyer who sells a practice to account for and transfer all client property at the time the client files are transferred.

Ohio Code Comparison to Rule 1.15

Rule 1.15 replaces DR 9-102, which is silent on the handling of property belonging to third persons.

Rule 1.15(a) includes several provisions which are not explicitly provided for in DR 9-102. The rule requires that client and third-person funds are maintained:

1. In an insured, interest-bearing account;

2. In a financial institution permitted under Ohio law and in the state where the lawyer's office is situated; and

3. In an account designated as "client trust account," "IOLTA account," or with another identifiable fiduciary title.

To ensure the proper handling of funds, Rule 1.15 requires the lawyer to maintain the following financial records for a period of seven years:

1. All fee agreements.

2. A ledger for each client's funds that sets forth:

   a. the client's name,
   b. the date, amount, and source of the funds received,
   c. the date, amount, payee, and purpose of each disbursement,
   d. the current balance.

3. A journal of each bank account that sets forth:

   a. the name of the account,
   b. the date, amount, and client affected by each credit and debit,
   c. the balance in the account.

4. All bank statements, all deposit slips, and canceled checks, if provided by the bank, for each account.

5. A monthly reconciliation of the items listed in 2, 3, and 4 above.

Under DR 9-102 lawyers must keep financial records indefinitely.

Rule 1.15(b) is a restatement of DR 9-102(A)(1), which authorizes lawyers to deposit their own funds into the trust account for the sole purpose of paying or obtaining a waiver of bank service charges.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is preferable to DR 9-102(A), which precludes a lawyer from placing advances for expenses in the lawyer's trust account. The vast majority of jurisdictions consider advances for expenses to be client funds that must be deposited in the trust account.

There are no Disciplinary Rules comparable to Rules 1.15(d), (e), and (f).

Rule 1.15(g) provides for the handling of funds upon the sale of a practice pursuant to Rule 1.17.

Rule 1.15(h) requires lawyers to comply with R.C. 120.52, 3953.231, 4705.09, and 4705.10, all rules adopted by the Oho Legal Assistance Foundation, and Gov. Bar R. VI, (1)(F). This provision is the same as the requirements of DR 9-102(D) and (E).

ABA Model Rules Comparison to Rule 1.15

Rule 1.15 is altered from the ABA Model Rule to clarify the lawyer's fiduciary responsibility. The primary divergence from the Model Rule is the adoption of the specific recordkeeping requirements in Rule 1.15(a)(1) to (5). These provisions are based on analogous rules adopted in Arizona, California, Colorado, Connecticut, Florida, Hawaii, Indiana, New Jersey, New York, Massachusetts, Minnesota, Oregon, Rhode Island, South Carolina, Vermont, and Virginia, as well as the ABA Model Rule on Financial Recordkeeping. Each of these jurisdictions, as well as the ABA Model Rule, incorporates similar recordkeeping requirements. The rules help ensure that Ohio lawyers fulfill their fiduciary duties.

Model Rule 1.15(a) requires lawyers to identify and appropriately safeguard all property other than funds. Rule 1.15(a) requires the lawyer to maintain a journal that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

Rule 1.15(c) directs lawyers to place advances on expenses into the trust account. This is the same as the Model Rule.

Rule 1.15(f) designates persons responsible for distributing client funds and maintaining financial records upon the dissolution of a law firm. This provision is not in the Model Rule. The Task Force felt the frequency with which law firms are dissolved necessitated this requirement.

Rule 1.15(g), which also is not in the Model Rule, provides for the handling of funds upon the sale of a law practice. This provision is consistent with the careful attention to protecting client's interests during the sale of a law practice pursuant to Rule 1.17.

Rule 1.15(h) incorporates the requirements of DR 9-102(D) and (E).

RULE 1.16: TERMINATING REPRESENTATION

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

(b) Upon termination of representation, a lawyer shall take steps, to the extent *reasonably* practicable, to protect a client's interest. The steps include giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items *reasonably* necessary to the client's representation.

(c) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.

(d) Subject to the provisions of divisions (a) and (b) of this rule, a lawyer shall withdraw from the representation of a client if any of the following apply:

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

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

(3) the lawyer is discharged.

(e) Subject to divisions (a) and (b) of this rule, a lawyer may withdraw from the representation of a client if any of the following apply:

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

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

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

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

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

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

(7) the client gives *informed consent* to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

Comment

[1] Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[1A] A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of the client and the possibility of prejudice to the client as a result of the withdrawal. Even when the lawyer justifiably withdraws, a lawyer should protect the welfare of the client by giving due notice of the withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Clients receive no benefit from a lawyer keeping a copy of the file and therefore can not be charged for any copying costs. Further, the lawyer should refund to the client any compensation not earned during the employment.

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

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

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

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority

that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

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

Optional Withdrawal

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

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

Assisting the Client upon Withdrawal

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

Ohio Code Comparison to Rule 1.16

Rule 1.16 governs withdrawal from representation. The rule is based on the format of Disciplinary Rules cited below but contains many of the Model Rule provisions.

Rule 1.16(a) is identical to DR 2-110(A)(1).

Rule 1.16(b) corresponds to DR 2-110(A)(2) and also requires the withdrawing lawyer to promptly return client papers and property to the client. "Client papers and property" are defined as including correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

Rule 1.16(c) is identical to DR 2-110(A)(3) except that the reference to the sale of a law practice rule is appropriately designated as Rule 1.17.

Rule 1.16(d)(1) corresponds to DR 2-110(B)(1) and (2), Rule 1.16(d)(2) corresponds to DR 2-110(B)(3), and Rule 1.16(d)(3) corresponds to DR 2-110(B)(4).

Rule 1.16(e)(1) generally corresponds to DR 2-110(A)(2).

Rule 1.16(e)(2) corresponds to DR 2-110(C)(1)(b).

Rule 1.16(e)(3) corresponds to DR 2-110 (C)(1)(c).

Rule 1.16(e)(4) corresponds to DR 2-110(C)(1)(c) and (d).

Rule 1.16(e)(5) corresponds to DR 2-110(C)(1)(f).

Rule 1.16(e)(6) corresponds to DR 2-110(C)(1)(d).

Rule 1.16(e)(7) corresponds to DR 2-110(C)(5).

Rule 1.16(e)(8) corresponds to DR 2-110(C)(7).

Rule 1.16(e)(9) corresponds to DR 2-110(C)(6).

ABA Model Rules Comparison to Rule 1.16

As indicated, the format of Rule 1.16 follows the format of the Disciplinary Rules. Thus, while most of the Model Rule provisions are in Rule 1.16, they do not occur in the same sequence.

Rule 1.16(a) corresponds to Model Rule 1.16(c).

Rule 1.16(b) corresponds to Model Rule 1.16(d). The Task Force has inserted a list items typically included in "client papers and property."

Rule 1.16(c) corresponds to Model Rule 1.16(d).

Rule 1.16(d)(1) corresponds to Model Rule 1.16(a)(1).

Rule 1.16(d)(2) corresponds to Model Rule 1.16(a)(2).

Rule 1.16(d)(3) corresponds to Model Rule 1.16(a)(3).

Rule 1.16(e)(1) corresponds to Model Rule 1.16(b)(1).

Rule 1.16(e)(2) corresponds to Model Rule 1.16(b)(2). The Task Force has changed "criminal" to "illegal." This allows the lawyer to withdraw when the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal. This would include violations of environmental laws and other statutes for which there is a noncriminal penalty.

Rule 1.16(e)(3) corresponds to Model Rule 1.16(b)(3).

Rule 1.16(e)(4) corresponds to Model Rule 1.16(b)(4).

Rule 1.16(e)(5) corresponds to Model Rule 1.16(b)(5). This includes the lawyer's ability to withdraw for nonpayment of the fee.

Rule 1.16(e)(6) corresponds to Model Rule 1.16(b)(6).

Rule 1.16(e)(7) does not directly correspond to any provision in the Model Rules.

Rule 1.16(e)(8) does not directly correspond to any provision in the Model Rules.

Rule 1.16(e)(9) corresponds to Model Rule 1.16(b)(7).

RULE 1.17: SALE OF LAW PRACTICE

(a) Subject to the provisions of this rule, a lawyer or *law firm* may sell or purchase a law practice, including the good will of the practice. The law practice shall be sold in its entirety, except where a conflict of interest is present that prevents the transfer of representation of a client or class of clients. This rule shall not permit the sale or purchase of a law practice where the purchasing lawyer is buying the practice for the sole or primary purpose of reselling the practice to another lawyer or *law firm*.

(b) As used in this rule:

(1) "Purchasing lawyer" means either an individual lawyer or a *law firm*;

(2) "Selling lawyer" means an individual lawyer, a *law firm*, the estate of a deceased lawyer, or the representatives of a disabled or disappeared lawyer.

(c) The selling lawyer and the prospective purchasing lawyer may engage in general discussions regarding the possible sale of a law practice. Before the selling lawyer may provide the prospective purchasing lawyer with information relative to client representation or confidential material contained in client files, the selling lawyer shall require the prospective purchasing lawyer to execute a confidentiality agreement. The confidentiality agreement shall bind the prospective purchasing lawyer to preserve the confidences and secrets of the clients of the selling lawyer, consistent with Rule 1.6, as if those clients were clients of the prospective purchasing lawyer.

(d) The selling lawyer and the purchasing lawyer may negotiate the terms of the sale of a law practice, subject to all of the following:

(1) The sale agreement shall include a statement by selling lawyer and purchasing lawyer that the purchasing lawyer is purchasing the law practice in good faith and with the intention of delivering legal services to clients of the selling lawyer and others in need of legal services.

(2) The sale agreement shall provide that the purchasing lawyer will honor any fee agreements between the selling lawyer and the clients of the selling lawyer relative to legal representation that is ongoing at the time of the sale. The purchasing lawyer may negotiate fees with clients of the selling lawyer for legal representation that is commenced after the date of the sale.

(3) The sale agreement may include terms that *reasonably* limit the ability of the selling lawyer to reenter the practice of law, including, but not limited to, the ability of the selling lawyer to reenter the practice of law for a specific period of time or to practice in a specific geographic area. The sale agreement shall not include terms limiting the ability of the selling lawyer to practice law or reenter the practice of law if the selling lawyer is selling his or her law practice to enter academic, government, or public service or to serve as in-house counsel to a business.

(e) Prior to completing the sale, the selling lawyer and purchasing lawyer shall provide *written* notice of the sale to the clients of the selling lawyer. For purposes of this rule, clients of the selling lawyer include all current clients of the selling lawyer and any closed files that the selling lawyer and purchasing lawyer agree to make subject of the sale. The *written* notice shall include all of the following:

(1) The anticipated effective date of the proposed sale;

(2) A statement that the purchasing lawyer will honor all existing fee agreements for legal representation that is ongoing at the time of sale and that fees for legal representation commenced after the date of sale will be negotiated by the purchasing lawyer and client;

(3) The client's right to retain other counsel or take possession of case files;

(4) The fact that the client's consent to the sale will be presumed if the client does not take action or otherwise object within ninety days of the receipt of the notice;

(5) Biographical information relative to the professional qualifications of the purchasing lawyer, including but not limited to applicable information consistent with Rule 7.2, information regarding any disciplinary action taken against the purchasing lawyer, and information regarding the existence, nature, and status of any pending disciplinary complaint certified by a probable cause panel pursuant to Gov. Bar R. V, Section 6(D)(1).

(f) If the seller is the estate of a deceased lawyer or the representative of a disabled or disappeared lawyer, the purchasing lawyer shall provide the *written* notice required by division (e) of this rule, and the purchasing lawyer shall obtain *written* consent from each client to act on the client's behalf. The client's consent shall be presumed if no response is received from the client within ninety days of the date the notice was sent to

the client at the client's last *known* address as shown on the records of the seller or the client's rights would be prejudiced by a failure to act during the ninety day period.

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

(h) The *written* notice to clients required by division (e) and (f) of this rule shall be provided by certified mail, return receipt requested. In lieu of providing notice by certified mail, either the selling lawyer or purchasing lawyer, or both, may personally deliver the notice to a client. In the case of personal delivery, the lawyer providing the notice shall obtain *written* acknowledgement of the delivery from the client.

(i) Neither the selling lawyer nor the purchasing lawyer shall attempt to exonerate the lawyer or *law firm* from or limit liability to the former or prospective client for any malpractice or other professional negligence. The provisions of Rule 1.8(h) shall be incorporated in all agreements for the sale or purchase of a law practice. The selling lawyer or the purchasing lawyer, or both, may agree to provide for the indemnification or other contribution arising from any claim or action in malpractice or other professional negligence.

Comment

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

representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6. A sale of a law practice is prohibited where the purchasing lawyer does not intend to engage in the practice of law but is buying the practice for the purpose of reselling the practice to another lawyer or law firm.

[2] The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation.

[3] The purchasing and selling lawyer may agree to a reasonable limitation on the selling lawyer's ability to reenter the practice of law following consummation of the sale. These limitations may preclude the selling lawyer from engaging in the practice of law for a specific period of time or in a defined geographical area, or both. However, the sale agreement may not include such limitations if the selling lawyer is selling his practice to enter academic service, assume employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] [RESERVED]

[5] [RESERVED]

Sale of Entire Practice

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

Client Confidences, Consent, and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. However, providing the purchaser access to client-specific information relating to the representation and to the file requires the purchaser and seller to take steps to ensure confidentiality of client confidences and secrets. The rule

provides that before such information can be disclosed by the seller to the purchaser, the purchaser and seller must enter into a confidentiality agreement that binds the purchaser to preserve client confidences and secrets in a manner consistent with Rule 1.6. This agreement binds the purchaser as if the seller's clients were clients of the purchaser and regardless of whether the sale is eventually consummated by the parties.

[7A] Before a sale is completed, written notice of the proposed sale must be provided to the clients of the selling lawyer whose matters are included within the scope of the proposed sale. The notice must be provided jointly by the selling and purchasing lawyers, except where the seller is the estate or representative of a deceased, disabled, or disappeared lawyer, in which case the notice is provided by the purchaser. At a minimum, the notice must include information about the proposed sale and the purchasing lawyer that will allow each client to make an informed decision regarding consent to the sale. A client may elect to opt out of the sale and seek other representation. However, consent is presumed if the client does not object or take other action within ninety days of receiving the notice of the proposed sale.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

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

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing arrangements between the seller and the client as to fees and the scope of the work must be honored by the purchaser. However, the purchaser may negotiate new fee agreements with clients of the seller for representation that is undertaken after the sale is completed.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); the obligation to avoid agreements limiting a lawyer's liability to a client for malpractice (see Rule 1.8(h)); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

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

Applicability of the Rule

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

[14] Admission to or retirement from a law partnership or professional association, retirement plans, and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this rule.

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

[16] The purchaser can not continue to use the seller's name unless the seller is deceased, disabled, or retired pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

Ohio Code Comparison to Rule 1.17

Rule 1.17 restates the existing provisions of DR 2-111, with no modifications.

Although there is little textual similarity between Rule 1.17 and the ABA Model Rule, most of the substantive provisions of the Model Rule are incorporated into the proposed rule, with the major exception being that Rule 1.17 does not permit the sale of

only a portion of a law practice. The comments are modified to track the rule and Ohio law.

Comment [1] is modified to clearly indicate that the provisions of the rule are not intended to permit sale to a lawyer who will merely act as a "broker" and resell the practice.

Comment [2] deletes the reference to the sale of an "area of practice" and the language that discusses the unanticipated return to practice of the selling lawyer. The latter modification is deemed unnecessary due to the prohibition in division (d)(3) directing that the sale agreement may not restrict the ability of the selling lawyer to reenter the practice if the sale is the result of the lawyer selling the practice to "to enter academic, government, or public service or to serve as in-house counsel to a business" and the commentary contained in Comment [3].

Comments [4] and [5] are deleted to reflect the fact that Rule 1.17 does not permit the sale of a part of a lawyer's practice.

Similarly, Comments [6], [9], and [15] are modified to delete references to the sale of an area of practice.

Comments [7] and [7A] are modified to reflect the actual mechanisms contained in the proposed rule respecting the preservation of client confidences.

Comment [10] is clarified to indicate that new fee arrangements may be negotiated with clients after the sale of a law practice "for representation that is undertaken after the sale is completed."

Comment [11] is modified to specifically ensure that the parties to the sale of a law practice understand that the sale may not limit the liability of either the buyer or the seller for malpractice.

Comment [16] is added to give notice to prospective purchasers that it is improper to utilize the seller's name in the practice unless the seller is deceased, disabled, or retired pursuant to Gov. Bar R. VI.

ABA Model Rules Comparison to Rule 1.17

Rule 1.17 differs from Model Rule 1.17 as noted above.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

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

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

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

(d) When the lawyer has received disqualifying information as defined in division (c), representation is permissible if either of the following apply:

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

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

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

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

Comment

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

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

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

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

[5] [RESERVED]

[6] Under division (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially

related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under division (c), the prohibition in this rule is imputed to other lawyers as provided in Rule 1.10, but, under division (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of division (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(l) (requirements for screening procedures). Division (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

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

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

Ohio Code Comparison to Rule 1.18

Rule 1.18 addresses the lawyer's duty relating to the formation of the client-lawyer relationship. This duty implicates the lawyer's obligations addressed by Canon 4 (confidentiality) and Canon 6 (competence) of the Code of Professional Responsibility. The only mention of prospective clients in the Ohio Code occurs in EC 4-1, which states that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." To the extent the Code encourages seeking legal advice as soon as possible, it does not provide a clear statement as to when the lawyer-client relationship is established so as to determine when the lawyer's duty of confidentiality arises. However, Ohio case law indicates that the lawyer-client relationship may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation. See *e.g., Cuyahoga County Bar Association v. Hardiman* (2003), 100 Ohio St.3d 260. Therefore, Rule 1.18 does not materially change the current law of Ohio, but clarifies the directives set forth by the Supreme Court in *Hardiman*.

ABA Model Rules Comparison to Rule 1.18

Rule 1.18 attempts to address the realities of the practice of law. There are no substantive changes between Rule 1.18 and the Model Rule. Rule 1.18 defines a "prospective client." Rule 1.18(b) prohibits the lawyer from using or revealing information learned in the consultation when no professional relationship ensues. This prohibition applies regardless of whether the information learned in the consultation may be defined as a "confidence or secret." Rule 1.18(c) disqualifies the lawyer from representing a client in "the same or a substantially related matter" when that client's interests are "materially adverse to those of a prospective client" and the "information received" is harmful to the prospective client in the matter, and prohibits lawyers in the disqualifying lawyer's law firm from "knowingly undertaking or continuing representation in such a matter." Rule 1.18(d) negates the disqualification if appropriate "notice" is provided to the affected parties and "screening" established to eliminate the potential harm from the use of the information learned during the consultation.

Comment [5] of Model Rule 1.18 is stricken.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

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

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

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

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

Offering Advice

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

Ohio Code Comparison to Rule 2.1

There are no Disciplinary Rules comparable to Rule 2.1. However, EC 7-8 addresses the scope of the rule.

ABA Model Rules Comparison to Rule 2.1

Rule 2.1 is identical to Model Rule 2.1.

RULE 2.3: EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may agree to provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer *reasonably believes* that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

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

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

Comment

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is

retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] Because an evaluation for someone other than the client involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Even when making an evaluation is consistent with the lawyer's responsibilities to the client, the lawyer should advise the client of the implications of the evaluation, particularly the necessity to disclose information relating to the representation and the duties to the third person that these rules and the law imposed upon the lawyer with respect to the evaluation. The legal duties, if any, that the lawyer may have to the third person is beyond the scope of these rules.

Access to and Disclosure of Information

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

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must

first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(f).

Financial Auditors' Requests for Information

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

Ohio Code Comparison to Rule 2.3

There is no Disciplinary Rule comparable to Rule 2.3.

ABA Model Rules Comparison to Rule 2.3

Model Rule 2.3(a) and Comment [3] are revised to clarify the intent of the rule.

RULE 2.4: LAWYER SERVING AS ARBITRATOR, MEDIATOR, OR THIRD-PARTY NEUTRAL

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

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

Comment

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

[2] In the role of a third-party neutral, the lawyer may be subject to statutes, court rules, or other laws that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, including but not limited to the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution.

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

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

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

Ohio Code Comparison to Rule 2.4

There is no Disciplinary Rule comparable to Rule 2.4. EC 5-20, while not specifically addressing the exact same role of the lawyer, nonetheless, does embody some of the same responsibilities as contained in the rule.

ABA Model Rules Comparison to Rule 2.4

Comment [2] is modified to include "statutes" that may govern the third-party neutrals conduct. This is consistent with the Ohio situation in which mediators are governed by statutory requirements.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

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

Comment

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

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

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Ohio Code Comparison to Rule 3.1

DR 7-102(A)(2) and EC 7-25 currently address the scope of Rule 3.1.

ABA Model Rules Comparison to Rule 3.1

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.2: EXPEDITING LITIGATION

Reporter's Note

The Task Force does not recommend adoption of ABA Model Rule 3.2, the text of which is set forth below. The substance of Model Rule 3.2 is addressed by other provisions of the Ohio Rules of Professional Conduct, including Rules 1.3 [Diligence], 3.1 [Meritorious Claims and Contentions], and 4.4(a) [Respect for Rights of Third Persons].

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

~~Comment~~

~~[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.~~

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

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

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

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

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

(c) The duty stated in division (a)(2) of this rule continues to the conclusion of the proceeding. The duties stated in divisions (a)(1), (a)(3), and (b) of this rule continue after the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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

Comment

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

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

Representations by a Lawyer

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

Legal Argument

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

Offering Evidence

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

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [RESERVED]

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

[9] [RESERVED]

Remedial Measures

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

examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action including making such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

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

Preserving Integrity of Adjudicative Process

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

Duration of Obligation

[13] Disclosure of contrary legal authority in the controlling jurisdiction need only be made while the proceedings are ongoing. Because fraud on the tribunal is antithetical to the justice system, a lawyer is obligated to remedy such fraud whenever it is discovered.

***Ex Parte* Proceedings**

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

Withdrawal

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

Ohio Code Comparison to Rule 3.3

Rule 3.3(a)(1) is comparable to DR 7-102(A)(5), Rule 3.3(a)(2) is comparable to DR 7-106(B)(1), and Rule 3.3(a)(3) is comparable to DR 7-102(A)(1) and (4).

Rule 3.3(b) is comparable to DR 7-102(B)(1) and (2). There are two differences. First, Rule 3.3(b) does not necessarily require disclosure to the tribunal. Rather, the rule requires the lawyer to remedy the situation, including, if necessary, disclosure to the tribunal. Second, the rule does not adopt the DR 7-102(B)(1) requirement that the lawyer reveal the client's fraudulent act, during the course of the representation, upon any person. Requiring a lawyer to disclose any and all frauds a client commits during the course of the representation is unworkable. There is no Ohio precedent where a lawyer was disciplined for failing to disclose a client's fraud upon a third person. The rule requires the lawyer to remedy all frauds related to the proceeding.

Rule 3.3(c) indicates disclosure under division (a)(2) is required until the conclusion of the proceeding. DR 7-106(B)(1) does not have any comparable time

limitation. An attorney should not be subject to discipline for failing to reveal adverse controlling authority that is not discovered until after the proceeding has concluded.

Rule 3.3(d) has no analogous Disciplinary Rule.

ABA Model Rules Comparison to Rule 3.3

Model Rule 3.3(c) is modified to specify that the duty to disclose adverse controlling authority continues only through the conclusion of the proceeding, whereas the duties imposed by divisions (a)(1) and (3) and division (b) are unlimited in time. The duty to remedy or disclose false statements, false evidence, or criminal or fraudulent conduct are so integral to the integrity of proceedings that they should not expire at the conclusion of a proceeding.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence, unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

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

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless both of the following apply:

(1) the person is a relative or agent of a client;

(2) the lawyer *reasonably believes* that the person's interests will not be adversely affected by refraining from giving such information;

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Division (a) applies to evidentiary material generally, including computerized information. A lawyer is permitted to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the lawyer is required to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to division (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee for testifying and it is improper to pay an expert witness a contingent fee.

[4] Division (e) does not prohibit a lawyer from arguing, based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced in that division.

[5] Division (f) permits a lawyer to request an employee of an organizational client to refrain from giving information to another party if: (a) the employee supervises, directs, or regularly consults with the organization's lawyer concerning the matter; (b) the employee has authority to obligate the organization with respect to the matter; or (c) the

employee's act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. See also Rule 4.2, Comment [7].

Ohio Code Comparison to Rule 3.4

DR 7-102, DR 7-106(B) and (C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

ABA Model Rule Comparison to Rule 3.4

Rule 3.4 adds division (g) to incorporate Ohio DR 7-109(B).

RULE 3.5: IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than *de minimis* value to a judicial officer, official, or employee of a *tribunal*;

(3) communicate *ex parte* with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

(4) communicate with a juror or prospective juror after discharge of the jury if any of the following apply:

(i) the communication is prohibited by law or court order;

(ii) the juror has made *known* to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

(5) engage in conduct intended to disrupt a *tribunal*.

(b) A lawyer shall reveal promptly to the *tribunal* improper conduct by a juror or prospective juror, or by another toward a juror, prospective juror, or family member of a juror or prospective juror, of which the lawyer has *knowledge*.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Ohio Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions. As used in division (a)(2), "*de minimis*" is defined in the Terminology section of the Ohio Code of Judicial Conduct.

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

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review, and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

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

Ohio Code Comparison to Rule 3.5

Rule 3.5 corresponds to DR 7-108 (communication with or investigation of jurors) and DR 7-110 (contact with officials).

Rule 3.5(a)(1) prohibits an attorney from seeking to "influence a judicial officer, juror, prospective juror, or other official." This provision generally corresponds to DR 7-108(A) and (B) and DR 7-110, which contain express prohibitions against improper conduct toward court officials and jurors, both seated and prospective.

Rule 3.5(a)(2) restates the prohibition contained in DR 7-110(A), and Rule 3.5(a)(3) incorporates the prohibitions on improper *ex parte* communications contained

in DR 7-108(A) and 7-110(B). Rule 3.5(a)(4) corresponds to DR 7-108(D) and prohibits certain communications with a juror or prospective juror following the juror's discharge from a case. Rule 3.5(a)(5) has no analogue in the Code of Professional Responsibility.

Rule 3.5(b) is revised to add the provisions of DR 7-108(G).

ABA Model Rule Comparison to Rule 3.5

Rule 3.5 differs from the Model Rule in three respects. First, a new division (a)(2) is added that incorporates the language of DR 7-110(A). The change makes clear the Ohio rule that a lawyer can never give or loan anything of more than *de minimis* value to a judicial officer, juror, prospective juror, or other official.

The second revision is to division (a)(3), which has been divided into two parts to treat separately communications with judicial officers and jurors. Division (a)(3)(i) follows DR 7-110(B) by prohibiting *ex parte* communications with judicial officers only with regard to the merits of the case. This language states that *ex parte* communications with judicial officers concerning matters not involving the merits of the case are excluded from the rule. In contrast, division (a)(3)(ii) prohibits any communication with a juror or prospective juror, except as permitted by law or court order.

The third change in the rule is a new division (b) that incorporates current DR 7-108(G). The rule mandates that a lawyer must reveal promptly to a court improper conduct by a juror or prospective juror or the conduct of another toward a juror, prospective juror, or member of the family of a juror or prospective juror.

Comment [1] is revised to explain that, with regard to Rule 3.5(a)(2), the impartiality of a public servant may be impaired by the receipt of gifts or loans and, therefore, it is never justified for a lawyer to make a gift or loan to a judge, hearing officer, magistrate, official, or employee of a tribunal.

RULE 3.6: TRIAL PUBLICITY

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

(b) Notwithstanding division (a) of this rule and if permitted by Rule 1.6, a lawyer may state any of the following:

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

(2) information contained in a public record;

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

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

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

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

(7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following:

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

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

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

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

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

(d) No lawyer associated in a *firm* or government agency with a lawyer subject to division (a) of this rule shall make a statement prohibited by division (a) of this rule.

Comment

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

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations, disciplinary, and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules. The provisions of this rule do not supersede the confidentiality provisions of Rule 1.6.

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

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

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

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

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

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

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

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

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

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

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

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

Ohio Code Comparison to Rule 3.6

Rule 3.6 reflects DR 7-107 in the Model Rule format. Ohio adopted Model Rule 3.6 in 1996.

ABA Model Rule Comparison to Rule 3.6

Rule 3.6 is identical to Model Rule 3.6 in format and substance, except for the addition to division (b) that makes clear that a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6.

RULE 3.7: LAWYER AS WITNESS

(a) Except as permitted by division (c) of this rule, a lawyer shall not accept employment in contemplated or pending litigation if the lawyer *knows* or it is obvious that the lawyer or a lawyer in the *firm* ought to be called as a witness.

Except as permitted by division (c) of this rule, if, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the *firm* ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and his or her *firm*, if any, shall not continue representation in the trial.

(c) A lawyer may undertake or continue employment in contemplated or pending litigation under the circumstances described in division (a) or (b) of this rule if one or more of the following applies:

(1) the testimony of the lawyer or a lawyer in the *firm* will relate solely to an uncontested issue;

(2) the testimony will relate solely to the nature and value of legal services rendered in the case to the client by the lawyer or the *firm*;

(3) the testimony will relate solely to a matter of formality and there is no reason to *believe* that *substantial* evidence will be offered in opposition to the testimony;

(4) the lawyer's declining representation or withdrawal from the case, as otherwise required by this rule, would work *substantial* hardship on the client

because of the distinctive value of the lawyer or the *firm* as counsel in the particular case.

(d) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the *firm* may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

Comment

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

Advocate-Witness Rule

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

[3] To protect the tribunal, division (a) prohibits a lawyer from simultaneously serving as counsel and necessary witness except in those circumstances specified in divisions (c)(1) to (4). Division (c)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Division (c)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these exceptions, division (c)(4) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of

other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

[5] [RESERVED]

[6] [RESERVED]

[7] [RESERVED]

Ohio Code Comparison to Rule 3.7

Rule 3.7 replaces DR 5-101(B) and 5-102. The substance of the Disciplinary Rules has primarily been maintained, although several stylistic changes were made.

ABA Model Rules Comparison to Rule 3.7

ABA Model Rule 3.7 fails to account for several circumstances that could arise when a lawyer is called to testify in a trial setting. Rule 3.7 addresses these circumstances.

Model Rule 3.7 applies the same standard regardless of which party requires a lawyer's testimony. Under Rule 3.7, a lawyer's obligation when the lawyer's testimony may be required depends upon who is requesting the lawyer's testimony. If a lawyer knows he or she ought to be called as a witness on behalf of his or her client, then the lawyer must decline or withdraw from representation. However, if opposing counsel calls the attorney to testify on behalf of his or her client, the attorney will be permitted to "continue representation until it is apparent that the testimony is or may be prejudicial to the client." By failing to distinguish between situations in which the lawyer or the opposing counsel seeks the lawyer's testimony, Model Rule 3.7 provides the opportunity for bad-faith trial tactics to deprive a client of chosen counsel.

Additionally, Model Rule 3.7 does not impute the disqualification of the lawyer-witness to the lawyer's firm. Model Rule 3.7 permits another lawyer in the same firm to continue representation, provided that neither Rule 1.7 nor 1.9 would require disqualification (for example, Rule 1.7 would require that the firm be disqualified if, in order to effectively represent the client, the non-testifying member of the firm would have to impeach the testimony of the testifying lawyer).

Rule 3.7 does not allow a firm to continue representation when an attorney is disqualified, therefore preserving the appearance of objectivity in the legal proceeding. This result is consistent with current Ohio law. *See, e.g.*, EC 5-9: "An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility," and DR 7-106(C)(4): "In appearing in his professional capacity before a

tribunal, a lawyer shall not: [a]ssert his personal opinion as to…the credibility of the witness." Even Model Rule 3.4(e) reflects this principle: "A lawyer shall not * * * state a personal opinion as to * * * the credibility of a witness * * *," and, to that extent, seems to contradict Model Rule 3.7.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall comply with all of the following:

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

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

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

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

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor *reasonably believes* all of the following apply:

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

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

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

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

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] A defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Division (c) does not apply, however, to an accused appearing *pro se* with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

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

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

[5] Division (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Division (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. Also see Rule 8.4(a).

Ohio Code Comparison to Rule 3.8

Rule 3.8(a) corresponds to DR 7-103(A) (no charges without probable cause), and Rule 3.8(d) corresponds to DR 7-103(B) (disclose evidence that exonerates defendant or mitigates degree of offense or punishment). There is no Disciplinary Rule similar to the other provisions of Rule 3.8. Rule 3.8(b) (ensure accused is advised of rights); Rule 3.8(c) (do not seek waiver of important rights), and Rule 3.8(f) have their roots in the *ABA Standards for Criminal Justice: Prosecution Function.* The *ABA Standards for Criminal Justice* have been cited with approval by the Supreme Court of Ohio, appellate courts, and the Board of Commissioners on Grievances and Discipline.

Ohio now recognizes the distinctive role of prosecutors in EC 7-13:

> The responsibility of a public prosecutor differs from that of the usual advocate; his [her] duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he [she] also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubt.

The distinctive role of prosecutors justifies the adoption of rules specifically addressed to them, but Ohio has no such rules other than DR 7-103, and there are few cases on prosecutorial misconduct other improper comment at trial. Rule 3.8 would begin to fill this void.

ABA Model Rule Comparison to Rule 3.8

Rule 3.8 deletes the portion of Model Rule 3.8(f) that holds a prosecutor responsible for the extrajudicial statements of law enforcement personnel and other nonlawyers involved in the prosecutorial function.

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) to (c), 3.4(a) to (c), and 3.5.

Comment

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

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislative bodies and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

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

Ohio Code Comparison to Rule 3.9

Rule 3.9 has no analogous provision in Ohio law. Rule 3.9 may be considered to having antecedents in DR 7-102(A)(3) and DR 9-101(C).

ABA Model Rules Comparison to Rule 3.9

Rule 3.9 is identical to Model Rule 3.9.

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not *knowingly* do either of the following:

(a) make a false statement of material fact or law to a third person;

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting an *illegal* or *fraudulent* act by a client.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

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

Disclosure to Prevent Illegal or Fraudulent Client Acts

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer's assistance in the client's illegal or fraudulent act. See also Rule 8.4(c). The client can, of course, prevent such disclosure by refraining from the wrongful conduct. If the client persists, the lawyer

can avoid assisting the client's illegal or fraudulent act by withdrawing from the representation. If withdrawal is not sufficient to avoid such assistance, division (b) of the rule requires disclosure of material facts necessary to prevent the assistance of the client's illegal or fraudulent act. Such disclosure may include disaffirming an opinion, document, affirmation or the like, or may require further disclosure to avoid being deemed to have assisted the client's illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer's work product to assist the client's illegal or fraudulent act.

[4] Division (b) of this rule addresses only ongoing or future illegal or fraudulent acts of a client. With respect to past illegal or fraudulent client acts of which the lawyer later becomes aware, Rule 1.6(b)(2) permits, but does not require, a lawyer to reveal information reasonably necessary to mitigate substantial injury to the financial or property interests of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.

Ohio Code Comparison to Rule 4.1

Rule 4.1 addresses the same issues contained in several provisions of the Code of Professional Responsibility. Division (a) of the rule is virtually identical to current DR 7-102(A)(5). Division (b) parallels current DR 7-102(A)(3) and the "fraud on a person" portion of DR 7-102(B)(1). The "fraud on a tribunal" portion of DR 7-102(B)(1) is now found in proposed Rule 3.3.

The Task Force noted in its deliberations that no Ohio case has construed DR 7-102(B) in the context of a lawyer failing to disclose a fraud on a person. Nevertheless, the Task Force recognizes that revealing such an ongoing or future fraud is justified under proposed Rule 4.1(b) when the client refused to prevent it, and the lawyer's withdrawal from the matter was not sufficient to prevent assisting the fraud.

The mitigation of past fraud on a person, addressed in DR 7-102(B), is now found in Rule 1.6(b)(2).

ABA Model Rules Comparison to Rule 4.1

Rule 4.1 incorporates two changes in Model Rule 4.1(b) that are intended to track Ohio law. First, division (b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts) consistent with proposed Rule 1.2(d) and DR 7-102(A)(7). Second, the "unless" clause at the end of division (b), which conditions the lawyer's duty to disclose on exceptions in Rule 1.6, is deleted. Deleting this phrase results in a clearer stand alone anti-fraud rule because it does not require reference to Rule 1.6, and also because such a provision is more consistent with DR 7-102(B)(1).

Comment [3] is rewritten and Comment [4] inserted to clarify the scope and meaning of division (b), and to add appropriate cross-references to other rules.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

Comment

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

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

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

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

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through

investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

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

[7] In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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

Ohio Code Comparison to Rule 4.2

Rule 4.2 is analogous to DR 7-104(A)(1), with the addition of language that allows an otherwise prohibited communication with a represented person to be made pursuant to court order.

ABA Model Rules Comparison to Rule 4.2

Rule 4.2 is identical to Model Rule 4.2.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON

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

Comment

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

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

Ohio Code Comparison to Rule 4.3

Rule 4.3 is analogous to DR 7-104(A)(2). The first and second sentences of Rule 4.3 expand on DR 7-104(A)(2) by requiring a lawyer to: (1) refrain from stating or implying that the lawyer is disinterested in the matter at issue; and (2) take reasonable steps to correct any misunderstanding that the unrepresented person may have with regard to the lawyer's role in the matter. The third sentence of Rule 4.3 tracks DR 7-104(A)(2), but provides that the prohibition on giving legal advice to an unrepresented person applies only where the lawyer knows or reasonably should know that the unrepresented person and the lawyer's client have conflicting interests.

ABA Model Rules Comparison to Rule 4.3

Rule 4.3 is identical to Model Rule 4.3.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no *substantial* purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Division (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to promptly notify the sender. Generally, the lawyer should refrain from reading the document once the lawyer has determined that the document was sent in error, notify the sender, and await the sender's instructions about what to do with the document. See Rule 8.4(c). If the document pertains to a matter in litigation, and if the receiving lawyer has a good faith belief that the document is discoverable, the receiving lawyer may keep a copy of the document in order to seek a ruling from the appropriate tribunal. If, before the lawyer receives or reads the document, the lawyer is advised by the sender that the document was sent in error, the lawyer shall refrain from reading the document, unless the sender permits otherwise, and follow the sender's instructions about what to do with the document. In contrast, when a lawyer conducts a public record search and through no wrongdoing obtains a copy of an inadvertently disclosed document that appears to contain information subject to the attorney-client privilege, there is no ethical duty to refrain from reading the document or revealing its contents to others; however, the lawyer does have an ethical duty to notify the person or the lawyer representing the person, as appropriate, whose document was inadvertently disclosed, and to return a copy of the document upon request. For purposes of this rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] [RESERVED]

Ohio Code Comparison to Rule 4.4

Rule 4.4(a) incorporates elements addressed by several provisions of the Ohio Code of Professional Responsibility. Specifically, it contains elements of: (1) DR 7-102(A)(1), which, in part, prohibits a lawyer from taking action on behalf of a client that serves merely to harass another; (2) DR 7-106(C)(2), which, in part, prohibits a lawyer from asking any question that the lawyer has no reasonable basis to believe is relevant and that is intended to degrade a third person; and (3) DR 7-108(D) and (E), which, in part, prohibit a lawyer from taking action that merely embarrasses or harasses a juror.

Rule 4.4(b) addresses the situation of when a lawyer receives a document that was inadvertently sent to the lawyer. There is no Disciplinary Rule comparable to Rule 4.4(b).

ABA Model Rules Comparison to Rule 4.4

Rule 4.4(a) is identical to Model Rule 4.4(a), with the additional prohibition of actions that have no substantial purpose other than to "harass" a third person.

Rule 4.4(b) is identical to Model Rule 4.4(b). Comment [2] is modified significantly to provide specific guidance to a lawyer who receives an inadvertently sent document as to the procedure that should be followed once the lawyer has determined or has been advised that a document was sent in error. The comment also addresses the situation of when a lawyer obtains documents from a public record search that contain information subject to the attorney-client privilege. Comment [3] is deleted because it is in conflict with the policy and procedure established in Comment [2].

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

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

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

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

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

(2) the lawyer is a *partner* or has comparable managerial authority in the *law firm* in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.

Comment

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

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

[3] Other measures that may be required to fulfill the responsibility prescribed in division (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the rules.

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

[5] Division (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of division (b) on the part of the supervisory lawyer even though it does not entail a violation of division (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate, or subordinate. Whether a lawyer may be

liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these rules.

[8] The duties imposed by this rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Ohio Rules of Professional Conduct. See Rule 5.2(a).

Ohio Code Comparison to Rule 5.1

There is no Disciplinary Rule comparable to Rule 5.1

ABA Model Rules Comparison to Rule 5.1

Rule 5.1 contains no substantive changes to Model Rule 5.1. One sentence from Comment [3] is deleted in light of Ohio's mandatory continuing legal education requirements.

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable* resolution of a question of professional duty.

Comment

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the resolution is unclear, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Ohio Code Comparison to Rule 5.2

There is no Disciplinary Rule comparable to Rule 5.2.

ABA Model Rules Comparison to Rule 5.2

Rule 5.2 contains one change from Model Rule 5.2. Division (b) is revised to strike the word "arguable." Some wording in Comment [2] is altered to clarify the duty of a supervising attorney to resolve close calls.

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

(a) a *partner* and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a *law firm* shall make *reasonable* efforts to ensure that the *firm* has in effect measures giving *reasonable* assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

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

(2) the lawyer is a *partner* or has comparable managerial authority in the *law firm* in which the person is employed, or has direct supervisory authority over the person, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.

Comment

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's

professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Division (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Ohio Rules of Professional Conduct. See Rule 5.1, Comment [1]. Division (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Division (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer.

Ohio Code Comparison to Rule 5.3

There is no Disciplinary Rule comparable to Rule 5.3. DR 4-101(D) and EC 4-2 speak to a lawyer's obligation in selecting and training secretaries so that a client's confidences and secrets are protected. The Supreme Court of Ohio cited Model Rule 5.3 with approval as establishing a lawyer's duty to maintain a system of office procedure that ensures delegated legal duties are completed properly. See *Disciplinary Counsel v. Ball* (1993), 67 Ohio St.3d 401.

ABA Model Rules Comparison to Rule 5.3

Rule 5.3 is substantively identical to the Model Rule.

RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or *law firm* shall not share legal fees with a nonlawyer, except in any of the following circumstances:

(1) an agreement by a lawyer with the lawyer's *firm*, *partner*, or associate may provide for the payment of money, over a *reasonable* period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or *law firm* may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement;

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter;

(5) a lawyer may share legal fees with a nonprofit organization that recommended employment of the lawyer in the matter, if the nonprofit organization complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if any of the following apply:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a *reasonable* time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation;

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in division (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Ohio Code Comparison to Rule 5.4

Rule 5.4 addresses the same subject currently addressed by DR 3-102(A), which prohibits dividing fees with nonlawyers, DR 3-103 and DR 5-107(C), which prohibit forming partnerships or practicing in professional corporation with nonlawyers, and DR 5-107(B), which prohibits direction or regulation of a lawyer's professional judgment by any person who recommends, employs, or pays the lawyer to render legal services to another.

Rule 5.4 is not intended to change any of the current provisions in the Ohio Code. Slight modifications in language between current Ohio Code provisions and the Model Rule are intended to promote clarity of meaning. Rule 5.4(a) is substantially the same as current DR 3-102(A). Rule 5.4(b) is identical to current DR 3-103. Rule 5.4(c) is substantially the same as current DR 5-107(B). Rule 5.4(d) is substantially the same as current DR 5-107(C).

ABA Model Rules Comparison to Rule 5.4

Rule 5.4(a) contains two changes from the Model Rule. Division (a)(4) is modified to retain the ability of a lawyer to share court-awarded legal fees with a nonprofit organization that employed or retained the lawyer in the matter.

Division (a)(5) is added to limit the ability of a lawyer to share legal fees with a nonprofit organization that recommended employment of the lawyer. Unlike Model Rule 5.4, the Ohio version of the rule limits the ability of a lawyer to share legal fees under these circumstances to nonprofit organizations that comply with provisions of the Supreme Court Rules for the Government of the Bar of Ohio that regulate lawyer referral and information services. See Gov. Bar R. XVI.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if any one or more of the following applies:

(1) the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or *reasonably* expects to be so authorized;

(3) the services are *reasonably* related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction in either of the following circumstances:

(1) the lawyer is a fulltime employee of a nongovernmental Ohio employer, is registered in compliance with Gov. Bar R. VI, Section 4, and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of divisions (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state,

territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the

lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Division (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] [RESERVED]

[17] If a lawyer employed fulltime by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration set forth in Gov. Bar R. VI, Section 4.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Divisions (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

Ohio Code Comparison to Rule 5.5

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

Pro hac vice admission of an out-of-state lawyer to represent a client before a tribunal is a matter within the discretion of the tribunal before which the out-of-state lawyer seeks to appear. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Some courts have adopted a specific local rule specifying procedures for seeking *pro hac vice* admission in cases pending before the court. See, *e.g.,* Rule 91 of the Franklin County Common Pleas Court, General Division.

ABA Model Rules Comparison to Rule 5.5

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 4 for the more general language used in the Model Rule.

Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a "systematic and continuous" presence, as that term is used in division (b).

RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making either of the following:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement;

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a claim or controversy.

Comment

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Division (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Division (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim or controversy.

[3] This rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Ohio Code Comparison to Rule 5.6

Rule 5.6 is analogous to DR 2-108.

Rule 5.6(a) tracks DR 2-108(A) by prohibiting restrictive agreements, except in conjunction with payment of retirement benefits. Unlike DR 2-108(A), however, Rule 5.6(a) does not reference an exception in conjunction with a sale of a law practice, as that situation is addressed separately in proposed Rule 1.17.

Rule 5.6(b) is substantially similar to DR 2-108(B), except that Rule 5.6(b) prohibits restrictive agreements in connection with settling "a claim or controversy." DR 2-108(B) uses the phrase "controversy or suit."

ABA Model Rules Comparison to Rule 5.6

Rule 5.6(b) is modified to track current Ohio prohibitions relative to restrictive agreements. Specifically, Model Rule 5.6(b) prohibits restrictive agreements only in conjunction with the settlement of a "client controversy." The Ohio version of Rule 5.6(b) does not limit the prohibition in conjunction with settling a claim on behalf of a client but, instead, prohibits restrictive agreements in conjunction with any "claim or controversy."

RULE 5.7: RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Ohio Rules of Professional Conduct with respect to the provision of law-related services, as defined in division (e) of this rule, if the law-related services are provided in either of the following circumstances:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients;

(2) in other circumstances by an entity controlled or owned by the lawyer individually or with others, unless the lawyer takes *reasonable* measures to ensure that a person obtaining the law-related services *knows* that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require any customer of that business to agree to legal representation by the lawyer as a condition of the engagement of that business. A lawyer who controls or owns an interest in a business that provides law-related services shall disclose the interest to a customer of that business, and the fact that the customer may obtain legal services elsewhere, before performing legal services for the customer.

(c) A lawyer who controls or owns an interest in a business that provides a law-related service shall not require the lawyer's client to agree to use that business as a condition of the engagement for legal services. A lawyer who controls or owns an interest in a business that provides a law-related service shall disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, before providing the law-related services to the client.

(d) Limitations or obligations imposed by this rule on a lawyer shall apply to all lawyers in that lawyer's *firm* and every lawyer in a *firm* that controls or owns an interest in a business that provides a law-related service.

(e) The term "law-related services" denotes services that might *reasonably* be performed in conjunction with the provision of legal services and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment

[1] When a lawyer performs law-related services, sometimes referred to as "ancillary business," or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The rule identifies the circumstances in which all of the Ohio Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, *e.g.,* Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Ohio Rules of Professional Conduct as provided in division (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Ohio Rules of Professional Conduct apply to the lawyer as provided in division (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows

that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations or owns an interest in the entity, the rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Ohio Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in division (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Ohio Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to ensure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

[8] A lawyer should take special care to keep separate the provision of law-related and legal services to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by division (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Ohio Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate

counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the rules addressing conflict of interest [Rules 1.7 to 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)], and scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 to 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Ohio Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4.

Ohio Code Comparison to Rule 5.7

The Ohio Code of Professional Responsibility contains no provision analogous to Rule 5.7. However, the rule is drawn from Advisory Opinion No. 94-7 of the Board of Commissioners on Grievances and Discipline.

ABA Model Rules Comparison to Rule 5.7

Rule 5.7(a)(2) is expanded to include a lawyer who owns an interest in an entity, in addition to a lawyer who controls an entity.

Added to Rule 5.7 are divisions (b) and (c), which contain reciprocal prohibitions and disclosures when a lawyer controls or owns an interest in a business that provides law-related services. Specifically, division (b) prohibits a lawyer who controls or owns an interest in a business that provides a law-related service from requiring customers of the business to agree to legal representation by the lawyer as a condition of engagement of the law-related services. Additionally, prior to performing legal services for a customer of a business that provides law-related services, division (b) requires the lawyer to notify the customer that the customer may obtain legal services elsewhere.

Conversely, division (c) prohibits a lawyer who controls or owns an interest in a business that provides law-related services from requiring a client to use the services of the law-related business as a condition of the engagement for legal services. Additionally, a

lawyer who controls or owns an interest in a business that provides law-related services must disclose the interest to the client, and the fact that the client may obtain the law-related services elsewhere, prior to providing the law-related services to the client.

Rule 5.7 also includes a new division (d), which makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer controls or owns an interest in a business that provides law-related services, and every lawyer in a firm that controls or owns an interest in a business that provides law-related services.

Model Rule 5.7(c) has been redesignated as division (e) with no substantive changes.

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Reporter's Note

The Task Force tabled consideration of Model Rule 6.1, the text of which appears below, in light of the ongoing work of the Supreme Court Task Force on Pro Se and Indigent Representation and Ohio Legal Assistance Foundation. See the "Model Rules Not Recommended by the Task Force" portion of the Task Force report.

~~Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:~~

~~(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:~~

~~(1) persons of limited means or;~~

~~(2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and~~

~~(b) provide any additional services through:~~

~~(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;~~

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Comment

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers, and

food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory, or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims, and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural, and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system, or the profession are a few examples of the many activities that fall within this paragraph.

~~[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.~~

~~[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.~~

~~[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule.~~

~~[12] The responsibility set forth in this rule is not intended to be enforced through disciplinary process.~~

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a *tribunal* to represent a person except for good cause, such as either of the following:

(a) representing the client is likely to result in violation of the Ohio Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer.

Comment

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the rules.

Ohio Code Comparison to Rule 6.2

Rule 6.2 is similar to Ohio Code of Professional Responsibility EC 2-25 through EC 2-32, Acceptance and Retention of Employment, and, in particular, EC 2-28.

ABA Model Rules Comparison to Rule 6.2

Stricken from Rule 6.2 is division (c) of the Model Rule, the substance of which is addressed in Rule 1.1, which mandates that a lawyer shall provide competent representation to a client.

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Reporter's Note

The Task Force does not recommend adoption of ABA Model Rule 6.3, the text of which is set forth below. The substance of Model Rule 6.3 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest, including Rule 1.7(a) [Conflicts of Interest: Current Clients].

~~A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:~~

~~(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or~~

~~(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.~~

~~Comment~~

~~[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.~~

~~[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.~~

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Reporter's Note

The Task Force does not recommend adoption of ABA Model Rule 6.4, the text of which is set forth below. The substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest.

~~A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.~~

~~Comment~~

~~[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.~~

RULE 6.5: NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter is subject to all of the following:

(1) Rules 1.7 and 1.9(a) only if the lawyer *knows* that the representation of the client involves a conflict of interest;

(2) Rule 1.10 only if the lawyer *knows* that another lawyer associated with the lawyer in a *law firm* is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in division (a)(2) of this rule, Rule 1.10 is inapplicable to a representation governed by this rule.

Comment

[1] Legal services organizations, courts, and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics, or *pro se* counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See *e.g.,* Rules 1.7, 1.9, and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this rule, the Ohio Rules

of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this rule ordinarily is not able to check systematically for conflicts of interest, division (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, division (b) provides that Rule 1.10 is inapplicable to a representation governed by this rule except as provided by division (a)(2). Division (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of division (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a), and 1.10 become applicable.

Ohio Code Comparison to Rule 6.5

The Ohio Code of Professional Responsibility does not have a specifically comparable rule regarding short-term limited legal services for programs sponsored by a nonprofit organization or court. Rule 6.5 codifies an exception to the general conflict provisions of Rule 1.7 (now DR 5-105) in order to encourage lawyers in firms to participate in short term legal service projects sponsored by courts or nonprofit organizations.

ABA Model Rules Comparison to Rule 6.5

Rule 6.5 contains no substantive changes to the Model Rule.

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or use a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] Characterization of rates or fees chargeable by the lawyer or law firm such as "cut-rate," "lowest," "giveaway," "below cost," "discount," or "special" is misleading.

[5] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

Ohio Code Comparison to Rule 7.1

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions currently found in DR 2-101 on client testimonials or self-laudatory claims. However, the rule does retain the DR 2-101 prohibition on unverifiable claims.

In addition, Rule 7.1 contains none of the other directives found in DR 2-101(B), the definition of misleading found in DR 2-101(C) (see comment [2] of Rule 7.1), or the directives found in DR 2-101(D), (E), and (G).

For DR 2-101(F) and DR 2-101(H) see Rule 7.3.

ABA Model Rules Comparison to Rule 7.1

Rule 7.1 is similar to Model Rule 7.1 except for the inclusion of a prohibition on the use of nonverifiable communications about the lawyer or the lawyer's services.

RULE 7.2: ADVERTISING AND RECOMMENDATION OF PROFESSIONAL EMPLOYMENT

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through *written*, recorded, or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may pay any of the following:

(1) the *reasonable* costs of advertisements or communications permitted by this rule;

(2) the usual charges of a legal service plan;

(3) the usual charges for a nonprofit or lawyer referral service that complies with Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio;

(4) for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or *law firm* responsible for its content.

Comment

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

[2] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will

undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Except as provided by these rules, lawyers are not permitted to give anything of value to another for channeling professional work. A reciprocal referral agreement between lawyers, or between a lawyer and a nonlawyer, is prohibited. *Cf.* Rule 1.5.

[5A] Division (b)(1) allows a lawyer to pay for advertising and communications permitted by this rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents, and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased

referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this rule only permits a lawyer to pay the usual charges of a nonprofit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved pursuant to Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Relative to fee sharing, see Rule 5.4(a)(5).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] [RESERVED]

Ohio Code Comparison to Rule 7.2

Rule 7.2(a) directs attention to Rules 7.1 and 7.3, each of which includes or deletes language from the advertising and solicitation rules contained in DR 2-101 through DR 2-104. This cross-reference instructs the reader of the new rule to look at those sections, as well as Rule 7.2.

The following are provisions of DR 2-101 that have not been included in Rule 7.1, 7.2, or 7.3:

- The prohibition in DR 2-101(A)(2) against advertising for a matter where the law firm intends to refer the matter, rather than work on the case;

- The specific reference to types of fees or descriptions, such as "give-away" or "below cost" found in DR 2-101(A)(5), although Rule 7.1, Comment [4] specifically indicates that these characterizations are misleading;

- Specific references to media types and words, as set forth in DR 2-101(B)(1) and (2)

- Specific reference that brochures or pamphlets can be disclosed to "others" as set forth in DR 2-101(B)(3);

- The list of items that were permissible for inclusion in advertising, contained in DR 2-101(D).

ABA Model Rules Comparison to Rule 7.2

Rule 7.2(b)(3) is modified to remove a reference to a qualified legal referral service and substitute a reference to the lawyer referral service provisions contained in Rule XVI of the Supreme Court Rules for the Government of the Bar of Ohio. Rule 7.2 also does not include Model Rule 7.2(b)(4) and thus prohibits reciprocal referral agreements between two lawyers or between a lawyer and a nonlawyer professional.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

(1) the person contacted is a lawyer;

(2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by *written*, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if either of the following applies:

(1) the prospective client has made *known* to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment.

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every *written*, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client *known* to be in need of legal services in a particular matter shall comply with all of the following:

(1) Disclose accurately and fully the manner in which the lawyer or *law firm* became aware of and verified the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

(d) Prior to making a communication soliciting professional employment from a prospective client pursuant to division (c) of this rule to a party who has been named as a defendant in a civil action, a lawyer or *law firm* shall verify that the party has been served with notice of the action filed against that party. Service shall be verified by consulting the docket of the court in which the action was filed to determine whether mail, personal, or residence service has been perfected or whether service by publication has been completed. Division (d) of this rule shall not apply to the solicitation of a debtor regarding representation of the debtor in a potential or actual bankruptcy action.

(e) If a communication soliciting professional employment from a prospective client or a relative of a prospective client within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death, the following "Understanding Your Rights" must be included with the communication.

UNDERSTANDING YOUR RIGHTS*

If you have been in an accident, or a family member has been injured or killed in a crash or some other incident, you have many important decisions to make. We believe it is important for you to consider the following:

1. Make and keep records - If your situation involves a motor vehicle crash, regardless of who may be at fault, it is helpful to obtain a copy of the police report, learn the identity of any witnesses, and obtain photographs of the scene, vehicles, and any

visible injuries. Keep copies of receipts of all your expenses and medical care related to the incident.

2. You do not have to sign anything - You may not want to give an interview or recorded statement without first consulting with an attorney, because the statement can be used against you. If you may be at fault or have been charged with a traffic or other offense, it may be advisable to consult an attorney right away. However, if you have insurance, your insurance policy probably requires you to cooperate with your insurance company and to provide a statement to the company. If you fail to cooperate with your insurance company, it may void your coverage.

3. Your interests versus interests of insurance company - Your interests and those of the other person's insurance company are in conflict. Your interests may also be in conflict with your own insurance company. Even if you are not sure who is at fault, you should contact your own insurance company and advise the company of the incident to protect your insurance coverage.

4. There is a time limit to file an insurance claim - Legal rights, including filing a lawsuit, are subject to time limits. You should ask what time limits apply to your claim. You may need to act immediately to protect your rights.

5. Get it in *writing* - You may want to request that any offer of settlement from anyone be put in *writing*, including a *written* explanation of the type of damages which they are willing to cover.

6. Legal assistance may be appropriate - You may consult with an attorney before you sign any document or release of claims. A release may cut off all future rights against others, obligate you to repay past medical bills or disability benefits, or jeopardize future benefits. If your interests conflict with your own insurance company, you always have the right to discuss the matter with an attorney of your choice, which may be at your own expense.

7. How to find an attorney - If you need professional advice about a legal problem but do not know an attorney, you may wish to check with relatives, friends, neighbors, your employer, or co-workers who may be able to recommend an attorney. Your local bar association may have a lawyer referral service that can be found in the Yellow Pages or on the Internet.

8. Check a lawyer's qualifications - Before hiring any lawyer, you have the right to know the lawyer's background, training, and experience in dealing with cases similar to yours.

9. How much will it cost? - In deciding whether to hire a particular lawyer, you should discuss, and the lawyer's written fee agreement should reflect:

a. How is the lawyer to be paid? If you already have a settlement offer, how will that affect a contingent fee arrangement?

b. How are the expenses involved in your case, such as telephone calls, deposition costs, and fees for expert witnesses, to be paid? Will these costs be advanced by the lawyer or charged to you as they are incurred? Since you are obligated to pay all expenses even if you lose your case, how will payment be arranged?

c. Who will handle your case? If the case goes to trial, who will be the trial attorney?

This information is not intended as a complete description of your legal rights, but as a checklist of some of the important issues you should consider.

***THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.**

(f) Notwithstanding the prohibitions in divisions (a) of this rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not *known* to need legal services in a particular matter covered by the plan.

Comment

[1] There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in

the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications that may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the prospective client's judgment. In using any telephone communication, a lawyer remains subject to applicable requirements of the "Do Not Call" provisions of federal telemarketing sales regulations.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to ensure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone, or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach, and occasionally cross, the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, division (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, that involves coercion, duress, or harassment within the meaning of Rule

7.3(b)(2), or that involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] None of the requirements of Rule 7.3 applies to communications sent in response to requests from clients or prospective clients. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this rule.

[7A] The use of written, recorded, and electronic communications to solicit prospective clients who have suffered personal injuries or the loss of a loved one can potentially be offensive. Nonetheless, it is recognized that such communications assist potential clients in not only making a meaningful determination about representation, but also can aid potential clients in recognizing issues which may be foreign to them. Accordingly, the information contained in division (e) must be communicated to the prospective client or a relative of a prospective client when the solicitation occurs within thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.

[8] Division (f) of this rule permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned or directed, whether as manager or otherwise, by any lawyer or law firm that participates in the plan. For example, division (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be

directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably ensure that the plan sponsors are in compliance with Rules 7.1, 7.2, and 7.3(b). See Rule 8.4(a).

Ohio Code Comparison to Rule 7.3

Rule 7.3 embraces the provisions of DR 2-104(A), DR 2-101(F) and DR 2-101(H), with modifications.

At division (c), the rule broadens the types of communications that are permitted by authorizing the use of recorded telephone messages and electronic communication via the Internet. Further, in keeping with the new methods of communication that are authorized, the provisions of DR 2-101(F) regarding disclosures are incorporated and modified to apply to all forms of permissible direct solicitations.

The provisions of DR 2-101(F)(2) have been incorporated in division (c) and modified to reduce the micromanagement of lawyer contact, which previously had been the subject of abuse, by requiring that the disclaimers "ADVERTISEMENT ONLY" and "ADVERTISING MATERIAL" be "conspicuously" displayed. The requirements contained in DR 2-101(F)(2)(b) regarding disclaimers of prior acquaintance or contact with the addressee and avoidance of personalization have not been retained.

The provisions of DR 2-101(F)(4) [pre-service solicitation of defendants in civil actions] have been inserted as a new division (d), and the provisions of DR 2-101(H) [solicitation of accident or disaster victims] have been inserted as a new division (e).

ABA Model Rules Comparison to Rule 7.3

Rule 7.3 contains the following substantive changes to the Model Rule 7.3:

- With the modifications previously discussed, the requirements placed upon the lawyer involved in the direct solicitation of prospective clients are more stringent than the requirements contained in division (c) of the Model Rule.

- Division (d), regarding preservice solicitation of defendants in civil actions, has been inserted.

- Division (e), regarding direct solicitation requirements respecting solicitation of accident or disaster victims and their families, has been inserted.

Added to the rule is Comment [7A], which discusses the rationale for inclusion of the new division (e).

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or limits his or her practice to or concentrates in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a *substantially* similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a *substantially* similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless both of the following apply:

(1) the lawyer has been certified as a specialist by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists;

(2) the name of the certifying organization is clearly identified in the communication.

Comment

[1] Division (a) of this rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Division (b) recognizes that patent lawyers are admitted to practice before the Patent and Trademark Office by examination. Division (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Division (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by the Supreme Court Commission on Certification of Attorneys as Specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge, and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. In order to ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Ohio Code Comparison to Rule 7.4

Rule 7.4 is comparable to DR 2-105 and does not depart substantively from that rule.

ABA Model Rules Comparison to Rule 7.4

Rule 7.4(a) is modified to include the existing ability of a lawyer to indicate that the lawyer's practice is limited to or concentrates in particular fields of law.

RULE 7.5: FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a *firm* name, letterhead or other professional designation that violates Rule 7.1. A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a *firm* name containing names other than those of one or more of the lawyers in the *firm*, except that the name of a professional corporation or association, legal clinic, limited liability company, or registered partnership shall contain symbols indicating the nature of the organization as required by Gov. Bar R. III. If otherwise lawful, a *firm* may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the *firm* or of a predecessor *firm* in a continuing line of succession.

(b) A *law firm* with offices in more than one jurisdiction that lists attorneys associated with the *firm* shall indicate the jurisdictional limitations on those not licensed to practice in Ohio.

(c) The name of a lawyer holding a public office shall not be used in the name of a *law firm*, or in communications on its behalf, during any *substantial* period in which the lawyer is not actively and regularly practicing with the *firm*.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Comment

[1] A firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. The letterhead of a law firm may give the names and dates of predecessor

firms in a continuing line of succession. A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm or the name of a nonlawyer.

[2] With regard to division (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm. The use of a disclaimer such as "not a partnership" or "an association of sole practitioners" does not render the name or designation permissible.

[3] A lawyer may be designated "Of Counsel" if the lawyer has a continuing relationship with a lawyer or law firm, other than as a partner or associate.

[4] A legal clinic operated by one or more lawyers may be organized by the lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office shall consist only of the names of one or more of the active practitioners in the organization, and may include the phrase "legal clinic" or words of similar import. The use of a trade name or geographical or other type of identification or description is prohibited. The name of any active practitioner in the clinic may be retained in the name of the legal clinic after the lawyer's death, retirement or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, and profits or losses cannot be shared with, nonlawyers or lawyers who are not actively engaged in the practice of law in the organization.

Ohio Code Comparison to Rule 7.5

With the exception of DR 2-102(E) and (F), Rule 7.5 is comparable to DR 2-102.

The provisions of DR 2-102(E), which prohibits truthful statements about a lawyer's actual businesses and professions, are not included in Rule 7.5. The Rules of Professional Conduct should not preclude truthful statements about a lawyer's professional status, other business pursuits, or degrees.

DR 2-102(F) is an exception to DR 2-102(E) and is unnecessary in light of the decision to not retain DR 2-102(E).

Comment [3] is substantially the same as the Ohio provision on the "of counsel" designation.

Comment [4] addresses the restrictions of DR 2-102(G) relative to operating a "legal clinic" and using the designation "legal clinic."

ABA Model Rules Comparison to Rule 7.5

Rule 7.5 combines Model Rule 7.5 with DR 2-102, with one exception. Rule 7.5(a) retains the prohibition in DR 2-102(B) that a lawyer shall not practice under a trade name. The Model Rule prohibition extends only to the use of a trade name that implies a connection to a governmental, charitable, or public legal services organization.

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

Reporter's Note

The Task Force does not recommend adoption of ABA Model Rule 7.6, the text of which is set forth below. The substance of Model Rule 7.6 is addressed by provisions of the Ohio Ethics Law, particularly R.C. 102.03(F) and (G), and other criminal prohibitions relative to bribery and attempts to influence the conduct of elected officials. A lawyer or law firm that violates these statutory prohibitions would be in violation of other provisions of the Ohio Rules of Professional Conduct, such as Rule 8.4.

~~A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.~~

~~Comment~~

~~[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.~~

~~[2] The term "political contribution" denotes any gift, subscription, loan, advance, or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party, or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this rule, the term "political contribution" does not include uncompensated services.~~

~~[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian, or other similar position that is made by a judge. Those terms do not, however,~~

include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications, and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) *knowingly* make a false statement of material fact;

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or knowingly fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment

[1] The duty imposed by this rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omit a material fact in connection with a disciplinary investigation of the lawyer's own conduct. Rule I of the Supreme Court Rules for the Government of the Bar of Ohio addresses the obligations of applicants for admission to the bar.

[2] This rule is subject to the provisions of the Fifth Amendment of the United States Constitution and Article I, Section 10 of the Ohio Constitution. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Ohio Code Comparison to Rule 8.1

Rule 8.1 is comparable to DR 1-101, DR 1-102(A)(5), and DR 1-103(B).

ABA Model Rules Comparison to Rule 8.1

Rule 8.1 differs from Model Rule 8.1 in two respects.

Rule 8.1(a) is modified to strike the provision that would make the rule applicable to bar applicants. The constraints and obligations placed upon applicants for admission

to the bar are more appropriately and distinctly addressed in Rule I of the Supreme Court Rules for the Government of the Bar of Ohio.

Rule 8.1(b) is modified for clarity. The clause, "fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter," is too unwieldy and creates a standard too difficult for explanation and comprehension. The elimination of that clause does not lessen the standard of candor expected of a lawyer in bar admission or disciplinary matters.

RULE 8.2: JUDICIAL OFFICIALS

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

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

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] [RESERVED]

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Ohio Code Comparison to Rule 8.2

Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule. Rule 8.2(b) corresponds to DR 1-102(A)(1).

ABA Model Rules Comparison to Rule 8.2

Rule 8.2(a) has been modified from the Model Rule to remove the phrase "public legal officers." Those officers are not included in DR 8-102, and disciplinary authorities should not be responsible for investigating statements made during campaigns for county attorney, attorney general, or any other public legal position. The title of Rule 8.2 is modified to reflect this revision.

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Ohio Code Comparison to Rule 8.3

Rule 8.3 differs from DR 1-103 in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

ABA Model Rules Comparison to Rule 8.3

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Ohio Code Comparison to Rule 8.4

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

ABA Model Rules Comparison to Rule 8.4

Rule 8.4 is substantially similar to Model Rule 8.4 except with the addition of the anti-discrimination provisions of DR 1-102(B). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's

disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 11 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. The decision of whether to permit representation by an out-of-state lawyer before an Ohio tribunal is a matter within the discretion of the trial court. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Division (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Division (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, division (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or,

if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this rule.

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

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties, or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

Ohio Code Comparison to Rule 8.5

The Ohio Code of Professional Responsibility has no provision analogous to Rule 8.5.

ABA Model Rule Comparison to Rule 8.5

Rule 8.5 is substantively identical to Model Rule 8.5. The Task Force includes Comment [1A] to reflect Ohio case law regarding the extension of *pro hac vice* status to out-of-state lawyers. See *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31.

APPENDIX B

Cross-Reference Table

Ohio Rules of Professional Conduct to Ohio Code of Professional Responsibility

The following is a summary of the Ohio Rules of Professional Conduct and corresponding provisions of the Ohio Code of Professional Responsibility. Please consult the code comparisons that follow each rule for a more detailed review of corresponding provisions.

OHIO RULES OF PROFESSIONAL CONDUCT	OHIO CODE OF PROFESSIONAL RESPONSIBILITY AND OTHER LAW
Rule 1.1 Competence	DR 6-101(A)(1) & (2)
Rule 1.2 Scope of Representation and Allocation of Authority	
Rule 1.2(a)	DR 7-101(A), EC 7-7, 7-10
Rule 1.2(b) [Reserved]	**N/A**
Rule 1.2(c)	None
Rule 1.2(d)	DR 7-102(A)(7), EC 7-4
Rule 1.2(e)	DR 7-105
Rule 1.3 Diligence	DR 6-101(A)(3), 7-101(A)(1)
Rule 1.4 Communication	
Rule 1.4(a) & (b)	EC 7-8, 9-2
Rule 1.4(c)	DR 1-104
Rule 1.5 Fees and Expenses	
Rule 1.5(a)	DR 2-106(A) & (B)
Rule 1.5(b)	EC 2-18
Rule 1.5(c)	EC 2-18; R.C. 4705.15
Rule 1.5(d)	DR 2-106(C), EC 2-19
Rule 1.5(e) & (f)	DR 2-107

Rule 1.6
Confidentiality

Rule 1.6(a)	DR 4-101(A), (B), & (C)(1)
Rule 1.6(b)(1)	DR 4-101(C)(3)
Rule 1.6(b)(2)	DR 7-102(B)(1)
Rule 1.6(b)(3)	None
Rule 1.6(b)(4)	DR 4-101(C)(4)
Rule 1.6(b)(5)	DR 4-101(C)(2)
Rule 1.6(c)	None

Rule 1.7
Conflict of Interest: Current Clients — DR 5-101(A)(1), 5-105(A), (B), & (C)

Rule 1.8
Conflict of Interest: Current Clients: Specific Rules

Rule 1.8(a)	DR 5-104(A), *Cincinnati Bar Assn. v. Hartke* (1993), 67 Ohio St.3d 65
Rule 1.8(b)	DR 4-101(B)(2)
Rule 1.8(c)	DR 5-101(A)(2) & (3)
Rule 1.8(d)	DR 5-104(B)
Rule 1.8(e)	DR 5-103(B)
Rule 1.8(f)	DR 5-107(A) & (B)
Rule 1.8(g)	DR 5-106
Rule 1.8(h)	DR 6-102, *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St.3d 431
Rule 1.8(j)	*Cleveland Bar Assn. v. Feneli* (1996), 86 Ohio St. 3d 102 & *Disciplinary Counsel v. Moore* (2004), 101 Ohio St.3d 261
Rule 1.8(k)	DR 5-105(D)

Rule 1.9
Duties to Former Clients — DR 4-101(B), *Kala v. Aluminum Smelting & Refining Co.* (1998), 81 Ohio St. 3d 1

Rule 1.10
Imputation of Conflicts of Interest: General Rule — DR 5-105(D), *Kala v. Aluminum Smelting & Refining Co.* (1998), 81 Ohio St. 3d 1

Rule 1.11	
Special Conflicts of Interest for Former and Current Governmental Employees	DR 9-101(B)
Rule 1.12	
Former Judge, Arbitrator, Mediator, or Other Third Party Neutral	DR 9-101(A) & (B), EC 5-21
Rule 1.13	
Organization as Client	EC 5-18, 5-19, & 5-24
Rule 1.14	
Client With Diminished Capacity	EC 7-11 & 7-12
Rule 1.15	
Safekeeping Property	
Rule 1.15(a)	DR 9-102
Rule 1.15(b)	DR 9-102(A)(1)
Rule 1.15(c)	DR 9-102(A)
Rule 1.15(d), (e), (f), & (g)	None
Rule 1.16	
Terminating Representation	
Rule 1.16(a)	DR 2-110(A)(1)
Rule 1.16(b)	DR 2-110(A)(2)
Rule 1.16(c)	DR 2-110(A)(3)
Rule 1.16(d)	DR 2-110(B)
Rule 1.16(e)	DR 2-110(A)(2), (C)(1), (C)(2), (C)(5), (C)(6), & (C)(7)
Rule 1.17	
Sale of Law Practice	DR 2-111
Rule 1.18	
Duties to Prospective Client	EC 4-1, *Cuyahoga Cty Bar Assn v. Hardiman* (2003), 100 Ohio St.3d 260
Rule 2.1	
Advisor	EC 7-8
Rule 2.3	
Evaluation for Use by Third Persons	None
Rule 2.4	
Lawyer Serving as Arbitrator, Mediator, or Third-Party Neutral	EC 5-20

Rule 3.1	
Meritorious Claims and Contentions	DR 7-102(A)(2), EC 7-25
Rule 3.3	
Candor Toward the Tribunal	
Rule 3.3(a)	DR 7-102(A)(1), (4), & (5) & 7-106(B)(1)
Rule 3.3(b)	DR 7-102(B)
Rule 3.3(c)	DR 7-106(B)
Rule 3.3(d)	None
Rule 3.4	
Fairness to Opposing Party and Counsel	
Rule 3.4(a)	DR 7-108(A)(8) & 7-109(A)
Rule 3.4(b)	DR 7-102(A)(6) & 7-109(C)
Rule 3.4(c)	DR 7-106(A)
Rule 3.4(d)	DR 7-106(C)(7)
Rule 3.4(e)	DR 7-106(C)(1) & (4)
Rule 3.4(f)	None
Rule 3.4(g)	DR 7-109(B)
Rule 3.5	
Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	DR 7-108(A) & (B) & 7-110
Rule 3.5(b)	DR 7-108(G)
Rule 3.6	
Trial Publicity	DR 7-107
Rule 3.7	
Lawyer as Witness	DR 5-101(B) & 5-102
Rule 3.8	
Special Responsibilities of Prosecutor	
Rule 3.8(a)	DR 7-103(A)
Rule 3.8(b)	None
Rule 3.8(c)	None
Rule 3.8(d)	DR 7-103(B), EC 7-13
Rule 3.8(e)	None
Rule 3.8(f)	None

Rule 3.9	
Advocate in Nonadjudicative Proceedings	None
Rule 4.1	
Truthfulness in Statements to Others	
Rule 4.1(a)	DR 7-102(A)(5)
Rule 4.1(b)	DR 7-102(A)(3) & 7-102(B)(1)
Rule 4.2	
Communication with Person Represented by Counsel	DR 7-104(A)(1)
Rule 4.3	
Dealing with Unrepresented Persons	DR 7-104(A)(2)
Rule 4.4	
Respect for Rights of Third Persons	
Rule 4.4(a)	DR 7-102(A)(1), 7-106(C)(2), & 7-108(D) & (E)
Rule 4.4(b)	None
Rule 5.1	
Responsibilities of Partners and Supervisory Lawyers	None
Rule 5.2	
Responsibilities of Subordinate Lawyer	None
Rule 5.3	
Responsibilities Regarding Nonlawyer Assistants	DR 4-101(D), EC 4-2, *Disciplinary Counsel v. Ball* (1993), 67 Ohio St. 3d 401
Rule 5.4	
Professional Independence of a Lawyer	
Rule 5.4(a)	DR 3-102(A)
Rule 5.4(b)	DR 3-103
Rule 5.4(c)	DR 5-107(B)
Rule 5.4(d)	DR 5-107(C)
Rule 5.5	
Unauthorized Practice of Law	
Rule 5.5(a)	DR 3-101
Rule 5.5(b)	None

Rule 5.5(c)	None
Rule 5.5(d)	None
Rule 5.6	
Restrictions on Right to Practice	
Rule 5.6(a)	DR 2-108(A)
Rule 5.6(b)	DR 2-108(B)
Rule 5.7	
Responsibilities Regarding Law-Related Services	None
Rule 6.2	
Accepting Appointments	EC 2-25, 2-26, 2-27, 2-28, 2-29, 2-30, 2-31, & 2-32
Rule 6.5	
Non-Profit and Court Annexed Limited Legal Service Programs	None
Rule 7.1	
Communications Concerning a Lawyer's Services	DR 2-101
Rule 7.2	
Advertising and Recommendation of Professional Employment	DR 2-101, 2-103, & 2-104(B)
Rule 7.3	
Direct Contact with Prospective Client**s**	DR 2-104(A)
Rule 7.3(a)	DR 2-101(F)(1)
Rule 7.3(b)	None
Rule 7.3(c)	DR 2-101(F)(2)
Rule 7.3(d)	DR 2-101(F)(4)
Rule 7.3(e)	DR 2-101(H)
Rule 7.3(f)	DR 2-103(D)(4)
Rule 7.5	
Firm Names and Letterheads	DR 2-102
Rule 8.1	
Bar Admission and Disciplinary Matters	DR 1-101

Rule 8.2 Judicial Officials	
Rule 8.2(a)	DR 8-102
Rule 8.2(b)	DR 2-102(A)(1)
Rule 8.3 Reporting Professional Misconduct	DR 1-103
Rule 8.4 Misconduct	
Rule 8.4(a)	DR 1-102(A)(1) & (2)
Rule 8.4(b)	DR 1-102(A)(3)
Rule 8.4(c)	DR 1-102(A)(4)
Rule 8.4(d)	DR 1-102(A)(5)
Rule 8.4(e)	DR 1-102(A)(5) & 9-101(C)
Rule 8.4(f)	DR 1-102(A)(5)
Rule 8.4(g)	DR 1-102(B)
Rule 8.4(h)	DR 1-102(A)(6)
Rule 8.5 Disciplinary Authority, Choice of Law	None

APPENDIX C

Cross-Reference Table

Ohio Code of Professional Responsibility to Ohio Rules of Professional Conduct

The following is a summary of the Ohio Code of Professional Responsibility and corresponding provisions of the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed review of corresponding provisions.

OHIO CODE OF PROFESSIONAL RESPONSIBILITY	OHIO RULES OF PROFESSIONAL CONDUCT
CANON 1	
DR 1-101	
Maintaining Integrity and Competence of the Legal Profession	Rule 8.1
DR 1-102 Misconduct	
DR 1-102(A)(1)	Rule 8.4(a)
DR 1-102(A)(2)	Rule 8.4(a)
DR 1-102(A)(3)	Rule 8.4(b)
DR 1-102(A)(4)	Rule 8.4(c)
DR 1-102(A)(5)	Rules 8.4(d), (e), & (f)
DR 1-102(A)(6)	Rules 1.8(j) & 8.4(h)
DR 1-102(B)	Rule 8.4(g)
DR 1-103	
Disclosure of Information to Authorities	Rule 8.3
DR 1-104	
Disclosure of Information to the Clients	Rule 1.4(c)
CANON 2	
DR 2-101	
Publicity	Rules 7.1, 7.2(a), (c), (d), & (e), & 7.3(a), (c), (d), & (e)
DR 2-102	
Professional Notices, Letterheads, and Offices	Rules 7.5 & 8.2(b)
DR 2-103	
Recommendations of Professional Employment	Rules 7.2 & 7.3(f)

DR 2-104	
Suggestion of Need of Legal Services	
DR 2-104(A)	Rule 7.3
DR 2-104(B)	Rule 7.2
DR 2-105	
Limitation of Practice	Rule 7.4
DR 2-106	
Fees for Legal Services	
DR 2-106(A) & (B)	Rule 1.5(a)
DR 2-106(C)	Rule 1.5(d)
DR 2-107	
Division of Fees Among Lawyers	Rules 1.5(e) & (f)
DR 2-108	
Agreements Restricting the Practice of a Lawyer	Rule 5.6
DR 2-109	
Acceptance of Employment	None
DR 2-110	
Withdrawal from Employment	Rule 1.16
DR 2-111	
Sale of Law Practice	Rule 1.17
CANON 3	
DR 3-101	
Aiding Unauthorized Practice of Law	Rule 5.5
DR 3-102	
Dividing Legal Fees with a Nonlawyer	Rule 5.4(a)
DR 3-103	
Forming a Partnership with a Nonlawyer	Rule 5.4(b)
CANON 4	
DR 4-101	
Preservation of Confidences and Secrets of a Client	
DR 4-101(A), (B), & (C)(1)	Rule 1.6(a)
DR 4-101(B)	Rule 1.9

DR 4-101(B)(2)	Rule 1.8(b)
DR 4-101(C)(2)	Rule 1.6(b)(5)
DR 4-101(C)(3)	Rule 1.6(b)(1)
DR 4-101(C)(4)	Rule 1.6(b)(4)
DR 4-101(D)	Rule 5.3

CANON 5

DR 5-101

Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment

DR 5-101(A)(1)	Rule 1.7
DR 5-101(A)(2) & (3)	Rule 1.8(c)
DR 5-101(B)	Rule 3.7

DR 5-102

Withdrawal as Counsel When the Lawyer Becomes a Witness	Rule 3.7

DR 5-103

Avoiding Acquisition of Interest in Litigation

DR 5-103(A)	Rule 1.8(i)
DR 5-103(B)	Rule 1.8(e)

DR 5-104

Limiting Business Relations with a Client

DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)

DR 5-105

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer

DR 5-105(A), (B), & (C)	Rule 1.7
DR 5-105(D)	Rules 1.8(k) & 1.10

DR 5-106

Settling Similar Claims of Clients	Rule 1.8(g)

DR 5-107
Avoiding Influence by Others Than the Client

DR 5-107(A) & (B)	Rule 1.8(f)
DR 5-107(B) & (C)	Rule 5.4

CANON 6
DR 6-101
Failing to Act Competently

DR 6-101(A)(1) & (2)	Rule 1.1
DR 6-101(A)(3)	Rule 1.3

DR 6-102
Limiting Liability to Client — Rule 1.8(h)

CANON 7
DR 7-101
Representing a Client Zealously

DR 7-101(A)(1)	Rules 1.3 & 3.2

DR 7-102
Representing a Client Within the Bounds of the Law

DR 7-102(A)(1)	Rules 3.3(a)(3) & 4.4(a)
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3), (4), & (5)	Rules 3.3 & 4.1
DR 7-102(A)(4) & (6)	Rule 3.3(a)
DR 7-102(A)(6)	Rule 3.4(b)
DR 7-102(A)(7)	Rule 1.2(d)
DR 7-102(A)(8)	Rule 3.4(a)
DR 7-102(B)	Rules 1.6(b)(2), 3.3(b), & 4.1

DR 7-103
Performing the Duty of Public Prosecutor or Other Government Lawyer — Rule 3.8

DR 7-104
Communicating With One of Adverse Interest

DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3

DR 7-105
Threatening Criminal Prosecution — Rule 1.2(e)

DR 7-106	
Trial Conduct	
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a)
DR 7-106(C)(1) & (4)	Rule 3.4(e)
DR 7-106(C)(2)	Rule 4.4(a)
DR 7-106(C)(7)	Rule 3.4(d)
DR 7-107	
Trial Publicity	Rule 3.6
DR 7-108	
Communication With or Investigation of Jurors	
DR 7-108(A) & (B)	Rule 3.5(a)
DR 7-108(D) & (E)	Rule 4.4(a)
DR 7-108(G)	Rule 3.5(b)
DR 7-109	
Contact With Witnesses	
DR 7-109(A)	Rule 3.4(a)
DR 7-109(C)	Rule 3.4(b)
DR 7-110	
Contact With Officials	Rule 3.5
DR 7-111	
Confidential Information	None
CANON 8	
DR 8-101	
Action as a Public Official	None
DR 8-102	
Statements Concerning Judges and Other Adjudicatory Officers	Rule 8.2(a)
CANON 9	
DR 9-101	
Avoiding Even the Appearance of Impropriety	
DR 9-101(A)	Rule 1.12
DR 9-101(B)	Rules 1.11 & 1.12
DR 9-101(C)	Rule 8.4(e)

DR 9-102 Preserving Identity of Funds and Property of a Client	Rule 1.15
Definitions	Rule 1.0

OHIO ETHICAL CONSIDERATIONS INCORPORATED IN MODEL RULES

EC 2-18 Agreement with Client with Respect to Fees	Rules 1.5(b) & (c)
EC 2-19 Contingent Fee Arrangements	Rule 1.5(d)(1)
EC 2-25 – 2-32 Acceptance and Retention of Employment	Rule 6.2
EC 4-1 Confidences and Secrets	Rule 1.18
EC 4-2 Confidences and Secrets	Rule 5.3
EC 5-18 Typical Potentially Different Interests	Rule 1.13
EC 5-19 Organizational Clients	Rule 1.13
EC 5-20 Right of Client to Determine Actual Conflict	Rule 2.4
EC 5-21 Arbitrator or Mediator	Rule 1.12
EC 5-24 Attorney Employed by One to Represent Another	Rule 1.13
EC 7-4 Construction of Law; Frivolous Conduct	Rule 1.2(d)
EC 7-7 Decision-Making Authority	Rule 1.2(a)

EC 7-8	
Informing Client of Relevant Considerations; Withdrawal from Employment	Rules 1.2(a), 1.4(a) & (b), and 2.1
EC 7-10	
Zealous Advocacy	Rule 1.2(a)
EC 7-11	
Varying Responsibilities Dependent Upon Client	Rule 1.14
EC 7-12	
Incompetent Client	Rule 1.14
EC 7-13	
Responsibility of Prosecutor	Rule 3.8
EC 7-24	
Expression by Attorney of Personal Opinion in Court	Rule 3.4
EC 7-25	
Adherence to Procedural Rules	Rules 3.1 & 3.4
EC 7-26	
False Testimony	Rule 3.4
EC 7-27	
Suppression of Evidence	**Rule 3.4**
EC 7-28	
Fees to Witnesses	**Rule 3.4**
EC 9-2	
Promoting Public Confidence in Legal Profession	**Rules 1.4(a) & (b)**

APPENDIX D

Individuals and Organizations that Commented on Proposed Rule Amendments

The Task Force on Rules of Professional Conduct expresses its gratitude to the following individuals and organizations that commented on draft rules that were published for comment in January, June and November 2004:

Association of Corporate Counsel
Bret Adams, Esq.
Mark Aultman, Esq.
Jason Blackford, Esq.
Kenneth A. Bravo, Esq.
Cincinnati Bar Association Ethics & Professional Responsibility Committee
Cleveland Bar Association
Shirley Cochran, Esq.
Columbus Bar Association
Cuyahoga County Bar Association
William Bruce Davis, Esq.
Dispute Resolution Section, Supreme Court of Ohio
Kenneth R. Donchatz, Esq.
Raymond G. Esch, Esq.
Harry J. Finke, Esq.
Catherine Cordial Geyer, Esq.
Professor Arthur F. Greenbaum
Thomas R. Houlihan, Esq.
Harlan Karp, Esq.
Max Kravitz, Esq.
Richard A. Magnus, Esq.
Sara K. Menefee
John T. Meredith, Esq.
Medina County Bar Association Certified Grievance Committee
Ohio Academy of Trial Lawyers
Ohio Association of Civil Trial Attorneys
Ohio Association of Magistrates
Ohio Legal Assistance Foundation
Ohio Prosecuting Attorneys Association
Ohio State Bar Association, Legal Ethics & Professional Conduct Committee
James T. O'Reilly, Esq.

Raymond Rundelli, Esq.
Professor Jack Sahl
Dean Lloyd Snyder
Patricia Walker, Esq.

The Supreme Court *of* Ohio

Attorney Services Division
65 South Front Street
Columbus, Ohio 43215-3431
614.387.9520 ■ 800.826.9010