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Educational Handouts/Resources

KMK Law Annual Legal Update Seminar
Thursday, December 7, 2023

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Top Cases Every Attorney Should Know This Year

2023 KMK Law Legal Update Seminar

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3. ***Morgan v. Sundance, 596 U.S. 411 (2022)***

4. ***In re LTL Mgmt., LLC, 64 F.4th 84 (3rd Cir. 2023)***

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6. ***Consumer Financial Protection Bureau v. Brown, 69 F.4th 1321 (11th Cir. 2023)***

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9. ***Carter v. Transp. Workers Union of Am., Loc. 556, 2023 U.S. Dist. LEXIS 136623, _ F.Supp.3d _ (N.D. Tex., Aug. 7, 2023)***

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United States v. Markwood

United States Court of Appeals for the Sixth Circuit

September 19, 1994, Argued ; March 17, 1995, Decided ; March 17, 1995, Filed

No. 93-2059

Reporter
48 F.3d 969 *; 1995 U.S. App. LEXIS 5291 **; 1995 FED App. 0097P (6th Cir.) ***; 31 Fed. R. Serv. 3d (Callaghan) 756; 40 Cont. Cas. Fed. (CCH) P76,785

UNITED STATES OF AMERICA, Petitioner-Appellee, v. RONALD P. MARKWOOD, Respondent-Appellant.

Prior History: [1]** ON APPEAL from the United States District Court for the Eastern District of Michigan. District No. 93-72162. Gerald E. Rosen, District Judge.

Core Terms

district court, false claim, subpoena, discovery, administrative subpoena, bid, excise tax, documents, enforcement proceeding, conflicting interest, trucks, order to show cause, bad faith, proceedings, antitrust, argues, grand jury, summons, investigate, abused, legislative history, improper purpose, price adjustment, ex parte, resisting, government attorney, believes, parties, motive, cases

Case Summary

Procedural Posture

Respondent, the winning bidder on a government contract, appealed from an order of the United States District Court for the Eastern District of Michigan, granting a petition by petitioner, the United States, to enforce a civil investigative demand under the False Claims Act, *31 U.S.C.S. §§ 3729-33*.

Overview

Petitioner United States invited bids to supply Army trucks. Respondent submitted the winning bid. Respondent then claimed that required federal excise taxes had not been included. After looking into the matter, petitioner issued a civil investigative demand (CID) under the False Claims Act, *31 U.S.C.S. §§ 3729-33*. Respondent did not appear for a deposition after being served. Petitioner then filed petition for enforcement. The petition was granted, and respondent appealed, arguing a due process violation because he was not timely served. Respondent also argued that the petition was not properly granted. The court affirmed, holding that respondent had ample time to respond since the hearing was two months after he had been served. The court further held that the CID was an administrative subpoena, and the petition was properly granted because the subpoena complied with *31 U.S.C.S. § 3733*, sought relevant testimony, sought information not in the government agency's possession, and was not an abuse of process.

Outcome
The court affirmed, holding that the petition was timely served and the civil investigative demand satisfied a statutory purpose.

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN1[] **Standards of Review, Plain Error**

The issues the court may review on appeal are limited to those first presented to and considered by the district court, unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or correct clear errors or omissions.

Administrative Law > ... > Scope of

Authority > Methods of Investigation > Subpoenas

Civil Procedure > ... > Methods of Discovery > Interrogatories > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN2 **Methods of Investigation, Subpoenas**

Under 31 U.S.C.S. § 3733(a)(1), a false claims civil investigation demand may be issued to any person having information relevant to a false claims law investigation. That person may be required to give oral testimony, answer written interrogatories, produce documents, or all of the above.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN3 **Methods of Investigation, Subpoenas**

A false claims civil investigation demand is a subpoena issued by an administrative agency.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN4 **Methods of Investigation, Subpoenas**

A district court's role in the enforcement of an administrative subpoena is a limited one. The first task in determining whether to grant a petition for enforcement is to decide whether the agency has met the statutory requirements pertaining to the issuance and enforcement of the subpoena. Next, the court must consider whether the agency has satisfied or complied with the judicially-created standards for enforcement of the subpoena.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN5 **Judicial Review, Standards of Review**

A federal court's adjudicatory task regarding the enforcement of an agency investigatory tool is limited. It is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. The gist of the protection is that the disclosure sought shall not be unreasonable.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN6 **Methods of Investigation, Subpoenas**

An agency need show only that the investigation had a legitimate purpose, that its inquiry may be relevant to that purpose, that it did not already have the information and that it otherwise followed any statutory requirements.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN7 **Methods of Investigation, Subpoenas**

An agency investigatory tool might be resisted if the agency acted in "bad faith."

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN8 **Judicial Review, Standards of Review**

Bad faith connotes a conscious decision by an agency to pursue a groundless allegation without hope of proving that allegation. In contrast, an agency could be found to be abusing the court's process if it vigorously pursued a charge because of the influence of a powerful third party without consciously and objectively

evaluating the charge.

Administrative Law > Agency Investigations > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Administrative Law > Judicial Review > Standards of Review > General Overview

HN9 **Administrative Law, Agency Investigations**

A court's inquiry into the enforcement of an administrative subpoena is limited to two questions: (1) whether the investigation is for a proper statutory purpose, and (2) whether the documents the agency seeks are relevant to the investigation.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN10 **Methods of Investigation, Subpoenas**

A district court must enforce a federal agency's investigative subpoena if the information sought is reasonably relevant and not unduly burdensome to produce.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN11 **Methods of Investigation, Subpoenas**

A false claims civil investigation demand is an administrative subpoena and should be enforced if the inquiry is within the authority of the agency, the demand is not too indefinite and the information is reasonably relevant to the agency's inquiry. The court must determine whether the court's process would or would not be abused by enforcement.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN12 **Methods of Investigation, Subpoenas**

Although the false claims civil investigation demand is not directly related to industry regulation, the need for expeditious enforcement is the same.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN13 **Methods of Investigation, Subpoenas**

31 U.S.C.S. § 3733(j)(6) states that the Federal Rules of Civil Procedure apply to civil investigation demand (CID) enforcement proceedings, unless their application is inconsistent with the false claims CID statute.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN14 **Methods of Investigation, Subpoenas**

31 U.S.C.S. § 3733(j)(1) requires that a petition for enforcement be served on the person resisting the civil investigation demand.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN15 **Standards of Review, Clearly Erroneous Review**

Fed. R. Civ. P. 61 requires reversal only if any error made by the district court affected the substantial rights of a party, and then only if the party is prejudiced by the error.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Disclosure > Mandatory Disclosures

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN16 **Discovery, Methods of Discovery**

Fed. R. Civ. P. 26(a)(1) and *26(b)* do not give a party the right to unlimited discovery. Both rules provide that a court may limit information to be disclosed and may limit the scope of discovery.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

HN17 **Methods of Investigation, Subpoenas**

See *Fed. R. Civ. P. 81(a)(3)*.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN18 **Methods of Investigation, Subpoenas**

The scope of discovery in the context of an administrative subpoena enforcement proceeding is commensurate with the nature of the administrative subpoena itself.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN19 **Methods of Investigation, Subpoenas**

A defendant is not entitled to engage in counter-discovery to find grounds for resisting a subpoena.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > Civil Litigants

Criminal Law & Procedure > ... > Fraud > Fraud Against the Government > General Overview

Criminal Law & Procedure > ... > Grand Juries > Secrecy > General Overview

Criminal Law & Procedure > ... > Secrecy > Disclosure > General Overview

Criminal Law & Procedure > ... > Standards > Particularized Need Standard > General Overview

HN20 **Procedural Due Process, Scope of Protection**

Fed. R. Crim. P. 6(e) prohibits the disclosure of grand jury materials for civil use without a court order. If the government desires to obtain grand jury materials for civil use, it must make a showing of a particularized need for the materials. *Rule 6(e)* grants a very substantial protection against abuse of the grand jury proceedings by the government in order to obtain information for civil investigations.

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > General Overview

HN21 **Fraud Against the Government, False Claims**

The False Claims Act, *31 U.S.C.S. §§ 3729-33*, does not require the Department of Justice to gather information from other agencies before conducting its own investigation.

Civil Procedure > Attorneys > General Overview

Governments > Federal Government > Employees & Officials

Legal Ethics > Client Relations > Conflicts of

Interest

HN22[] **Civil Procedure, Attorneys**

A government attorney working on a civil matter who has been involved in a prior civil investigation with another agency concerning the same facts is working for the same client, the United States, however, that government attorney is not automatically insulated from having a conflict of interest even though he or she is working on civil matters only.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Self-Incrimination Privilege

Criminal Law & Procedure > ... > Self-Incrimination Privilege > Immunity > General Overview

Evidence > Privileges > Self-Incrimination Privilege > Elements

Evidence > Privileges > Self-Incrimination Privilege > General Overview

HN23[] **Procedural Due Process, Self-Incrimination Privilege**

31 U.S.C.S. § 3733(h)(7)(B) merely allows, and does not require, the government to grant immunity to any person refusing to give testimony on grounds of self-incrimination.

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For RONALD P. MARKWOOD, Respondent - Appellant: Nancy Luque, ARGUED, BRIEFED, Dombroff & Gilmore, Washington, DC.

Judges: Before: BROWN, MARTIN, and BOGGS, Circuit Judges.

Opinion by: BOYCE F. MARTIN, JR.

Opinion

[*1] [*972]** BOYCE F. MARTIN, JR., Circuit Judge. The dispute that gives rise to this appeal involves a disagreement over whether or not Arveco, Inc. included the requisite amount of federal excise tax when it bid on a billion dollar contract to supply the Army with trucks. We are charged with determining under the arcanum of federal procurement and false claims laws whether an administrative subpoena was properly issued to begin an investigation of a possible false **[***2]** claim. Agreeing with the district court that it was properly issued, we **AFFIRM**.

On May 1, 1985, a division of the United States Department of Defense, the Tank Automotive Command of the United States Army, issued a two-step invitation for bids to supply the Army with 15,218 five-ton trucks. The bid was to cover delivery over five years with an option to supply an additional 15,218 trucks of the same size. The party offering its bid to the Tank Command is not clearly identified in the materials submitted to this Court, and most of the bid solicitation documents **[**2]** are illegible. The offering party appears to be Arveco, Inc., a joint venture with Harsco, Incorporated and one of Harsco's unincorporated subsidiaries, BMY Wheeled Vehicles Division, and General Automotive Corporation, Inc., all of which we will refer to as Arveco. [1] Ronald Markwood, the now named party to this appeal, was President of Arveco on the date it submitted its bid and, as of February 9, 1988, Markwood was Vice President and General Manager of its BMY Wheeled Vehicle Division. Markwood was directly in charge of preparing and submitting the bids on the trucks, and signed the bid offer as President of Arveco.

[3]** The bids to provide the Army with trucks were opened on April 14, 1986, and the bids for the trucks were to include an amount for federal excise tax. [2] In a

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[1] According to a grand jury subpoena concerning the same facts, the offering party (Arveco) came into being as follows: "In January 1985, Harsco Corporation entered into an agreement with General Automotive Corporation (GAC) which resulted in an entity known at the time as Arveco, and which later became BMY, for the purpose of bidding on a contract for the sale of 5-ton trucks to the U.S. Army Tank Automotive Command." J.A. at 236.

[2] "B.O.1.1. Retail federal excise tax (RFET) is applicable to those vehicle Contract Line Item Numbers (CLINs) where indicated in this Section B. and the bid prices therefore include

departure from common sense, Congress has decreed that manufacturers of certain vehicles weighing over 33,000 **[***3]** pounds must pay a federal excise tax for road maintenance even though the United States is the purchaser. *26 U.S.C. § 4051(a)(1)*. In any event, whether the federal excise tax clause (paragraph B.O.1.1) in the government's bid solicitation document required bidders to include federal excise tax for trucks delivered during the entire term of the contract, or only for trucks delivered prior to October 1, 1988 (the scheduled expiration date for the tax), was a subject of dispute between Arveco and the Tank Command just prior to the due date for the submission of bids.

[4]** On the morning bids were to be submitted, April 14, 1986, Arveco asked the purchasing officer for the United States if it should include the excise tax on trucks to be delivered after October 1, 1988, because the statute extending the excise tax was due to expire on that date. However, the statute had been regularly extended since its enactment in 1917. Anticipating the extension of the tax, the purchasing officer apparently told Arveco to include the tax on all the trucks, even those delivered after September 30, 1988. Arveco succeeded in placing the winning bid, but its bid was some ninety-seven million dollars less than the next lowest bid. On April 23, 1986, Arveco informed the Tank Command that it had not included the taxes as instructed because, as stated in its May 14 letter to the Tank Command, it believed it should include only excise tax as it considered to be "payable." On April 28, Arveco submitted a letter to the Tank Command expressing its intention to certify that its bid had *not* included an amount to cover any extension of the excise tax. However, on the same day, Arveco called the Tank Command's contract specialist and said it would rescind its April 28 letter. **[**5]** Arveco was then awarded the contract on May 14. Arveco changed its position again and informed the Tank Command that it had not included an **[*973]** amount for an extension of the federal excise tax. "Since the [excise tax] expires on October 1, 1988, we feel no tax is payable after that date and only payable taxes are included in. . .our bid." (Letter of May 14, 1986 from Ronald P. Markwood, President of Arveco, to Mr. Sheill at the Tank Command).

[*4]** At this point, the record goes silent as to what happened regarding the contract for the trucks until February 9, 1988, when Arveco requested in writing a contract price adjustment of $ 47,386,980 to reimburse Arveco for the tax on trucks to be delivered after October 1, 1988. Arveco submitted its price adjustment claim under the Contract Disputes Act, 41 U.S.C. §§ 604-613 (1988) ("Section 604" claim). Arveco submitted its price adjustment claim after the excise tax was extended by Congress in March 1987. Highway Revenue Act of 1987, P.L. 100-17, Sec. 502(a)(2), 101 Stat. 256 (changing the expiration date for this federal excise tax from October 1, 1988 to October 1, 1993). In submitting its price adjustment claim, Arveco stated that it had omitted **[**6]** the excise tax on trucks to be delivered after October 1, 1988. Arveco's claim was at first denied by the contracting officer, but on appeal from the contracting officer's decision, the price adjustment was granted by the Armed Services Board of Contract Appeals.

In deciding to sustain Arveco's price adjustment appeal, the Armed Services Board of Contract Appeals did not have before it an important document. According to a memorandum dated April 18, 1986 and prepared by John Witmer, Harsco's Tax Manager, the bid included excise tax for all trucks to be delivered under the contract:

> The bid specifications require that the bid proposal include federal excise tax. *BMY's bid included federal excise tax on all models to be produced during the term of the contract despite the fact that the excise tax is scheduled to expire September 30, 1988*.
>
> It is possible IRS may question the gross vehicle weight of those trucks BMY considers to have a gross weight of 33,000 pounds or less. Should IRS prevail, we would owe excise tax on those vehicles. *Please note that the bid price included the excise tax* and the only additional cost to us would be any interest on the tax **[**7]** due.

("Witmer memorandum") (emphasis added). Partly based on this new evidence, the Army has moved for **[***5]** reconsideration and to reopen the Section 604 proceedings, but the Armed Services Board of Contract Appeals had not decided to reopen the proceedings as of July 1, 1993.

Into this labyrinth Arveco and the United States have led three federal jurisdictions without a mention of the trucks that were ordered. We assume they were delivered. The plot thickens when, on February 19, 1993, a federal grand jury in the Eastern District of Michigan issued a subpoena to Markwood to appear and produce documents. Markwood provided documents on April 6,

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such tax."

and testified before the grand jury on September 28, after the court issued an order compelling his testimony and granting him immunity pursuant to 18 U.S.C. § 6002 (1988). The grand jury obtained corporate documents, including the Witmer memorandum, indicating that Arveco did in fact include all excise tax in its initial bid. The Army obtained an order allowing disclosure of these documents, pursuant to *Federal Rule of Criminal Procedure 6(e)*. These documents were also provided to Lt. Col. Phillips, an Army Judge Advocate General officer **[**8]** assigned to the Department of Justice Civil Division. [3] Markwood did not argue before **[***6]** **[*974]** the district court, nor to the judge presiding over the grand jury proceeding, that Lt. Col. Phillips's access to the documents violated *Rule 6(e)*. Instead, Markwood uses this alleged violation to support his argument before this Court that Phillips has a conflict of interest and that the subpoena was issued for an improper purpose. According to Markwood, this information, particularly the Witmer memorandum, created the suspicion that Arveco had filed a false request for a contract adjustment.

[9]** The Arveco documents provided the Department of Justice with information to issue a civil investigative demand ("CID") [4] to Markwood in its False Claims Act investigation. 31 U.S.C. §§ 3729-33 (1988). After being served with the CID, Markwood provided documents, but refused to testify because the ongoing grand jury investigation implicated his Fifth Amendment privilege. Markwood did not appear for his scheduled deposition. The Department of Justice informed him that it viewed his failure to appear as a failure to comply with the CID. Also, the Army used Markwood's refusal to appear to support its motion to reopen and for reconsideration of the Section 604 price adjustment claim before the Armed Services Board of Contract Appeals.

On May 24, 1993, the Department of Justice **[**10]** filed a petition to enforce the CID and requested an Order to Show Cause. 31 U.S.C. §§ 3733(j)(1) and (j)(5). On June 1, the district court issued an Order to Show Cause, requiring Markwood to appear for a hearing, and provided that Markwood could not serve or file any discovery requests **[***7]** without further leave of court. On June 15, Markwood filed a Motion to Vacate the Order to Show Cause arguing that the district court proceeded in an *ex parte* manner because the petition for enforcement was not served on Markwood at the time of filing. The district court declined to rule on this motion until the show cause hearing. On June 29, the district court conducted the show cause hearing on the petition for enforcement. The parties submitted briefs and argued their positions before the district court. The district court ordered Markwood to comply with the CID, denied Markwood's motion for a temporary stay of the enforcement of the CID, denied his motion to vacate the order to show cause, and ordered the documents in this proceeding to be unsealed. [5] Markwood appeared for his deposition on October 5, 1993, and refused to answer most of Phillips's questions, invoking his Fifth Amendment privilege. **[**11]** [6] Markwood now requests that the parties be returned to their status quo before the enforcement of the false claims CID, meaning that the government should be ordered to destroy any record of his deposition, as well as any related notes, and

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[3] Whether Lt. Col. Phillips's access to these memoranda violated ***Fed. R. Crim. P. 6(e)*** was not an issue in this case. However, in cases arising out of these facts, two courts have determined that Lt. Col. Phillips did not violate ***Rule 6(e)***. In *United States v. Seitz*, 1993 WL 501817, at * 6 (S.D. Ohio Aug. 26, 1993), the district court found that

> Lt. Col. Phillips has executed a second supplemental declaration stating categorically that although the Army's counsel discussed the existence of the Witmer and Seitz memoranda with him, he did not gain access to them through the Army. Instead, the Civil Division sought and received a *Rule 6(e)* Order from Judge Smith January 25, 1993.

In another case involving the same facts, the Third Circuit implicitly determined that Lt. Col. Phillips did not have improper access to grand jury materials for the additional reason that Harsco voluntarily shared these memoranda with the Civil Division. ***United States v. Witmer, 30 F.3d 1489 (3d Cir. 1994)***, *aff'g*, 835 F. Supp. 208, 216 (M.D. Pa., Oct. 8, 1993) ("*Witmer II*") (*Witmer II* is a reconsideration of Witmer I, 835 F. Supp. 201 (M.D. Pa., Sept. 9, 1993)). In both *Witmer II* and *Seitz*, the courts determined that the appellants should have raised their ***Rule 6(e)*** objections before the judge presiding over the grand jury proceedings.

[4] Although here we have used the term "CID" without explanation, we believe it is a type of administrative subpoena. Because everyone involved in this litigation uses the term, we will use CID and administrative subpoena interchangeably.

[5] On September 16, 1993, a panel of this Court granted Markwood's motion to seal the pleadings filed in this Court. However, this panel unsealed all documents in this matter at oral argument.

[6] 31 U.S.C. § 3733(g)(7) provides that a person giving oral testimony in compliance with a false claims CID may not assert his Fifth Amendment privilege against self-incrimination generally, but only on a question-by-question basis.

furthermore should be forbidden from using any information gained from his deposition.

HN1[] The issues we may review on appeal are limited to those first presented to and considered by the district court, unless review of an issue is necessary in order to prevent manifest injustice, promote procedural efficiency, or correct clear errors or omissions. **[**12]** Brown v. Crowe, 963 F.2d 895, 898 (6th Cir. 1992). Although Markwood argued to the district court that the petition for enforcement **[***8]** was *ex parte*, he did not raise the separate issue, which he now urges on appeal, of whether the government's Request for an Order to Show Cause was *ex parte.* Therefore, we will not consider this issue. **[*975]** We do consider Markwood's second new argument on appeal, questioning whether the district court correctly determined that a false claims CID is an administrative subpoena. Markwood could not have anticipated the legal reasoning the district court would use in its opinion, and we must review whether the district court correctly applied the case law regarding administrative subpoenas to this case. Thus, Markwood's second argument comes within an exception to the general rule enunciated in *Brown. Id.*

The only issue in this case is whether the district court properly granted the petition for enforcement of the false claims CID. The district court was first called upon to decide whether the Department of Justice complied with the statute empowering it to issue the CID. The district court also had to apply the judicially-created standards for **[**13]** enforcement of administrative subpoenas and apply them to the facts of the case at issue. We review, therefore, whether the district properly determined that the false claims CID and the petition for enforcement complied with 31 U.S.C. § 3733 and other judicially-created standards for enforcement of **[***9]** administrative subpoenas. We review de novo the district court's interpretation and application of Section 3733 [7] and the case law regarding enforcement of administrative subpoenas. United States v. Braggs, 23 F.3d 1047, 1049 (6th Cir.), *cert. denied*, *130 L. Ed. 2d 191, 115 S. Ct. 274 (1994)*.

[14]** As a preliminary matter, we do not agree with Markwood's suggestion that a false claims CID cannot be enforced like other administrative subpoenas. Markwood contends that a CID is not an administrative subpoena [8] **[**15]** because it may be issued only under the terms of 31 U.S.C. § 3733, and not under the less detailed "general administrative subpoena" statute. [9] Also, Markwood believes that Congress, by making false claims CIDs subject to the Federal Rules of Civil Procedure, intended false claims CIDs to be enforced differently from other administrative subpoenas. [10] Finally, Markwood argues that, because a false claims CID is not part of a general regulatory scheme, parties receiving a CID are not fairly forewarned that information may be required from them. **[***10]** Markwood also insists that, because a false claims CID is not part of a specific regulatory scheme, it may not be enforced summarily, and certainly not without the right to trial-type discovery prior to enforcement.

First, the CID Markwood received is an administrative subpoena partly because the Department of Justice is an executive administrative agency. 5 U.S.C. §§ 101,

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[7] For questions of statutory interpretation, it is clear that the starting point for our inquiry is the language used by Congress. United States v. Hans, 921 F.2d 81, 82 (6th Cir. 1990). *See also* Estate of Cowart v. Nicklos Drilling Co., 120 L. Ed. 2d 379, 112 S. Ct. 2589, 2594 (1992) (quoting Demarest v. Manspeaker, 498 U.S. 184, 190, 112 L. Ed. 2d 608, 111 S. Ct. 599 (1991)). "When a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Id.*; *see also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (observing that "The plain meaning of legislation should be conclusive, except in 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of the drafters.'") (citation omitted). However, when there is an ambiguous term in a statute, or when a term is undefined or its meaning unclear from the context of the statute, it is our duty to examine the legislative history in order to render an interpretation that gives effect to Congress's intent. In re Vause, 886 F.2d 794, 801 (6th Cir. 1989).

[8] However, later in his brief, Markwood seems to concede that a false claims CID is an administrative subpoena by urging this Court to accept the proposition that an administrative subpoena (like this one) is subject to *de novo* review, citing McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 493, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991). Furthermore, *McNary* is inapposite. *McNary* does not concern judicial enforcement of an administrative subpoena, but, in part, concerns standards of judicial review of administrative agency determinations of "Special Agricultural Worker" status under the Immigration Reform and Control Act of 1986 and the Immigration and Nationality Act.

[9] Inspector General Act of 1978, 5 U.S.C. app. 3 ***§ 6(a)(4)*** (1988).

[10] However, the Federal Rules of Civil Procedure do not apply if their application is inconsistent with Section 3733. 31 U.S.C. § 3733(j)(6).

105, 500, **[*976]** 551 (1988). Further, Congress has given the Department of Justice a particular type of investigative tool, the false claims civil investigative demand, to enable it to investigate whether there is a basis for remedying a false claim made against the United States. 31 U.S.C. § 3733. **HN2**[↑] A false claims CID may be issued to "any person" having information "relevant to a false claims law investigation." 31 U.S.C. 3733(a)(1). That person may be required to give oral testimony, answer written interrogatories, produce documents, or all of the above. *Id*. As Black's Law Dictionary states, a subpoena is simply "a command to appear at a certain time and place to give testimony upon a certain matter" and a subpoena duces tecum **[**16]** "requires production of books, papers and other things." **Black's Law Dictionary** 1426 (6th ed. 1990). Although Congress has chosen to call this subpoena by another name, **HN3**[↑] a false claims CID is, at its essence, a subpoena issued by an administrative agency. Furthermore, the legislative history regarding the false claims CID bears out this conclusion.

Congress crafted the false claims CID after the antitrust CID statute and explicitly made the case law concerning antitrust CIDs applicable to false claims CIDs. As both parties here point out, Congress intended the false claims CID to function analogously to the antitrust CID. 15 U.S.C. §§ 1311-14. It is clear from the legislative history that Congress viewed an antitrust CID as a type of administrative subpoena, and by analogy and legislative intent, also viewed the false claims CID similarly. The Senate Committee on the Judiciary explained that "the CID authority granted by [the False Claims Amendments Act of 1986] is identical to that available to the Justice **[***11]** Department's Antitrust Division [under the Hart-Scott-Rodino Antitrust Improvements Act of 1976]. . .and the Committee intends that the legislative history and case law **[**17]** interpreting that statute [15 U.S.C. §§ 1311-14], fully apply to this bill." False Claims Amendments Act of 1986, Senate Committee on the Judiciary, S. Rep. No. 345, 99th Cong., 2d Sess. 33 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5298; *see also id*. at 5280-81. In its report on the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the House Committee on the Judiciary stated that an antitrust CID is a "special kind of civil subpoena," H.R. Rep. No. 1343, 94th Cong., 2d Sess. 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2596, 2596, and "like any other civil administrative subpoena, [an antitrust] CID has no compulsory force unless and until a federal judge upholds its legality, by issuing an order enforcing compliance." *Id. at 2607*. Thus, like its predecessor the antitrust CID, Congress considered the false claims CID to be an administrative subpoena. [11] While consistency of terminology would make our work easier, as Ralph Waldo Emerson said, "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." [12] Finally, at least two other Circuits have determined that civil investigative demands are administrative **[**18]** subpoenas. *FTC v. Invention Submission Corp., 296 U.S. App. D.C. 124, 965 F.2d 1086, 1087 (D.C. Cir. 1992)*, *cert. denied*, *122 L. Ed. 2d 654, 113 S. Ct. 1255 (1993)* (FTC civil investigative **[***12]** demand); *Witmer II, 835 F. Supp. at 212*, *aff'd*, *30 F.3d 1489 (3d Cir. 1994)* (False Claims Act CID).

Having decided this issue, it must be emphasized that **HN4**[↑] a district court's role in the enforcement of an administrative subpoena **[**19]** is a limited one. *See Sandsend Fin. Cons. v. Federal Home Loan Bank Bd., 878 F.2d 875, 879 (5th Cir. 1989)* (citing *FTC v. Texaco, 180 U.S. App. D.C. 390, 555 F.2d 862, 872* (D.C. Cir.) (holding that the role of a court in reviewing an administrative subpoena is "strictly limited"), *cert. denied*, *431 U.S. 974 (1977)*). A district court's first task in determining whether to grant a petition for enforcement is to decide **[*977]** whether the agency has met the statutory requirements pertaining to the issuance and enforcement of the subpoena. Next, the court must consider whether the agency has satisfied or complied with the judicially-created standards for enforcement of the subpoena.

In the 1940s, the Supreme Court began articulating the current judicial standards for administrative subpoena enforcement. In a show of deference to the statutory authority of administrative agencies to perform investigative functions, the Supreme Court in *Endicott Johnson Corp. v. Perkins* determined that the district court should have enforced the subpoena where "the evidence sought by the subpoena was not plainly

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[11] Also, in discussing the 1976 amendments to the 1962 Antitrust Civil Process Act, Congress cited with approval an Eighth Circuit case, *Petition of Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963)*, *aff'd*, *325 F.2d 1018 (8th Cir. 1964)*, wherein that Court analogized an antitrust CID to the administrative subpoenas issued by the Secretary of Labor and the Federal Trade Commission and applied the *Oklahoma Press* and *Morton Salt* standards for enforcement. 1976 U.S.C.C.A.N. at 2605 n. 18.

[12] Essays: First Series (1841) (quoted by John Bartlett, **Bartlett's Familiar Quotations** 431 (16th ed. 1992)).

incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties." 317 U.S. 501, **[**20]** 509, 87 L. Ed. 424, 63 S. Ct. 339 (1943). In *Oklahoma Press Publishing Co. v. Walling*, the Court extended this principle of *Endicott Johnson* to the enforcement of a subpoena duces tecum issued by the Wage and Hour Administrator of the United States Department of Labor to a publishing company, pursuant to the Fair Labor Standards Act. 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946). *Oklahoma Press* held that Fourth Amendment concerns are satisfied if the district court determined that the agency's demand for production of documents is

> authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry. Beyond this the requirement of **[***13]** reasonableness, including particularity in "describing the place to be searched, and the person or things to be seized". . .comes down to [whether] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily. . .this cannot be reduced to [a] formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

Id. at 209.

In the 1950s, in a case involving the Federal **[**21]** Trade Commission's power to obtain information through orders requiring salt manufacturers to file certain reports, the Supreme Court further refined and applied the principles of *Endicott Johnson* and *Oklahoma Press*. The Supreme Court, in United States v. Morton Salt Co., 338 U.S. 632, 94 L. Ed. 401, 70 S. Ct. 357 (1950), examined the respective functions and powers of the Federal Trade Commission and the federal courts where Congress had given an agency the power to investigate, including the power to require reports. The Court stated:

> The only power that is involved here is the power to get information. . .Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because **[**22]** it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

[*14]** 338 U.S. 632, 641, 94 L. Ed. 401, 70 S. Ct. 357. The Supreme Court in *Morton Salt* went on to say that ***HN5***[⬆] a federal court's adjudicatory task regarding the enforcement of an agency investigatory tool (there orders requiring reports) is limited as follows:

> It is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is. . .that the disclosure sought shall not be unreasonable."

Morton Salt, 338 U.S. at 652-53 (quoting *Oklahoma Press*, 327 U.S. at 208).

The next important Supreme Court case addressing judicial standards applicable to enforcement of an administrative subpoena was United States v. Powell. 379 U.S. 48, 85 **[*978]** S. Ct. 248, 13 L. Ed. 2d 112 (1964). In that case, a corporate taxpayer was issued an administrative summons by the Internal Revenue Service. The district court granted the petition for enforcement, although it limited the government's examination of the records. **[**23]** The Third Circuit reversed, and denied enforcement of the summons altogether. The Supreme Court reversed, holding that the government did not have to make a showing of probable cause to suspect tax fraud to obtain enforcement, but only need show that

> the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . .It is the court's process which is invoked to enforce the administrative summons and the standard then becomes whether the court's process is abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose

> reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by **[***15]** a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already **[**24]** been once examined.

Id. at 57-58. *See also* *EEOC v. K-Mart Corp., 694 F.2d 1055, 1065-66 (6th Cir. 1982)* (applying the standards of *Morton Salt* and *Powell* in a case involving enforcement of EEOC subpoenas); *United States v. Will, 671 F.2d 963, 968 (6th Cir. 1982)* (stating that "a proceeding seeking enforcement of an IRS summons is an adversary proceeding . . .of a summary nature. . . .") (citing *United States v. Powell, 379 U.S. at 58*). Thus, after *Powell*, ***HN6***[⬆] an agency need show only that the investigation had a legitimate purpose, that its inquiry may be relevant to that purpose, that it did not already have the information and that it otherwise followed any statutory requirements. *Powell* also gave subpoena recipients an additional defense against enforcement (in addition to the defense that one or more of these standards weren't met). ***HN7***[⬆] An agency investigatory tool might be resisted if the agency acted in "bad faith." Examples of agency "bad faith" included harassment of the recipient of the subpoena, or a conscious attempt by the agency to pressure the recipient to settle a collateral dispute.

Finally, in *United States v. LaSalle Nat'l Bank, **[**25]** 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978)*, the Supreme Court refined the "bad faith" defense first articulated in *Powell*. *LaSalle* held that agency "bad faith" could not be asserted based on the improper motivations of individual agency employees, but must be institutionalized bad faith. The Court noted that, "while the special agent is an important actor in the process, his motivation is hardly dispositive. . .the dispositive question in each case . . .is whether the [agency] is pursuing the authorized purposes in good faith." *437 U.S. at 317-18*. Furthermore, *LaSalle* held that the party asserting that the agency acted in bad faith bears a heavy burden of proof. *Id. at 316*. **[***16]**

After *LaSalle*, the Third Circuit had occasion to examine the bad faith defense, and distinguished the "bad faith" defense from the "abuse of the court's process" defense. In *SEC v. Wheeling-Pittsburgh Corp.*, the Third Circuit observed that ***HN8***[⬆] "bad faith connotes a conscious decision by an agency to pursue a groundless allegation without hope of proving that allegation. . . .In contrast, an agency could be found to be abusing the court's process if it vigorously pursued a charge because of the influence of a powerful **[**26]** third party without consciously and objectively evaluating the charge." *SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 125 (3d Cir. 1979)* (en banc). In *Wheeling-Pittsburgh*, the district court refused to enforce an SEC subpoena because it found that the SEC, although acting in good faith, had permitted its investigatory process to be abused, and therefore enforcement would be an abuse of the court's process. The district court found that the SEC's investigatory process had been abused by a course of events whereby a competitor of Wheeling-Pittsburgh had enlisted the aid of U.S. Senator **[*979]** Lowell Weicker to oppose the extension of federal loan guarantees to Wheeling-Pittsburgh. After a Senate subcommittee approved the loan guarantees, Senator Weicker requested an SEC investigation of Wheeling-Pittsburgh.

Several Circuits have applied these judicially-created standards to determine whether to enforce administrative subpoenas. The Fifth Circuit in *Sandsend* held that ***HN9***[⬆] a court's inquiry into the enforcement of an administrative subpoena is limited to two questions: "(1) whether the investigation is for a proper statutory purpose, and (2) whether the documents the agency **[**27]** seeks are relevant to the investigation." *878 F.2d at 879*; *see also* *Burlington No. R.R. Co. v. Office of Inspector General, R.R. Retirement Bd., 983 F.2d 631 (5th Cir. 1993)*. The District of Columbia Circuit, in *FTC v. Invention Submission Corp.*, has also recognized the limited nature of the court's inquiry regarding the enforcement of administrative subpoenas. *965 F.2d 1086, 1089 (D.C. Cir. 1992)*, *cert. denied*, *113 S. Ct. 1255 (1993)* (stating, "it is well established that ***HN10***[⬆] a district court must enforce a federal agency's investigative **[***17]** subpoena if the information sought is 'reasonably relevant'. . .and not 'unduly burdensome' to produce. . . .) (citations omitted).

In *Witmer II*, the Third Circuit agreed with the district court that ***HN11***[⬆] a **[***18]** false claims CID is an administrative subpoena and should be enforced if "'the inquiry is within the authority of the agency, the demand is not too indefinite and the information is reasonably relevant' to the agency's inquiry." *Witmer II, 835 F. Supp. at 220* (quoting *United States v. Morton Salt Co., 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357 (1950)*). The *Witmer II* court continued, "in other words, the court must determine whether 'the court's process **[**28]** would or would not be abused by enforcement.'" *Id.* (citing *SEC v. Wheeling-Pittsburgh Steel Corp., 648 F.2d 118, 125 (3d Cir. 1981)*). This demonstrates that a

district court is not a "rubber stamp" for agency demands for the production of information. A district court's task is limited, however, to making decisions concerning whether the subpoena, and the enforcement process, are authorized by Congress, whether the information sought is relevant to the agency's investigation, and whether or not the investigation and enforcement of the subpoena is an abuse of the court's process. The District of Columbia Circuit has summarized the task of the district court this way:

> While the court's function is "neither minor or ministerial," *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. at 217 n. 57, the scope of the issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity. As the Ninth Circuit has noted, the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the **[**29]** rapid exercise of the power to investigate. . . ." *FMC v. Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975)*.

FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 872-73 (D.C. Cir.) (en banc), *cert. denied*, *431 U.S. 974 (1977)*. **HN12**[] Although the false claims CID is not directly related to "industry regulation," the need for expeditious enforcement is the same. Congress intended the false claims CID to provide the Department of Justice with a means to assess quickly, and at the least cost to the taxpayers or to the party from whom information is requested, whether grounds exist for initiating a false claim suit under *31 U.S.C. §§ 3729-32*, particularly in cases of possible procurement fraud. [13] We do not agree with Markwood that Congress intended the false claims CID to be enforced in a way other than we have discussed.

[30] [*980]** In this case, Markwood has already produced the documents demanded by the United States and is now only resisting the United States' ability to retain information from his oral deposition. In this instance, we need not determine whether the United States' demand met the requirement of definiteness for production of documents. We believe that the subpoena was properly enforced if 1) the subpoena complied with the terms of *31 U.S.C. § 3733*, 2) the subpoena sought relevant testimony from Markwood, 3) the information sought is not already in the agency's possession, and 4) enforcement of the subpoena will not abuse the court's process. We now review the district court's decision to determine whether it correctly applied these standards in granting the petition for enforcement.

A. Whether the subpoena, and the enforcement proceeding, complied with *Section 3733*.

Markwood is not arguing before us that the subpoena itself does not comply with *31 U.S.C. § 3733*. Instead, he **[***19]** argues that the United States has not followed the statutory procedure for enforcement of the subpoena. He asserts that the United States impermissibly filed an "*ex parte*" Petition for Summary Enforcement **[**31]** of the CID, resulting in the district court's issuance of an "*ex parte*" Order to Show Cause. Specifically, Markwood argues that the United States denied him notice and an opportunity to be heard regarding the petition, in violation of his statutory and due process rights. Markwood believes that the district court, by issuing its Order to Show Cause *before* he received the petition, "ruled" in the government's favor without giving him a hearing. Because Markwood admits that he was served with the petition, the crux of his contention seems to be that the petition was "*ex parte*" because it was not served in a timely manner, in violation of *Federal Rule of Civil Procedure 5* and *31 U.S.C. § 3733(j)(6)*. [14] In addition, Markwood believes he had a right, not only to unlimited discovery, but to discovery *before* the court issued its Order to Show Cause.

[32]** Markwood does not specify the date on which he was served with the petition and does not cite in his brief a statutory provision by which this Court might determine the timeliness of the service. It appears that Markwood was served both the Order to Show Cause and the Petition on June 2, 1993, the day after the district court issued its Order to Show Cause. In its

[13] "The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud. . .. While it may be difficult to estimate the exact magnitude of fraud in Federal programs and procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe." S. Rep. No. 345, 99th Cong., 2d Sess. 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.

[14] *31 U.S.C. § 3733(j)(6)* provides, "The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section."

Opinion and Amended Order of August 23, the district court found that "it is undisputed that Respondent Markwood was served with a copy of the enforcement petition and supporting documents," but does not otherwise discuss the timeliness issue. The district court concluded that the order to show cause is not a substantive order, but a procedural order requiring Markwood to give reasons why the CID should not be enforced, including a substantial showing that the court's process will be abused by enforcement.

[*20]** Section 3733(j)(6) **HN13**[↑] states that the Federal Rules of Civil Procedure apply to CID enforcement proceedings, unless their application is inconsistent with the false claims CID statute. *Federal Rule of Civil Procedure 5(a)* requires that pleadings, and other various motions and papers "shall be served on each of the parties." **[**33]** *Rule 5* does not specify a time period for service. *Rule 6(a)* states that the time period for service will be prescribed in one of several ways: by the Federal Rules of Civil Procedure, by local rules, by order of court, or by any applicable statute. By the terms of Section 3733, we must examine first whether a time period is prescribed by, or delineated in any way by that statute. However, Section 3733 does not prescribe a time for service of the petition.

Section 3733(j)(1) **HN14**[↑] requires that a petition for enforcement be served on the person resisting the CID. It does not specify a time period for serving a copy of the petition, or any related motion or paper. *See Seitz*, 1993 WL 501817, at * 2 (observing that "although it would be better practice to serve the petition on the respondent when it is **[*981]** filed, failure to do so does not violate 31 U.S.C. § 3733(j)(1)."). Section 3733(j)(1) states: "the Attorney General may file . . .and serve upon [a person failing to comply with a CID] a petition for an order of such court for the enforcement of the [CID]." The plain meaning of the language of Section 3733 leads us to conclude that Congress is not requiring the United States to serve **[**34]** the party resisting the CID with a petition for enforcement *before* the petition is filed or *before* a district court issues an order to show cause. Because the enforcement proceeding under Section 3733(j)(1) is summary, we do not think Congress intended that service of the petition be made before filing. By using the language "may file. . .and serve," we believe Congress is requiring service within a reasonable amount of time after filing. We believe that the district court should set a date by which the petition should be served, as it is empowered to do under Section 3733(j)(5), which gives the district court the power to issue whatever order is necessary for enforcement of the CID. In addition, we do not believe the local rule requiring service *before* filing, **[***21]** E.D. Mich. L.R. § 7.1(g), applies here because it is inconsistent with Section 3733(j)(1). Because neither the CID statute, the Federal Rules of Civil Procedure, nor the local rules provide the proper time period for service, we believe that in Section 3733(j)(1) enforcement proceedings the district court should prescribe a date by which a person resisting enforcement should be served with the petition. The district **[**35]** court is in the best position to determine, on a case-by-case basis, a reasonable time by which the person resisting the CID should be served with the petition.

While Markwood argues that a lack of a time period for service of the petition determines this issue in his favor, Federal Rule of Civil Procedure 61 **HN15**[↑] requires reversal only if any error made by the district court affected the substantial rights of a party, and then only if the party is prejudiced by the error. "It is a 'well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.'" Jordan v. Paccar, Inc., 37 F.3d 1181, 1184 (6th Cir. 1994) (quoting McCandless v. United States, 298 U.S. 342, 347-48, 80 L. Ed. 1205, 56 S. Ct. 764 (1936)). We do not believe that Markwood's procedural right to service of the petition was infringed because, although not setting a date for service of the petition, the service of the petition was procedurally adequate. Markwood was served with a copy of the petition on June 2, 1993. The show cause hearing occurred on July 29, almost two months after Markwood was served, giving him ample **[**36]** time to respond to the petition. We conclude that Markwood was timely served with the petition and no aspect of the enforcement proceeding took place *ex parte* as he argues. Thus, Markwood's procedural rights were not violated; furthermore, even if we thought his substantial rights were violated he was not prejudiced thereby because he was served within a reasonable time (nine days) after the petition was filed and fully briefed and argued his position against enforcement.

[*22]** Markwood also contends that he was denied his statutory and Due Process rights to an opportunity to be heard regarding the court's curtailment of discovery. He believes he should have had a hearing regarding the court's decision to curtail discovery *before* the court issued its order to show cause. He argues that by the time he received notice of the enforcement proceeding, his right to discovery was curtailed without an

opportunity for him to be heard on the matter. He claims he was unable to gather evidence to show that the CID was being used for the improper purpose of gathering information for use by the Army in the Armed Services Board of Contract Appeals proceedings. We believe these arguments are without **[**37]** merit.

First, the district court's order to show cause stated that "no party may serve or file any discovery requests without further leave of court." Markwood did not ask leave of the court to conduct discovery on any issue, preferring to argue (in his Motion to Vacate the Order to Show Cause) that, because Congress made the Federal Rules of Civil Procedure applicable to CID enforcement proceedings, he should be allowed to conduct discovery as a matter of right. *31 U.S.C. § 3733(j)(6)*; *Fed. R. Civ. P. 26(a)* and *26(b)(1)*. **[*982]** This argument is not persuasive for two reasons.

First, *Rules 26(a)(1)* and *26(b)* ***HN16***[⬆] do not give a party the right to unlimited discovery. Both rules provide that a court may limit information to be disclosed and may limit the scope of discovery. Further, *Federal Rule of Civil Procedure 81(a)(3)* states:

> ***HN17***[⬆] These rules apply to a proceeding to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

This rule permits **[**38]** the district court to limit discovery as it did in this case. *See Donaldson v. United States, 400 U.S. 517, 528-29, 27 L. Ed. 2d 580, 91 S. Ct. 534 **[***23]** (1971)* (holding that "*Rule 81(a)(3)* [specifically recognizes] that a district court, by local rule or by order, may limit the application of the [Federal Rules of Civil Procedure] in a summons proceeding.").

Second, as we have discussed, Markwood incorrectly asserts that a CID is not an administrative subpoena and not subject to the case law governing the enforcement of administrative subpoenas. Markwood argues that Congress intended persons subject to CIDs, unlike persons subject to administrative subpoenas, to have discovery on any relevant issue regarding the subpoena. However, the Federal Rules of Civil Procedure were written for post-complaint litigation. Most of the Federal Rules of Civil Procedure are simply inapplicable to the pre-complaint enforcement of an administrative subpoena. We find no help in *Section 3733(j)(6)* regarding what Congress had in mind by making the Federal Rules of Civil Procedure applicable to a false claims CID enforcement proceeding. However, while the legislative history to the false claims act CID does not discuss how Congress **[**39]** intended the Federal Rules of Civil Procedure to apply to a pre-complaint subpoena, the legislative history to the antitrust CID reveals that when Congress thought about the applicability of the Federal Rules of Civil Procedure to the antitrust CIDs, it was thinking of the civil discovery protections concerning how discovery is to be conducted; Congress did not discuss whether a party has a right to discovery or on what issues. *See* 1976 U.S.C.C.A.N. at 2603-04. Other than this legislative history, we have no help from Congress concerning the meaning of *Section 3733(j)(6)* and therefore turn to the abundant case law on the scope of discovery in administrative subpoena enforcement proceedings.

HN18[⬆] The scope of discovery in the context of an administrative subpoena enforcement proceeding is commensurate with the nature of the administrative subpoena itself. In *SEC v. McGoff*, the District of Columbia Circuit held that in summary subpoena enforcement proceedings, discovery is generally disallowed absent "extraordinary circumstances." *647 F.2d 185, 193* **[***24]** (D.C. Cir.), *cert. denied*, *452 U.S. 963 (1981)*. In *McGoff*, the subject of a Securities and Exchange Commission subpoena claimed **[**40]** he was a target because he was a vocal critic of President Carter's administration. The Court held that, under the facts, this claim did not amount to an extraordinary circumstance requiring discovery. *647 F.2d at 193-93*; *see also United States v. Aero Mayflower Transit Co., Inc., 265 U.S. App. D.C. 383, 831 F.2d 1142, 1146 (D.C. Cir. 1987)* (reasoning that "'discovery may be available in some subpoena enforcement proceedings where the circumstances indicate that further information is necessary for the courts to discharge their duty.'") (quoting *SEC v. Dresser Indus., 202 U.S. App. D.C. 345, 628 F.2d 1368, 1388* (D.C. Cir.), *cert. denied*, *449 U.S. 993 (1980)*). Even if discovery may be appropriate in some instances, "as a general matter, ***HN19***[⬆] a defendant is not 'entitled to engage in counter-discovery to find grounds for resisting' a subpoena." *In re EEOC, 709 F.2d 392, 400 (5th Cir. 1983)* (quoting *United States v. Litton Indus., Inc., 462 F.2d 14, 17 (9th Cir. 1972)*).

Finally, in a case involving the enforcement of an Internal Revenue Service summons, we have said,

there is no unqualified right to pretrial discovery in a summons enforcement proceeding. **[*983]** To impose such a right would often destroy the summary **[**41]** nature of such a proceeding. Rather, the use of discovery devices in summons enforcement proceedings should be limited to those cases where a taxpayer makes a preliminary and substantial demonstration of abuse.

United States v. Will, 671 F.2d 963, 968 (6th Cir. 1982) (citing *United States v. Moon, 616 F.2d 1043, 1047 (8th Cir. 1980)* (reasoning that "an application of discovery rules which would destroy the summary nature of enforcement proceedings is not required")); *see also In re Office of Inspector General, R.R. Retirement Bd., 933 F.2d 276, 277-78 (5th Cir. 1991)* ("discovery is only allowed in the exceptional cases 'where the circumstances indicate that further information is necessary for the courts to discharge their duty'") (citation omitted). The Circuits appear to **[***25]** agree that the summary nature of enforcement proceedings must be preserved by limiting discovery. Our rule in *Will* would permit discovery in an administrative subpoena enforcement proceeding only after the party subject to the subpoena makes a "preliminary and substantial demonstration of abuse" of the court's process. *671 F.2d at 968*.

Our reading of Sections 3729-33 gives us no reason to **[**42]** alter this rule in the context of a false claims CID. The district court considered at length Markwood's reasons for believing that the CID was issued for improper purposes and rejected each argument. As discussed below, we agree that the "evidence" of impropriety Markwood points to is merely an assertion of impropriety, and does not amount to a substantial demonstration that the government is abusing the court's process in enforcing this CID. We conclude that the district court properly denied discovery because Markwood did not make a substantial demonstration of abuse of the Court's process.

Third, Markwood's general assertion that his Due Process rights were violated is also meritless. [15] Markwood does not identify the liberty or property interest at stake here and does not tell the Court in what way the pre-enforcement hearing he received was constitutionally insufficient to protect his unspecified liberty or property interest. Furthermore, even if the *Fifth Amendment* required a full adversarial hearing before a federal judge, this was the type of hearing Markwood received. Finally, the statute does not give Markwood a right to a hearing on the discovery issue *before* his **[**43]** show cause hearing, and certainly he is not entitled to a hearing on the issue of discovery where he did not ask the court for leave to conduct discovery nor made the requisite showing of abuse of the court's process.

[*26] B. Whether the information sought was relevant and whether it was already in the possession of the Department of Justice.**

Markwood does not assert that the United States is seeking irrelevant evidence and neither does he assert that the Department of Justice has the information it seeks from his testimony. [16] Rather, he claims that the United States is entitled to issue a CID only when the information sought is an "absolute necessity," and not, as the statute says, "whenever the Attorney General has reason to believe that any person may be in possession. . .of any. . .information relevant to a false claims law investigation." *31 U.S.C. § 3733(a)(1)*. He argues that **[**44]** the United States could have gotten the same information from the Armed Services Board of Contract Appeals proceedings or from the grand jury proceedings.

Markwood's assertion that the Department of Justice could have obtained the same information from the grand jury proceedings reflects a substantial lack of understanding of the state of evolution of the legislation authorizing false claims CIDs. As the legislative history of the False Claims Amendment Act reveals, one of Congress's **[*984]** purposes in creating a false claims CID was to enable the Department of Justice to obtain information no longer available to it after the decision in *United States v. Sells Engineering Co., 463 U.S. 418, 77 L. Ed. 2d 743, 103 S. Ct. 3133 (1983)*. *Sells* held that **[**45]** *Rule 6(e) of the Federal Rules of Criminal Procedure* ***HN20***[⬆] prohibits the disclosure of grand jury materials for civil use without a court order. *Id. at 440*. If the government desires to obtain grand jury materials for civil use, it must make a showing of a particularized need for the materials. *Id. at 445*. Thus, *Rule 6(e)* grants a very substantial protection **[***27]**

[15] We assume he means his *Fifth Amendment* Due Process rights, although he did not cite the United States Constitution.

[16] In any event, the record demonstrates that Markwood had information relevant to the false claims investigation. He was directly involved in preparing the bid, he signed the bid as President of Arveco, and he signed the certification for the price adjustment to the contract as Vice President of BMY.

against abuse of the grand jury proceedings by the government in order to obtain information for civil investigations. Consequently, after *Sells*, Congress determined there was a need for an investigative tool to aid the Department of Justice in obtaining relevant information relating to possible false claims. As the Senate Committee on the Judiciary observed,

> Currently, the Civil Division of the Department relies primarily on two sources for investigation of civil fraud cases: the work of agency Inspectors General (IGs) and material developed in criminal investigations, usually through the use of grand jury subpoenas. However, since the Supreme Court's decision in *United States v. Sells Engineering Co.* . . .interpreting *Rule 6(e)* of the Rules of Criminal Procedure, the Civil Division has been largely unable to **[**46]** gain access to the information developed before the grand jury. Therefore, in addition to supplementing the investigative powers of the IGs, the CID authority would permit the Civil Division to gain access to evidence of fraud which might currently be unavailable to it due to the Supreme Court's interpretation of *Rule 6(e)*.

S. Rep. No. 345, 99th Cong., 2d Sess. 33 (1986), *reprinted in* 1986 U.S.C.C.A.N. at 5298. Therefore, Markwood's claims--that the CID was improper because the Attorney General failed to show that the information was absolutely necessary, and because the Department of Justice could have obtained the information from the grand jury proceedings--are baseless. Markwood also suggests that the Department of Justice could have gotten the information it desired from the Armed Services Board of Contract Appeals proceedings. Even if this were true, we find no statute or case law requiring the Department of Justice to obtain the information it desires from another agency's proceedings when it is authorized to conduct its own investigation. Further, ***HN21***[↑] the False Claims Act, *31 U.S.C. §§ 3729-33*, does not require the Department of **[***28]** Justice to gather information from other **[**47]** agencies before conducting its own investigation.

C. Whether the court's process was abused by the enforcement of the CID.

Markwood claims that the district court erred in enforcing the CID because the record demonstrated that the Department of Justice issued it for an improper purpose. Although Markwood has not stated it this way, we take him to mean that the Department of Justice issued the CID in bad faith. Essentially, Markwood argues that because Lt. Col. Phillips, who issued the CID, was an Army attorney assigned to the Department of Justice, he had a conflict of interest that allowed or caused him to use the CID for the improper purpose of gathering information for the Army's Armed Services Board of Contract Appeals litigation. To support this argument, Markwood asserts that another Army attorney, Maj. Kunzi, disclosed a grand jury memoranda to Lt. Col. Phillips in violation of the *Rule 6(e)* order permitting disclosure only to Army attorneys. Markwood also believes that the Department of Justice's decision not to seek immunity for him demonstrates that the government's only purpose in issuing the CID was to generate a record of his invocation of his *Fifth Amendment* **[**48]** privilege. Markwood concludes that the district court failed to conduct a *de novo* hearing on the enforcement of the CID. He argues that "because the court erred in considering the evidence, failed to inquire, and deprived Appellant of the right to do so [by limiting discovery], the impact of Lt. Col. Phillips' conflict of interest on the CID is still unknown."

These allegations are meritless. Markwood does not assert, as *LaSalle Bank* requires, that any improper motive on Lt. **[*985]** Col. Phillips's part was adopted by, and therefore institutionalized by, Acting Assistant Attorney General Gerson when he issued the subpoena. Further, nothing in this record, or in the facts as discussed by the *Witmer II* and *Seitz* courts, show that the Attorney General adopted any alleged improper motive of one of its line attorneys. **[***29]** Therefore, Markwood has failed to make the requisite allegation or showing of institutionalized bad faith.

Furthermore, we do not believe that Lt. Col. Phillips had a conflict of interest. To show that Lt. Col. Phillips had a conflict of interest, Markwood offers two criteria for this Court to use to determine whether a conflict of interest exists. The first criterion **[**49]** concerns the ability of government attorneys to obtain information from one investigation for use in another. Relying upon dictum from a Ninth Circuit case, Markwood contends that it is impermissible for "government attorneys who are specially assigned to matters affecting their own agencies [to be in a situation]. . .where there is the temptation for the specially appointed attorney 'to obtain documentary access to information useful in the underlying civil litigation.'" Appellant's Brief at 32-33 (citing *FTC v. American Nat'l Cellular, 868 F.2d 315,*

319 (9th Cir. 1989)). [17]

[50]** Markwood's second criterion would require this Court to find a conflict of interest where an attorney's interest in continued employment and advancement with one agency is dependent upon his or her performance as an investigator with another agency. Markwood argues that "numerous courts have found a conflict of interest to exist where the government attorney remains dependent on the interested agency for salary or career advancement." Markwood cites **[***30]** only two cases for this proposition, one of which is *In re April* 1977 Grand Jury Subpoenas, 573 F.2d 936, 939, 941 (6th Cir. 1978). However, the panel decision in *In re April 1977 Grand Jury Subpoenas* was vacated and the case reheard *en banc*. 584 F.2d 1366 (6th Cir. 1978) (en banc), *cert. denied*, *440 U.S. 934 (1979)*. On rehearing, it was noted that "if in fact a prosecutorial conflict of interest constituting abuse of the grand jury process were shown . . .this court could properly consider the case. . . ." *Id. at 1371* (Edwards and Lively, JJ., concurring). But because "there is no inherent conflict of interest" in the appointment of an Internal Revenue Service attorney who investigated a civil tax matter to assist **[**51]** in or conduct a criminal tax investigation of the same matter, *584 F.2d at 1371*, the concurring members of the Court believed that we did not have jurisdiction to review the conflict issue under the All Writs Statute, *28 U.S.C. § 1651 (1970)*.

To date this Court has not faced the precise question presented here, namely, what criteria should determine when an agency attorney, involved in a civil investigation by that agency, has a conflict of interest because of his or her work on a civil investigation involving the same facts with another agency. The district court rejected Markwood's argument, reasoning that an agency attorney working for another agency of the federal government is working for "a single client--the United States" (quoting *In re April 1977 Grand Jury Subpoenas*, 584 F.2d at 1372); *see also Seitz*, 1993 WL 501817, at * 11 ("Lt. Col. Phillips is representing the United States of America"). The district court further observed that, not only does Phillips have as a single client the United States, but the same agency in both investigations--the United States Army.

While we agree that ***HN22*** a government attorney working on a civil matter who has **[*986]** been involved in a prior **[**52]** civil investigation with another agency concerning the same facts is working for the same client, the United States, that government attorney is not automatically insulated from having a conflict of interest even though he or she is working on civil matters only. *American Nat'l Cellular, [***31] 868 F.2d at 319*. Some cases may present facts where the nature of the civil matter under investigation, or the parties involved, or some other factor requires that a government attorney involved in a related matter not participate in the second civil investigation. Here, however, Markwood's conflict of interest argument is based on the fact of dual representation alone. That "dual representation" alone does not create a conflict. *United States v. Birdman, 602 F.2d 547, 561-63 (3d Cir. 1979)* (citations omitted), *cert. denied*, *444 U.S. 1032, 62 L. Ed. 2d 668, 100 S. Ct. 703 (1980)*.

Lt. Col. Phillips was not involved in the litigation before the Armed Services Board of Contract Appeals prior to being assigned to the Department of Justice and the extent of Lt. Col. Phillips's involvement in the Army's investigation has been to help the Army determine whether to move to reopen the Armed Services Board of Contract Appeals proceedings **[**53]** for reconsideration of Arveco's price adjustment claim. *Witmer II, 835 F. Supp. at 214*. Further, when Lt. Col. Phillips came to the Department of Justice, he arrived after it had started investigating Arveco, and did not work on the Arveco matter until five months after his assignment began. We agree with *Witmer II* that Lt. Col. Phillips's slight involvement in the Army's investigation does not create a conflict of interest. In fact, we consider it appropriate for the United States to utilize in one civil proceeding the knowledge and expertise gained by its attorneys in another proceeding, absent circumstances showing that the information is being used for harassment, bad faith, or in violation of law.

Markwood has shown that Lt. Col. Phillips's involvement

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[17] American Nat'l Cellular involved the appointment of Federal Trade Commission attorneys, who had obtained a civil injunction against the target of a deceptive practices investigation and later served as special prosecutors in a related criminal contempt action. The Ninth Circuit held that the FTC attorneys did not have a conflict of interest, not because they worked for a single interest--the public interest--in both roles, *868 F.2d at 318*, but because: 1) under the principles of *Young v. United States, 481 U.S. 787, 95 L. Ed. 2d 740, 107 S. Ct. 2124 (1987)*, the control retained by the United States Attorney over prosecutorial decisionmaking ameliorated any appearance of impropriety; and 2) the extent of the agency attorneys' involvement in the underlying civil litigation was not sufficient to compromise the principles of prosecutorial impartiality as well as the appearance of propriety. *868 F.2d at 320*.

in the first civil investigation was negligible, and that his "conflict of interest" arises only from his "dual representation" status. We agree with the district court that Lt. Col. Phillips did not have a conflict of interest and did not act improperly. Even if we thought he had an improper motive or a conflict of interest, on the facts asserted here, the Department of Justice did not issue the CID to Markwood because **[**54]** of Lt. Col. Phillips's motives.

[*32]** Markwood also contends that the Department of Justice's failure to seek immunity for him illustrates that it had an improper purpose in issuing the CID. He specifically alleges that the Department of Justice wanted to create a record of his invoking his *Fifth Amendment* privilege against self-incrimination. However, *Section 3733(h)(7)(B)* ***HN23***[⬆] merely allows, and does not require, the government to grant immunity to any person refusing to give testimony on grounds of self-incrimination. Further, Markwood's assertion that the government knew, prior to deposing him, that he was going to refuse to answer questions on *Fifth Amendment* grounds is pure speculation. *See also Seitz*, 1993 WL 501817, at * 5 (discussing reasons why this assertion is meritless).

Markwood's final assertion is that the district court failed to conduct a *de novo* inquiry [18] on the summary enforcement petition and failed to consider the evidence of impropriety. This argument is also groundless. Essentially, Markwood is claiming that the district court acted as a "rubber stamp" in granting the United States' petition. However, it is clear that the district court did not act as a "rubber **[**55]** stamp" for the Department **[*987]** of Justice. As Markwood points out, in addition to discussing the requirements of *Section 3733*, the district court discussed and applied the proper body of law to this case, the law regarding the enforcement of administrative subpoenas, and **[***33]** after an extensive discussion of the arguments Markwood raised against enforcement, determined that Markwood had not shown an abuse of the court's process. We believe the district court did not err in deciding to grant the petition.

[56]** Therefore, we **AFFIRM** the decision of the district court.

End of Document

[18] Citing H.R. Rep. 94-1343, *reprinted in* 1976 U.S.C.C.A.N. at 2608 (discussing enforcement of the antitrust CID) ("After a *de novo* hearing on the nature of the investigation and all the objections to the CID. . . ."). The House has used *de novo* here in an imprecise way to describe the function of a district court in reviewing administrative subpoenas. "*De novo*" is a standard of review which a district court uses, if required by statute or case law, to review administrative determinations of law. In issuing a CID, the Department of Justice is not making a formal determination of law, but must comply with the law in issuing the CID. The district court, as we have said, must make its own determination as to whether the Department of Justice has complied with the CID statute and the judicially-created standards for obtaining enforcement of its subpoena.

Positive
As of: November 30, 2023 8:37 PM Z

Doe v. United States (In re Admin. Subpoena)

United States Court of Appeals for the Sixth Circuit

April 27, 2001, Argued ; June 14, 2001, Decided ; June 14, 2001, Filed

No. 00-4352

Reporter
253 F.3d 256 *; 2001 U.S. App. LEXIS 12880 **; 2001 FED App. 0195P (6th Cir.) ***

In re: ADMINISTRATIVE SUBPOENA; JOHN DOE, D.P.M., Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 00-MC-00053. Patricia A. Gaughan, District Judge.

Disposition: AFFIRMED.

Core Terms

subpoena, documents, administrative subpoena, healthcare, records, financial records, testing, patients, fraud investigation, district court, requesting, enforcing, training, federal health, probable cause, subpoena power, ethical, cases, labs, financial document, motion to quash, oral argument, investigations, burdensome, producing, privacy, copies, professional education, laboratories, designee

Case Summary

Procedural Posture
Petitioner podiatrist appealed from the United States District Court for the Northern District of Ohio order denying his motion to quash an administrative subpoena issued by respondent Department of Justice pursuant to a health care fraud investigation, claiming it violated his right against unreasonable searches and seizures.

Overview
Petitioner was under investigation by respondent for an alleged kickback arrangement with two medical testing laboratories. Respondent issued an administrative subpoena, its third, under § 248 of the Health Insurance Portability & Accountability Act (HIPAA), ordering him to turn over a number of documents relating to his professional education and ethical training; personal and business financial records; records evidencing any asset transfers to his children; and patient files. Petitioner moved to quash. His motion was denied. The appellate court affirmed. The court noted respondent had evidence of medical testing laboratories making unusual rental payments to petitioner and evidence from independent medical experts that one of the labs to which petitioner referred patients was performing excessive and unnecessary testing. Thus, even under a standard requiring a reasonable suspicion of wrongdoing before enforcing a subpoena, respondent had made a sufficient showing. Respondent's document request was reasonable and enforceable.

Outcome
The order denying petitioner's motion to quash was affirmed.

LexisNexis® Headnotes

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN1[] **Methods of Investigation, Subpoenas**

In the case of administrative subpoenas, parties may immediately appeal district court orders enforcing these subpoenas.

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN2[] **Standards of Review, De Novo Standard of Review**

Review of the district court's interpretation and

application of 18 U.S.C.S. § 3486, as well as the case law relating to enforcement of administrative subpoenas, is de novo.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN3 Judicial Review, Standards of Review

All the district court must do in deciding whether to enforce an administrative subpoena is: (1) determine whether the administrative agency to which Congress has granted the subpoena power has satisfied the statutory prerequisites to issuing and enforcing the subpoena, and (2) determine whether the agency has satisfied the judicially created standards for enforcing administrative subpoenas.

Administrative Law > Judicial Review > Standards of Review > General Overview

HN4 Judicial Review, Standards of Review

An agency's request for documents should be approved by the judiciary so long as it is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. In other words, the agency request must be reasonable.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN5 Methods of Investigation, Subpoenas

Rather than probable cause, all an agency need show to obtain judicial enforcement of a summons is that its investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within its possession, and that the required administrative steps have been followed.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN6 Methods of Investigation, Subpoenas

The U.S. Department of Justice need not make a showing of probable cause to issue an administrative subpoena under 18 U.S.C.S. § 3486.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Probable Cause

Criminal Law & Procedure > Search & Seizure > Search Warrants > General Overview

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Constitutional Law > ... > Fundamental Rights > Search & Seizure > General Overview

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

Criminal Law & Procedure > ... > Search Warrants > Probable Cause > General Overview

HN7 Search & Seizure, Probable Cause

Whereas the U.S. Const. amend. IV mandates a showing of probable cause for the issuance of search warrants, subpoenas are analyzed only under the U.S. Const. amend. IV's general reasonableness standard.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

HN8 Methods of Investigation, Subpoenas

The reasonable relevance test should apply to administrative subpoenas under 18 U.S.C.S. § 3486.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN9[] Methods of Investigation, Subpoenas

A subpoena is properly enforced if: (1) it satisfies the terms of its authorizing statute, (2) the documents requested were relevant to the investigation, (3) the information sought is not already in the agency's possession, and (4) enforcing the subpoena will not constitute an abuse of the court's process.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Public Health & Welfare Law > Healthcare > General Overview

HN10[] Methods of Investigation, Subpoenas

See 18 U.S.C.S. § 3486(a)(1)(A).

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > False Claims > General Overview

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

Criminal Law & Procedure > ... > Fraud > Wire Fraud > General Overview

HN11[] Wire Fraud, Elements

Under 18 U.S.C.S. § 24(a)(1), a "federal health care offense" is a violation of, or a conspiracy to violate, a number of health-care related offenses, including 18 U.S.C.S. § 1035 (false statements relating to health care matters) and 18 U.S.C.S. § 1347 (health care fraud). A federal health care offense also encompasses a variety of general criminal violations, if those violations relate to a health care benefit program. 18 U.S.C.S. § 24 (a)(2).

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN12[] Methods of Investigation, Subpoenas

Any administrative subpoena must describe the objects to be produced and allow a reasonable period of time for the items to be assembled. 18 U.S.C.S. § 3486(a)(2). The subpoenaed party need not deliver any documents requested more than 500 miles from the place where it was served. 18 U.S.C.S. § 3486(a)(3).

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN13[] Methods of Investigation, Subpoenas

Subpoenas should be enforced when the evidence sought by the subpoena is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

HN14[] Methods of Investigation, Subpoenas

In reviewing whether an administrative subpoena should be enforced, the court weighs the likely relevance of the requested material to the investigation against the burden of producing the material.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Business & Corporate Law > ... > Corporate

Governance > Record Inspection & Maintenance > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Subpoenas

Business & Corporate Law > Corporations > Corporate Governance > General Overview

HN15 **Methods of Investigation, Subpoenas**

When personal documents of individuals, as contrasted with business records of corporations, are the subject of an administrative subpoena, privacy concerns must be considered.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

HN16 **Search & Seizure, Scope of Protection**

Unlike personal financial records, there is no protected *U.S. Const. amend. IV* interest in any records held by one's bank, as they are the business records of the bank rather than documents over which one can assert ownership or possession.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN17 **Methods of Investigation, Subpoenas**

Family members of a government investigation's target have a greater reasonable expectation of privacy in their personal financial affairs than do those individuals who do participate in such matters.

Administrative Law > ... > Scope of Authority > Methods of Investigation > Subpoenas

Torts > Intentional Torts > Malicious Prosecution > General Overview

Administrative Law > Agency Investigations > General Overview

HN18 **Methods of Investigation, Subpoenas**

A court's process is abused where a subpoena is issued for an improper purpose, such as to harass an investigation's target or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. Furthermore, any bad faith asserted by a plaintiff may not be based on the improper motives of an individual agency employee, but instead must be founded upon evidence that the agency itself, in an institutional sense, acted in bad faith when it served its subpoena.

Counsel: ARGUED: Leonard W. Yelsky, YELSKY & LONARDO, Cleveland, Ohio, for Appellant.

Subodh Chandra, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

ON BRIEF: Leonard W. Yelsky, YELSKY & LONARDO, Cleveland, Ohio, for Appellant.

Subodh Chandra, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellee.

Judges: Before: SILER and MOORE, Circuit Judges; STAGG, District Judge. *

Opinion by: KAREN NELSON MOORE

Opinion

[*2]** **[*259]** KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant John Doe ("Doe" or "petitioner") appeals the district court's order denying his motion to quash an administrative subpoena issued by the Department of Justice pursuant to a health care fraud investigation. Doe, a podiatrist, is under investigation for an alleged kickback arrangement with two medical testing laboratories. The administrative subpoena, issued pursuant to the Department of Justice's **[**2]** authority under § 248 of the Health Insurance Portability & Accountability Act ("HIPAA"), ordered Doe to turn over a number of documents, including: records relating to his professional education and ethical training; personal and business financial records; records evidencing any asset transfers by Doe

* The Honorable Tom Stagg, United States District Judge for the Western District of Louisiana, sitting by designation.

to his children; and various patient files.

We **AFFIRM** the district court's order denying Doe's motion to quash the administrative subpoena and compelling compliance therewith.

[*260] I. BACKGROUND

John Doe, D.P.M., a podiatrist operating a clinic in the Cleveland metropolitan area, is under investigation by the FBI and a federal grand jury for an alleged "kickback" **[***3]** arrangement with two medical testing laboratories. More specifically, it is alleged that Doe received payments from these labs for referring his patients to them for medically unnecessary vascular and electrodiagnostic tests. The government alleges that these kickbacks were disguised as rental payments that the labs made to Doe for the periodic use of one room in his clinic. The government has obtained documents through previous subpoenas evidencing lease agreements with the labs that show that, in less **[**3]** than three years, approximately $ 10,000 was paid to Doe for the use of a single room in his clinic for a few hours each month. By contrast, Doe himself only paid about $ 16,800 in rent for the entire office over that same period of time. The government claims that, based on information discovered thus far, Doe may have aided one of the laboratories in submitting false claims approximating $ 150,000 to various health care benefit programs. These programs paid approximately $ 57,000 on the claims.

The government also has evidence from independent medical experts stating that one of the labs to which Doe referred patients was performing a grossly excessive amount of electrodiagnostic testing. Furthermore, the government has evidence that one of the medical conditions for which Doe referred his patients for further testing could not have been accurately diagnosed by this lab's technicians, as it required medically invasive and non-routinized testing, testing which the Ohio State Medical Board has concluded may not, under Ohio law, be performed by technicians.

Pursuant to the DOJ's investigation, a series of subpoenas were issued to Doe requesting various documents. In the first subpoena, **[**4]** issued August 5, 1998, the DOJ requested lease agreements between Doe and the labs, any payments made to Doe by any medical service provider, including laboratories, and information on tests performed on patients by any medical service provider. The second subpoena, issued May 25, 1999, requested information on various patients. The third subpoena, an administrative subpoena and the subpoena at issue in this case, was ordered pursuant to the **[***4]** DOJ's authority under § 248 of the HIPAA, which allows the Attorney General or her designee to issue subpoenas requiring the production of records "which may be relevant to" a "Federal health care offense" investigation. *18 U.S.C. § 3486(a)(1)(A)*. [1]

[5]** The administrative subpoena ordered Doe's records custodian to turn over a number of documents by August 28, 2000. The documents requested were divided into the following nine categories:

1) all professional journals, magazines, and newsletters subscribed to or received by Doe from January 1990 through March 1998;

2) copies of recent bank and other financial records showing the current location, amount, and value of all Doe's personal and health care-related business **[*261]** assets, whether jointly or individually held;

3) copies of recent bank and other financial records showing the current location, amount, and value of all Doe's children's assets insofar as those assets were provided or derived from the individual or jointly held assets of Doe;

4) all documents and patient files evidencing Doe's referral of patients for certain electrodiagnostic tests after April 2, 1998;

5) all documents and patient files after January 1, 1993 evidencing Doe's referral of patients to a specific **[***5]** medical testing laboratory for certain diagnostic ultrasound tests;

6) complete academic transcripts and records from medical or podiatric school, as well as any other **[**6]** post-graduate training;

7) all documents concerning the extent of Doe's continuing medical education, including a list and description of courses taken, credit hours earned,

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[1] On December 19, 2000, several months after the subpoena was issued in this case, the Presidential Threat Protection Act of 2000, Pub. L. No. 106-544, 114 Stat. 2715, altered the precise statutory language authorizing the Attorney General to issue administrative subpoenas pursuant to federal health care investigations. Although we apply *§ 3486* as it existed at the time the subpoena was issued, we note that the changes made in the language of *§ 3486* would not alter the ultimate outcome in this case.

and any materials provided in those courses;
8) all documents concerning ethics, professional responsibility, and medical-billing issues in Doe's custody; and
9) retained copies of federal, state, and local tax returns both for Doe and any of his businesses from 1993 to the present.

Joint Appendix ("J.A.") at 11 (Admin. Subpoena). Doe did not turn over these documents. Instead, on August 29, 2000, Doe filed in the district court a motion to quash the subpoena, or, in the alternative, to issue a protective order. In this motion, Doe called the government's latest document request "unreasonably burdensome" and questioned its relevance. J.A. at 6-7 (Mem. in Supp. of Mot. to Quash).

On October 10, 2000, following the government's combined motion in opposition to Doe's motion to quash and countermotion to compel Doe to comply with the subpoena, the district court denied Doe's motion to quash the subpoena and granted the government's motion to compel compliance with the subpoena. The district **[**7]** court denied the motion to quash because "the subpoena was issued within the authority of the U.S. Attorney General, the records sought [were] relevant to the government's health-care fraud investigation, the materials [were] not already in the possession of the Department of Justice, and [because the] Court's process would not be abused by enforcement of the subpoena." J.A. at 56 (Dist. Ct. Order Den. Mot. to Quash).

[*6]** Doe now appeals the denial of his motion to quash the administrative subpoena to this court.

II. ANALYSIS

We first take note of our jurisdiction to hear this appeal. Although a party served with a subpoena typically cannot appeal the denial of a motion to quash the subpoena until he has resisted the subpoena and been held in contempt, the Supreme Court has treated subpoenas issued by government agencies differently. ***HN1***[↑] In the case of administrative subpoenas, parties may immediately appeal district court orders enforcing these subpoenas, as the Supreme Court has deemed them to be "self-contained, so far as the judiciary is concerned[.]" ***Cobbledick v. United States***, *309 U.S. 323, 330, 84 L. Ed. 783, 60 S. Ct. 540 (1940)*; **[**8]** **see also** 19 James Wm. Moore et al., *Moore's Federal Practice § 202.11[2][c]*.

HN2[↑] Our review of the district court's interpretation and application of *18 U.S.C. § 3486*, as well as the case law relating to enforcement of administrative subpoenas, **[*262]** is de novo. ***United States v. Markwood***, *48 F.3d 969, 975 (6th Cir. 1995)*.

A. The Government's Motion to Close Oral Argument to the Public

Before proceeding to an analysis of the administrative subpoena at issue in this case, we briefly note that, ruling from the bench, we denied the government's motion to conduct oral argument in a closed courtroom in this case. The government, concerned about revealing sensitive matters that could jeopardize its ongoing criminal investigation of other medical professionals and service providers, filed a motion, in advance of oral argument and unopposed by Doe's counsel, to close oral argument to the public.

While we deliberate in private, we recognize the fundamental importance of "issuing public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges **[***7]** by reason. **[**9]** Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." ***Union Oil Co. v. Leavell***, *220 F.3d 562, 568 (7th Cir. 2000)*. To the extent the government believes that it must reveal sensitive information to the court as part of its argument, it can "submit arguments in writing under seal in lieu of the in camera oral argument." ***New York Times Co. v. United States***, *403 U.S. 944, 29 L. Ed. 2d 854, 91 S. Ct. 2271 (1971)*.

B. Background on the Enforcement of Administrative Subpoenas

As noted in its heading, *18 U.S.C. § 3486* authorizes the Attorney General or her designee to issue "administrative subpoenas in federal health care investigations[.]" Doe claims that, by enforcing the DOJ's administrative subpoena in this case, his *Fourth Amendment* right to be free from unreasonable searches and seizures has been violated.

This circuit has noted that a district court plays only a limited role in the enforcement of an administrative subpoena. ***Markwood***, *48 F.3d at 976*. ***HN3***[↑] All the district court must do **[**10]** in deciding whether to

enforce an administrative subpoena is 1) determine whether the administrative agency to which Congress has granted the subpoena power, in this case the DOJ, has satisfied the statutory prerequisites to issuing and enforcing the subpoena, and 2) determine whether the agency has satisfied the judicially created standards for enforcing administrative subpoenas. *Id. at 976-77*. We first turn to the judicially created standards that must be met for an administrative subpoena to be enforced.

In *Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 90 L. Ed. 614, 66 S. Ct. 494 (1946)*, one of the Supreme Court's first major cases addressing the constitutionality of an administrative subpoena under the *Fourth Amendment*, the Court created standards for the enforcement of administrative subpoenas that are still used today. In **Oklahoma Press**, the Court held that a subpoena duces tecum for corporate records issued by the **[***8]** Department of Labor would comply with the Constitution so long as the demand for documents

> is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant **[**11]** to the inquiry. Beyond this the requirement of reasonableness, including particularity in describing the place to be searched, and the persons or things to be seized . . . comes down to [whether] specification of the documents to be produced [is] adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, . . . this **[*263]** cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.

Id. at 209 (footnote and internal quotation marks omitted). Put more succinctly in *United States v. Morton Salt Co., 338 U.S. 632, 652-53, 94 L. Ed. 401, 70 S. Ct. 357 (1950)*, another case involving a request for corporate documents, the Court stated that *HN4*[↑] an agency's request for documents should be approved by the judiciary so long as it "is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." In other words, the agency request must be reasonable.

It is from the last major Supreme Court case on the issue, *United States v. Powell, 379 U.S. 48, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964)*, **[**12]** that the basic language of the "reasonable relevance" test employed by this circuit emanates. In **Powell**, the Internal Revenue Service ("IRS"), suspecting tax fraud, issued an administrative summons requesting corporate tax records from the president of a corporation. Powell argued that the IRS could not use its summons power to require production of the records unless it could proffer some grounds for its suspicion that a fraud had been committed. The Court disagreed, however, stating that the IRS need make no showing of probable cause to suspect tax "fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process[.]" *Id. at 51*. **[***9]** A court's process is abused if the summons is "issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id. at 58*.

The **Powell** Court was concerned that requiring the IRS to show probable cause that a tax fraud had been committed would seriously hinder the **[**13]** agency's ability to conduct these kinds of investigations. *Id. at 53-54*. *HN5*[↑] Thus, rather than probable cause, the Court held that all the IRS need show to obtain judicial enforcement of a summons is "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed[.]" *Id. at 57-58*. We still use this test today when examining administrative subpoenas. *Markwood, 48 F.3d at 980*. As this circuit has summarized, "while the court's function is neither minor nor ministerial" when deciding whether to enforce an administrative subpoena, "the scope of the issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity." *Id. at 979* (quoting *FTC v. Texaco, Inc., 180 U.S. App. D.C. 390, 555 F.2d 862, 872-73* (D.C. Cir.) (en banc), **cert. denied**, *431 U.S. 974 (1977)*; **[**14]** other quotations omitted).

HN6[↑] Following **Powell** and the precedent of this circuit, we hold that the DOJ need not make a showing of probable cause to issue an administrative subpoena under *18 U.S.C. § 3486*, nor does petitioner argue for such a standard on appeal. In *In re Subpoena Duces Tecum, 228 F.3d 341, 347-49 (4th Cir. 2000)*, the U.S. Court of Appeals for the Fourth Circuit was the first circuit court to address administrative subpoenas issued under *§ 3486*. *HN7*[↑] As the Fourth Circuit explained, whereas the *Fourth Amendment* mandates a showing **[*264]** of probable cause for the issuance of search

warrants, subpoenas are analyzed only under the *Fourth Amendment's* general **[***10]** reasonableness standard. ***Id. at 347-48***. One primary reason for this distinction is that, unlike "the immediacy and intrusiveness of a search and seizure conducted pursuant to a warrant[,]" the reasonableness of an administrative subpoena's command can be contested in federal court before being enforced. ***Id. at 348***.

Unlike the Fourth Circuit, the district court in **In re Subpoena Duces Tecum** was more troubled by the notion of **[**15]** simply applying the reasonable relevance standard to subpoenas issued under *§ 3486*. ***In re Subpoenas Duces Tecum**, 51 F. Supp. 2d 726, 733-36 (W.D. Va. 1999)*. The district court discussed several cases, including one from this circuit, which it believed weighed in favor of applying a probable cause standard to administrative subpoenas used to further criminal, as opposed to civil, investigations. [2] We believe, however, that these cases are distinguishable from the facts in this case.

[16]** In ***Abel v. United States**, 362 U.S. 217, 226, 4 L. Ed. 2d 668, 80 S. Ct. 683 (1960)*, and ***United States v. Phibbs**, 999 F.2d 1053, 1077 (6th Cir. 1993)*, **cert. denied**, *510 U.S. 1119 (1994)*, two cases cited by the district court in **In re Subpoenas Duces Tecum**, both the Supreme Court and this circuit spoke in favor of using the probable cause standard when analyzing administrative agencies' efforts to obtain information pursuant to a criminal investigation. In both these cases, however, the courts were addressing administrative searches, as opposed to administrative subpoenas. ***Abel**, 362 U.S. at 226*; ***Phibbs**, 999 F.2d at 1077* **[***11]** (stating that, if "an on-premises search and inspection" is needed to execute an administrative subpoena, then a valid search warrant and a showing of probable cause is needed). Meanwhile, in this case, the DOJ has simply requested documents from Doe, a request which he has decided to challenge in federal court, as is his right. The immediacy and intrusiveness associated with a search are not present in the document request in this case, and thus the heightened **[**17]** requirement of probable cause is inapplicable here.

The district court in **In re Subpoenas Duces Tecum** also cited to the Supreme Court's decision in ***United States v. LaSalle National Bank**, 437 U.S. 298, 57 L. Ed. 2d 221, 98 S. Ct. 2357 (1978)*, as a basis for applying a probable cause standard to an agency's subpoena request in a criminal investigation. ***In re Subpoenas Duces Tecum**, 51 F. Supp. 2d at 734*. **LaSalle**, however, is also distinguishable. Although the Supreme Court in **LaSalle** did hold that it would be unlawful for the IRS to use its administrative subpoena power under *26 U.S.C. § 7602* solely to gather evidence for a criminal prosecution, the Court's decision was based not on constitutional considerations, but on Congress's failure to give the IRS the statutory authority to use its subpoena power in this fashion. ***LaSalle**, 437 U.S. at 317 n.18*. In our case, on the other **[*265]** hand, Congress has given the DOJ the express power to issue administrative subpoenas for all documents and things "which may be relevant" to its criminal health care fraud investigation. *18 U.S.C. § 3486* **[**18]** *(a)(1)(A)*. The Supreme Court's reasoning in **LaSalle** is inapplicable to this case.

HN8[⬆] We agree with the Fourth Circuit that the reasonable relevance test should apply to administrative subpoenas under *§ 3486*. Both the Supreme Court and this circuit have long applied this test when reviewing administrative subpoena requests, and we see no convincing basis upon which to distinguish these binding precedents simply because this subpoena was issued pursuant to a criminal, as opposed to civil, investigation.

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[2] Based, in part, on these cases, the district court refused to enforce the government's administrative subpoena insofar as it sought the personal financial records of the target of the health care fraud investigation. ***In re Subpoenas Duces Tecum**, 51 F. Supp. 2d at 736*. The district court did enforce, however, the remainder of the government's subpoena. On appeal to the U.S. Court of Appeals for the Fourth Circuit, the government did not cross-appeal the district court's denial of its request to subpoena the target's personal financial records. Thus, the Fourth Circuit did not address the issue. Nevertheless, at no time did the court of appeals indicate that anything but a test of reasonableness should be applied to administrative subpoenas issued pursuant to *§ 3486*.

[*12] C. Applying the Law to the Subpoena in this Case**

Following Supreme Court precedent on the enforcement of administrative subpoenas, this circuit has held that ***HN9***[⬆] a subpoena is properly enforced if 1) it satisfies the terms of its authorizing statute, 2) the documents requested were relevant to the DOJ's investigation, 3) the information sought is not already in the DOJ's possession, and 4) enforcing the subpoena will not constitute an abuse of the court's process. ***Markwood**, 48 F.3d at 980*.

As noted earlier, the administrative subpoena at issue in this case requested nine categories of documents. Of these, two involve requests for the files of **[**19]** patients who were referred to outside labs for additional testing. Doe no longer disputes the reasonableness of the government's request for patient documents, however, and thus we will not address this aspect of the subpoena. **See** Appellant's Reply Br. at 4. Of the remaining categories, four encompass documents related to Doe's professional education and the extent of his ethical training, two involve Doe's personal and business financial records, and the final request seeks those bank and other financial records of Doe's children showing any assets that "were provided or derived from individual or jointly held assets of [John Doe.]" J.A. at 11 (Admin. Subpoena).

We will now address whether the requirements for enforcing an administrative subpoena have been met in this case, focusing on each of the different categories of documents in turn.

1. Does this Subpoena Comply with *§ 3486*'s statutory requirements?

Petitioner does not argue that this administrative subpoena fails to comply with the statutory requirements of *§ 3486*. Indeed, to do so would be difficult given the broad subpoena power that the statute gives to the Attorney General and her designees. The provision **[**20]** states: ***HN10***[⬆] **[***13]**

> In any investigation relating to any act or activity involving a Federal health care offense, . . . the Attorney General or the Attorney General's designee may issue in writing and cause to be served a subpoena . . . requiring the production of any records (including any books, papers, documents, electronic media, or other objects or tangible things), which may be relevant to an authorized law enforcement inquiry, that a person or legal entity may possess or have care, custody, or control[.]

18 U.S.C. § 3486(a)(1)(A). ***HN11***[⬆] The Code broadly defines a "Federal health care offense" as a violation of, or a conspiracy to violate, a number of health-care related offenses, including *18 U.S.C. § 1035* (false statements relating to health care matters) and *18 U.S.C. § 1347* (health care fraud). *18 U.S.C. § 24(a)(1)*. A federal health care offense also encompasses a variety of general criminal violations (**e.g.**, mail and **[*266]** wire fraud under *18 U.S.C. §§ 1341* and *1343*), if those violations "relate[] to a health care benefit program." *18 U.S.C. § 24* **[**21]** *(a)(2)*.

HN12[⬆] *Section 3486* also requires that any subpoena issued describe the objects to be produced and allow a reasonable period of time for the items to be assembled. *18 U.S.C. § 3486(a)(2)*. The subpoenaed party need not deliver any documents requested pursuant to *§ 3486* more than 500 miles from the place where it was served. *18 U.S.C. § 3486(a)(3)*.

There is no dispute that the investigation at issue in this case relates to a potential federal health care offense. While Doe does describe the subpoena as "overly burdensome[,]" J.A. at 7 (Mem. in Supp. of Mot. to Quash), he does not argue that the length of time given him to comply with the subpoena or the designated delivery location for the requested documents are beyond the scope of the authority granted in *§ 3486*. Instead, the primary point of contention in this case is whether the documents requested are relevant to the DOJ's investigation of Doe. Because *§ 3486* authorizes subpoena requests for documents "which **may be relevant** to an authorized law enforcement inquiry," *§ 3486(a)(1)(A)* **[***14]** (emphasis added), the question of the relevance of the documents requested is **[**22]** inherently a question of whether the DOJ had the statutory authority to issue this subpoena. Nevertheless, because the second element of our test for determining the enforceability of an administrative subpoena focuses on the relevance of the documents to the agency's investigation, we will address this issue under that heading. Thus, aside from the question of relevance, we are confident that the DOJ has satisfied *§ 3486*'s statutory requirements for issuing this administrative subpoena.

2. Does the Subpoena Seek Documents Relevant to the DOJ Investigation?

While we have no circuit precedent addressing the administrative subpoena relevance requirement as it relates to documents requested under *§ 3486*, other administrative subpoena cases in this circuit, as well as Supreme Court precedent, hold that relevance should be construed broadly. First, we note that the language of *§ 3486* indicates that the question of an administrative subpoena's relevance is not a question of evidentiary relevance, but rather is simply a question of whether the documents requested pursuant to the subpoena are relevant to the health care fraud investigation being undertaken. *18 U.S.C. § 3486* **[**23]** *(a)(1)(A)*. Furthermore, in **Markwood**, while

we did not have to engage in a discussion of the relevance of the documents requested through the administrative subpoena, we did note often the deference that courts must show to the statutory authority of the administrative agency, stating that ***HN13***[↑] subpoenas should be enforced when "'the evidence sought by the subpoena [is] not plainly incompetent or irrelevant to any lawful purpose of the [agency] in the discharge of [its] duties.'" ***Markwood***, *48 F.3d at 977* (quoting ***Endicott Johnson Corp. v. Perkins***, *317 U.S. 501, 509, 87 L. Ed. 424, 63 S. Ct. 339 (1943)*).

In ***EEOC v. Ford Motor Credit Co.***, *26 F.3d 44, 47 (6th Cir. 1994)*, this court discussed the relevance requirement as it related to administrative subpoenas issued by the EEOC. Following Supreme Court precedent, we explained that the **[***15]** term "relevant" in the statute authorizing the EEOC to issue administrative subpoenas had been construed broadly so as to allow "the Commission access to virtually any material that might cast light on the allegations against the employer." ***Ford Motor***, *[*267] 26 F.3d at 47* **[**24]** (quotation omitted). We noted that this broad interpretation of relevance was influenced by Congress's intent that the EEOC have the authority to demand documents that it deemed relevant to its investigation. We stated, however, that, while relevance should be viewed broadly, because the court was given the duty of reviewing the agency's decision to issue a subpoena, it did not simply have to accept the agency's opinion as to what is and is not relevant to agency investigations. ***HN14***[↑] Ultimately, we decided that, in reviewing whether an administrative subpoena should be enforced, we would "weigh the likely relevance of the requested material to the investigation against the burden . . . of producing the material." **Id**.

As with the EEOC's subpoena power, it appears clear, both from the language of the statute and from Congress's intent in enacting HIPAA, that the DOJ's subpoena power in investigating federal health care offenses is meant to be broad. *Section 3486* authorizes the Attorney General or her designee to subpoena any records "which **may be relevant**" to an authorized investigation, thus illustrating the substantial scope of the subpoena power Congress intended to give to **[**25]** the Attorney General. *18 U.S.C. § 3486(a)(1)(A)* (emphasis added).

Aside from the statutory language, other evidence of Congress's intent to grant the Attorney General a broad subpoena power can be found in HIPAA's legislative history. One of the main legislative purposes of HIPAA was to prevent[] health care fraud and abuse. H.R. Rep. No. 104-496, at 67 (1996), **reprinted in** 1996 U.S.C.C.A.N. 1865, 1866. As the House Ways and Means Committee Report stated in recommending that HIPAA be passed:

> In order to address the problem of health care cost inflation and make insurance more affordable, it is **[***16]** important to focus on key sources affecting levels of the underlying health care costs. Two key sources of excessive cost are medical fraud and abuse, and the current medical paperwork burden.
>
> According to the General Accounting Office (GAO), as much as 10 percent of total health care costs are lost to fraudulent or abusive practices by unscrupulous health care providers. The GAO reports that only a small fraction of the fraud and abuse committed in the health care system is identified and dealt with. Federal funding for prevention, detection, **[**26]** and prosecutions of the perpetrators of health care fraud and abuse has not kept pace with the problem. Coordination of the various law enforcement agencies at the federal and state levels has been insufficient, and law enforcement agencies agree that penalties for health care fraud and abuse should be increased.

H.R. Rep. No. 104-496, at 69-70, **reprinted in** 1996 U.S.C.C.A.N. at 1869. It is safe to assume that Congress, in passing HIPAA, recognized the serious problem that health care fraud had become, and that, through this legislation, Congress was intending to strike back at this problem. Accordingly, in light of both the statutory language and legislative history of *§ 3486*, it appears that Congress intended to give the Attorney General broad authority to conduct health care fraud investigations, thus entailing a less restricted interpretation of what records may be subpoenaed under *§ 3486* because they are "relevant" to a health care investigation.

While the **Ford Motor** court's decision to weigh the likely relevance of requested material against the burden of producing that material came in the context of an EEOC administrative subpoena, we did not confine **[**27]** our reasoning only to that type of administrative subpoena, nor is there **[*268]** any basis for following a different course in this case. The administrative subpoena powers under both Title VII and HIPAA are broadly defined, and the **Ford Motor** court's **[***17]** approach of balancing the likely

relevance of documents against the burden of their production clearly appears applicable in this case. With this background in mind, we now turn to an analysis of the relevance of the various materials requested in this subpoena.

a. Documents Relating to Doe's Professional Education and the Extent of His Ethical Training

As noted earlier, of the nine categories of documents subpoenaed by the DOJ, four categories request documents relating to Doe's professional education and training regarding ethical issues. Those categories are:

> 1) all professional journals, magazines, and newsletters subscribed to or received by Doe from January 1990 through March 1998;
> 2) complete academic transcripts and records from medical or podiatric school, as well as any other post-graduate training;
>
> 3) all documents concerning the extent of Doe's continuing medical education, including a **[**28]** list and description of courses taken, credit hours earned, and any materials provided in those courses; and
> 4) all documents concerning ethics, professional responsibility, and medical-billing issues in Doe's custody.

J.A. at 11 (Admin. Subpoena).

The government claims that these documents are relevant to its investigation because they go to show Doe's intent. If it were to prosecute Doe for these alleged kickback agreements, the government states that it would have to prove that "[Doe] knew as a general matter that the concept of remuneration for referrals was somehow wrongful (whether illegal or unethical)[.]" Appellee's Br. at 27. The government further states that its request for documents **[***18]** relating to Doe's medical training will aid it in learning the extent to which Doe may have known that the tests to which he was subjecting his patients were medically unnecessary.

The government, through its proffered reasons for requesting documents relating to Doe's professional education and ethical training, has sufficiently shown how these documents are relevant to its underlying health care fraud investigation. The extent to which Doe knew that these tests **[**29]** were medically unnecessary and the extent to which he knew that kickback arrangements were illegal or unethical are not ancillary or unimportant issues in an investigation of possible health care fraud. Thus, this request falls within the broad concept of relevance intended by Congress in *§ 3486*.

As this circuit has stated, however, this court must weigh against the relevance of the requested material the burden that would be placed on Doe in producing it. ***Ford Motor**, 26 F.3d at 47*. The extent of Doe's argument regarding the burden imposed by this request is his statement that he "would have to literally put his life on hold and search for papers and documents which stretch **ten years** into the past[,] well beyond any statute of limitations that the Government may apply to any alleged health care offenses." Appellant's Br. at 21. Of the four categories of documents currently under consideration, however, only one, the request for all professional journals, magazines, and newsletters subscribed to or received by Doe from January 1990 through March 1998, has the potential to pose any meaningful burden on Doe. Nevertheless, Doe has made no **[*269]** attempt to reach a **[**30]** reasonable accommodation with the government regarding this aspect of the subpoena, an effort the Supreme Court has suggested should be expected before a court is willing to hold an administrative subpoena overly burdensome. [3] ***Morton Salt**, 338 U.S. at 653*; **see also** ***In re Subpoena Duces Tecum**, 228 F.3d at 351* (holding that an effort by the party contesting **[***19]** the subpoena to reach an accommodation with the government is a condition to finding the subpoena overly broad or oppressive). Nor has Doe given us anything but a general and conclusory statement as to why this request constitutes an undue burden. Although Doe's arguments regarding the burden of this subpoena are rather general and conclusory, we do note that the government's investigation of Doe has gone on for more than two years, and that this is the third subpoena requesting documents from Doe issued over this time. While we do not believe that the length of the investigation or the number of subpoenas previously issued to Doe make any further request for documents unreasonable in this case, such factors may be taken into account when deciding whether an administrative subpoena **[**31]** is unduly burdensome.

In sum, we believe that the strong likelihood of the requested documents' relevance to the government's health care fraud investigation outweighs any burden imposed on Doe in producing these documents.

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[3] For example, in an attempt to reach a reasonable accommodation with the government regarding this request, Doe could have simply offered to produce a list of all professional journals he regularly received.

Accordingly, this aspect of the government's administrative subpoena will be enforced so long as the final two elements of our administrative subpoena test are met.

b. Doe's Personal and Business Financial Records

The government's subpoena also requested "copies of recent bank and other financial records sufficient to completely show current location, amount, and value of all assets for [John Doe], D.P.M., and/or his health care related businesses," as well as copies of Doe's business and personal tax returns from 1993 to the present. J.A. at 11 (Admin. Subpoena). The government **[**32]** asserts that these documents are relevant because they go to show "[Doe]'s profit motive for alleged criminal activity, the degree to which [Doe] profited from illegal activity, and the assets that may be forfeitable as a result of criminal activity." Appellee's Br. at 29. Again, Doe offers no specific reason why the production of these documents would be overly burdensome.

[*20]** Several courts have recognized that heightened privacy interests are at stake when dealing with personal, as opposed to corporate, financial records. **See** ***FDIC v. Wentz***, *55 F.3d 905, 908 (3d Cir. 1995)* ("***HN15***[] When personal documents of individuals, as contrasted with business records of corporations, are the subject of an administrative subpoena, privacy concerns must be considered."). Despite these heightened privacy concerns, the U.S. Courts of Appeals for the Second, Ninth, and District of Columbia Circuits have held that the same standard of reasonable relevance applied to corporate records when requested pursuant to the administrative subpoena power granted to the FDIC and the now-defunct Resolution Trust Corporation ("RTC") to investigate fraudulent asset transfers should also **[**33]** be applied to requests for the private financial records of corporate officials. **See** ***FDIC v. Garner***, *126 F.3d 1138, 1143-44 (9th Cir. [*270] 1997)*; ***In re McVane, 44 F.3d 1127, 1136 (2d Cir. 1995)***; ***Resolution Trust Corp. v. Walde***, *305 U.S. App. D.C. 183, 18 F.3d 943, 947-48 (D.C. Cir. 1994)*; **see also** Katherine Scherb, Comment, Administrative Subpoenas For Private Financial Records: What Protection For Privacy Does The *Fourth Amendment* Afford?, *1996 Wis. L. Rev. 1075, 1085-90*. **But see** ***Parks v. FDIC***, *65 F.3d 207, 1995 WL 529629*, at *8 (1995), **withdrawn from publication following grant of reh'g en banc** (holding that FDIC must "articulate a reasonable suspicion of wrongdoing" before a subpoena for personal financial records can be enforced). [4]

[34]** We agree with the reasoning of these circuits applying the reasonable relevance standard to subpoenas requesting the personal financial documents of corporate officials, and believe that applying the reasonable relevance standard is particularly appropriate in light of the facts of this case. Doctors operating their own medical clinics or practices, as **[***21]** appears to be the case with Doe, can easily transfer assets from business accounts to personal accounts, arguably even more readily than the corporate officers whose personal financial documents were requested pursuant to the FDIC and RTC subpoenas. To apply a more stringent standard to Doe's personal financial records in this case, in light of the ease with which personal and corporate assets could be commingled and shuttled from one account to another, would be inconsistent with the Congressional mandate given the Attorney General in *§ 3486* to uncover information relevant to its health care fraud investigation.

Applying the reasonable relevance standard to the government's requests for Doe's personal and business financial records, we again hold that the likely relevance of these documents outweighs the burden imposed **[**35]** on Doe in producing them. Doe has not explained why producing documents related to this portion of the subpoena would burden him, nor has he proffered any argument to refute the government's explanation of the documents' relevance. So long as the remaining elements of the reasonable relevance test are met, we will enforce this aspect of the government's administrative subpoena. [5]

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[4] ***HN16***[] Unlike his personal financial records, Doe has no protected *Fourth Amendment* interest in any records held by his bank, as they are "the business records of the bank[]" rather than documents over which he can assert ownership or possession. ***United States v. Miller***, *425 U.S. 435, 440-43, 48 L. Ed. 2d 71, 96 S. Ct. 1619 (1976)*.

[5] Even if we imposed a higher standard than reasonable relevance for the request of Doe's personal financial documents, we are confident that this standard would be met in this case. The most difficult standard for subpoenaing personal financial records announced by any court of appeals was that in the withdrawn First Circuit decision in **Parks**, in which the court held that an agency would have to show "a reasonable suspicion of wrongdoing[.]" **Parks**, 1995 WL 529629, at *8. In this case, the DOJ has articulated a reasonable suspicion of wrongdoing on the part of Doe. The

[36] [***22] c. Doe's Children's Financial Records**

In addition to Doe's personal financial records, the DOJ's administrative subpoena also requested "copies of recent bank and other financial records sufficient **[*271]** to show current location, amount, and value of all assets for any and all children of [John Doe], D.P.M., insofar as those assets were provided or derived from individual or jointly held assets of John Doe, D.P.M." J.A. at 11 (Admin. Subpoena). The government requests these documents for many of the same reasons it requested Doe's personal and business financial documents: to determine the degree to which Doe profited from this potentially illegal activity, and the assets that may be forfeitable as a result. Appellee's Br. at 29.

We are more troubled by the government's request for personal financial documents of the children of the target of a health care fraud investigation. Indeed, in other administrative subpoena cases, the U.S. Courts of Appeals for the Second and Ninth Circuits have recognized that ***HN17***[↑] family members of an investigation's target "have a greater reasonable expectation of privacy in their personal financial affairs than do those individuals who do **[**37]** participate in such matters." ***McVane, 44 F.3d at 1137*** (quotation omitted); **see also** ***Garner***, *126 F.3d at 1144-45*.

Although we are more reluctant to enforce this aspect of the administrative subpoena, we believe that it is sufficiently narrowly-tailored to pass the reasonable relevance standard. The DOJ's request for Doe's children's financial documents explicitly limits its reach to only those records concerning assets "provided or derived from individual or jointly held assets of [John Doe], D.P.M." J.A. at 11 (Admin. Subpoena). Further evidence of the government's efforts to confine the scope of this portion of the subpoena can be found in correspondence between the government and Doe's attorney following the issuance of the subpoena, in which the government stated that "the request concerning [Doe's] children's assets is limited to information relating to assets/moneys where [Doe] was the source, and where, **[***23]** presumably, the source of that money was his health-care business." J.A. at 19 (DOJ Letter to Doe's Att'y).

As his attorney acknowledged at oral argument, Doe's children are minors. Just as Doe could easily commingle assets **[**38]** between his personal and business financial accounts, so also could he transfer ill-gotten gains into the personal accounts of his unsuspecting minor children. Because the government has been careful to avoid a sweeping exploration of Doe's children's assets, we hold that the likely relevance of these documents to the government's health care fraud investigation outweighs the children's heightened privacy interests in guarding this information. Doe has made no other showing of why the production of these documents would be unduly burdensome, and, assuming the final elements of the reasonable relevance test are met, we will enforce the government's narrowly tailored request for specific personal financial documents belonging to Doe's children.

Having concluded our analysis of the relevance of the requested documents to the government's health care fraud investigation, we now proceed to the remaining elements of the reasonable relevance test.

3. Is the Information the DOJ Seeks Already in Its Possession?

Doe does not contend that the DOJ already has in its possession the documents it seeks through this subpoena, nor is there any evidence that this is the case.

4. Will Enforcing [39] the Subpoena Abuse the Court's Process?**

The Supreme Court has stated that ***HN18***[↑] a court's process is abused where the subpoena is "issued for an improper purpose, such as to harass the [investigation's target] or to put pressure on him to settle **[*272]** a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." ***Powell***, *379 U.S. at 58*. Furthermore, in **United States v. LaSalle**, the Court held that any bad faith **[***24]** asserted by a plaintiff may not be based on the improper motives of an individual agency employee, but instead must be founded upon evidence that the agency itself, in an institutional sense, acted in bad faith when it served the subpoena. ***LaSalle***, *437 U.S. 298, 314-16 (1978)*.

Doe asserts that, because this is the third subpoena

government has evidence of medical testing laboratories making unusual rental payments to Doe, as well as evidence from independent medical experts stating that one of the labs to which Doe referred patients was performing excessive and unnecessary electrodiagnostic testing. Thus, even under a standard requiring a reasonable suspicion of wrongdoing before a subpoena can be enforced, the government has made a sufficient showing to request Doe's personal financial records.

served to him in two years, it constitutes harassment. While we are troubled by the fact that the government, after two years of investigation and two subpoenas, has now imposed yet another document request on Doe, Doe has proffered no evidence, nor is there any in the record, that would support a conclusion that the DOJ was motivated by an improper purpose **[**40]** when issuing this subpoena. Doe has not met his "heavy" burden of showing institutional bad faith in this case. ***LaSalle***, *437 U.S. at 316*.

III. CONCLUSION

Thus, because all the requirements for enforcing an administrative subpoena have been met in this case, we **AFFIRM** the district court's decision enforcing the administrative subpoena.

End of Document

OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective September 1, 2021)

TABLE OF CONTENTS

Note: Except for Latin terms, 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 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 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 or other organization.

(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 a violation of an applicable statute or administrative regulation.

(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) “Substantially related matter” denotes one that involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter.

(o) “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.

(p) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications. 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, a lawyer in an of-counsel relationship with a law firm will be treated as part of that firm. On the other hand, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm for purposes of fee division in Rule 1.5(e). The terms of any 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.

[3] With respect to the law department of an organization, 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.

[4A] Government agencies are not included in the definition of "firm" because there are significant differences between a government agency and a group of lawyers associated to serve nongovernmental clients. Of course, all lawyers who practice law in a government agency are subject to these rules. Moreover, some of these rules expressly impose upon lawyers associated in a government agency the same or analogous duties to those required of lawyers associated in a firm. See Rules 3.6(d), 3.7(c), 5.1(c), and 5.3. Identifying the governmental client of a lawyer in a government agency is beyond the scope 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 1.6(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 (p) 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 (p).

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 1.10, 1.11, 1.12, or 1.18.

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

[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. The definition of "substantially related matter" is taken from Rule 1.9, Comment [3] and defines the term 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.

Comparison to former Ohio Code of Professional Responsibility

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

Comparison to ABA Model Rules of Professional Conduct

Rule 1.0 contains four substantive changes to the Model Rule terminology and revisions to the corresponding comments.

The definition in Model Rule 1.0(c) of "firm" and "law firm" is rewritten to expressly include legal aid and public defender offices. Comments [2] and [3] have been altered, and Comment [4A] has been added. Comment [2] is revised to address the status of of-counsel lawyers and practitioners who share office space. Comment [3] is amended to eliminate the reference to government lawyers. The rationale for this deletion and application of the Ohio Rules of Professional Conduct to lawyers in government practice are addressed in a new Comment [4A].

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 rules referring to "illegal or fraudulent conduct," including Rules 1.2(d), 1.6(b)(3), 1.16(b)(2), 4.1(b), and 8.4(c), apply to statutory and regulatory prohibitions that are not classified as crimes.

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. The new definition of "substantially related" is taken from Rule 1.9, Comment [3]. 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.

I. CLIENT-LAWYER RELATIONSHIP

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.

Retaining or Contracting with Other Lawyers

[6] Before a lawyer retains or contracts with another lawyer outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyer's services will contribute to the competent and ethical representation of the client. See also Rule 1.2, 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with another lawyer outside the lawyer's own firm will depend on the circumstances, including the education, experience, and reputation of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and the legal protections, professional conduct rules, and ethical environments of the jurisdiction in which the services will be performed, particularly relating to confidential information. The decision to contract with a lawyer for purposes other than the provision of legal services, such to serve as an expert witness, may be governed by other rules. See Rule 1.4 and 1.5.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers should ordinarily consult with each other and the client about the scope of their respective representations and the allocation of responsibility between or among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law and beyond the scope of these rules.

Maintaining Competence

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

Comparison to former Ohio Code of Professional Responsibility

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.

Comparison to ABA Model Rules of Professional Conduct

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

(b) [RESERVED]

(c) 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, preferably in *writing*.

(d)(1) 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.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal 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(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(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 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.

Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] Although division (c) affords the lawyer and client substantial latitude in defining the scope of the representation, any limitation 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 a limitation 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.

[7A] Written confirmation of a limitation of a new or existing representation is preferred and 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. A lawyer may create a form or checklist that specifies the 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 scope of that representation.

[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)(1) 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 permissible but then discovers is improper. See 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)(1) 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)(1) 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)(1) 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 Ohio 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).

Comparison to former Ohio Code of Professional Responsibility

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 DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

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

The first sentence of Rule 1.2(d)(1) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d)(1) 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."

Comparison to ABA Model Rules of Professional Conduct

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.

Model Rule 1.2(b) has been moved to Comment [5] 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 from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d)(1) 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)(1), and Model Rule 1.2(d) was split into two sentences in 1.2(d)(1).

Rule 1.2(d)(2) does not exist in the Model Rules.

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 Rules 1.2(c) and 1.5(b).

[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 26 of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

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)].

Comparison to ABA Model Rules of Professional Conduct

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 26. 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 Ohio 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 and the fees and costs incurred to date.

[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. A lawyer should promptly respond to or acknowledge client communications.

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 limited liability 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.

Comparison to former Ohio Code of Professional Responsibility

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. Rules 1.4(a)(2) and (3) correspond 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 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.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for 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 nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably 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 and the lawyer will be disbursing funds, 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) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee 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.

Nature and Scope of Representation; Basis or Rate of Fee and Expenses

[2] The detail and specificity of the communication required by division (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee. A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding. 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 established promptly. Unless the situation involves a regularly represented client, the lawyer should 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.

[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(e). 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.

[5A] If all funds held by the lawyer are not disbursed at the time the closing statement required by division (c)(2) is prepared, the lawyer's obligation with regard to those funds is governed by Rule 1.15.

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. Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval 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. Except where court approval of the fee division is obtained, 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 Rules 1.1 and 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 between a client and a lawyer, 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.

Comparison to former Ohio Code of Professional Responsibility

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 nature and scope of the representation and the arrangements for fees and expenses shall promptly be communicated to the client, preferably 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.

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 fee 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 [6A].

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 Rule 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, except where the fee division is court-approved. 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.

Comparison to ABA Model Rules of Professional Conduct

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 Model Rule 1.5 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.

Model Rule 1.5(c), while dealing with contingent fees, is expanded and clarified. The closing statement provisions of the Model Rule are expanded to bring them in line with existing R.C. 4705.15(C). Additionally, the 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 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."

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 (d) 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* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to 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;

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

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

(6) to comply with other law or a court order;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a *firm*, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.

(d) 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.

[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 overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) 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)(3) 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. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[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)(4) 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)(5) 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)(5) 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)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Division (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.,* the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of a divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, division (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

[14] Any information disclosed pursuant to division (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Division (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to division (b)(7). Division (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See Comment [5].

[15] 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)(6) permits the lawyer to comply with the court's order.

[16] 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. 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. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

[17] 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)(6). 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

[18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and 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. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.,* by making

a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to forego security measures that would otherwise be required by this rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state or federal laws that govern data privacy or that impose specific notification requirements upon the loss of or unauthorized access to electronic information is beyond the scope of these rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm see Rule 5.3, Comments [3] and [4].

[19] 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. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws governing data privacy, is beyond the scope of these rules.

Former Client

[20] 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.

Comparison to former Ohio Code of Professional Responsibility

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 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 new and has no comparable Code provision. Rule 1.6(b)(2) is

the future crime exception and corresponds to DR 4-101(C)(3), with the addition of "or other person" from the Model Rule. Rule 1.6(b)(3) 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)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. Rule 1.6(b)(6) 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.

Comparison to ABA Model Rules of Professional Conduct

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 exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio's exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer's discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to "substantial injury to the financial interests of another." Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words "prevent" and "rectify;" and it allows for disclosure to mitigate the effects of the client's commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of "criminal" to "illegal" is consistent with the use of the term "illegal" in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds “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 *substantial* 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 and diligent 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), whether the lawyer can competently and diligently represent all clients affected by the conflict of interest; and (5) 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). [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 a 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 whether: (1) 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 (2) 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 substantial 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: (1) 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. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of division (b) are met. [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 substantial 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: (1) where the cases are pending; (2) whether the issue is substantive or procedural; (3) the temporal relationship between the matters; (4) the significance of the issue to the immediate and long-term interests of the clients involved; and (5) 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

substantial 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 activity with clients.* A lawyer is prohibited from engaging in sexual activity 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 clients of insurance defense counsel in Rule 1.8(f)(4). If acceptance of the payment from any other source presents a substantial 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 must be fully explained to the clients at the outset of the representation and communicated to the client, preferably 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 Rule 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). 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 (p) (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: (1) to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives; and (2) 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 spouses in the preparation of a separation agreement. [*Columbus Bar Assn 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 and diligently 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]

Comparison to former Ohio Code of Professional Responsibility

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 comments to 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 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 that 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 and diligent 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).

Comparison to ABA Model Rules of Professional Conduct

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. Division (a)(2) uses phrases borrowed from Model Rule 1.7, Comment [8] and DR 5-101 to explain the nature of a "material limitation" conflict and substitutes the defined term "substantial" in place of "significant."

Rule 1.7 differs in substance from 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(b)(2) and (3), are unexceptional, and their inclusion in the rule is appropriate. Note, however, that unlike Rule 1.7(c)(2), corresponding Model Rule 1.7(b)(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 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) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.

(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 divisions (f)(1) to (3) and, if applicable, division (f)(4) 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 compensated 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 retained 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 retained 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. In addition, your insurance company may establish guidelines governing how lawyers are to proceed in defending you—guidelines that you are entitled to know. However, the lawyer cannot act on the insurance company's instructions when they are contrary to your interest.

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

4. Confidentiality: Lawyers have a duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have duty to share with the insurance company information relating to the defense or settlement of the claim. Whenever a waiver of lawyer-client confidentiality is needed, your lawyer has a duty to consult with you and obtain your informed consent.

5. Release of Information for Audits: Some insurance companies retain auditing companies to review the billing and files of the lawyers they hire to represent

policyholders. If the lawyer believes an audit, bill review, or other action initiated by the insurance company may release confidential information in a manner that may be contrary to your interest, the lawyer must advise you regarding the matter and provide an explanation of the purpose of the audit and the procedure involved. Your written consent must be given in order for an audit to be conducted. If you withhold your consent, the audit shall not be conducted.

6. Conflicts of Interest: The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you have a concern about a conflict of interest in your case, you should discuss your concern with the lawyer. If a conflict of interest 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. 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 the settlement or agreement is subject to court approval or 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 or agreement.

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

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice or requiring arbitration of a claim against the lawyer 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*.

(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 activity 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. See also Rule 1.9(b). Division (b) applies whether or not 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 a land-use regulation 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 substantial 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] Divisions (f)(1) to (f)(3) apply to insurance defense counsel compensated by an insurer to defend an insured, subject to the unique aspects of that relationship. Whether employed or retained by an insurance company, 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. The insured's consent to the insurer's payment of defense counsel, required by Rule 1.8(f)(1), can be inferred from the policy contract. Nevertheless, an insured may not understand how defense counsel's relationship with and duties to the insurer will affect the representation. Therefore, to ensure that such consent is informed, these rules require a lawyer who undertakes defense of an insured at the expense of an insurer to provide 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). Alternatively, where a settlement is subject to court approval, as in a class action, the interests of multiple clients are protected when the lawyer complies with applicable rules of civil procedure and orders of the court concerning review of the settlement.

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. Division (h)(1) also prohibits a lawyer from prospectively entering into an agreement with the client to arbitrate any claim unless the client is independently represented. This division, however, does not 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 engaging in sexual activity 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.

Comparison to former Ohio Code of Professional Responsibility

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 similar to DR 4-101(B)(2), but the prohibition against adverse use of confidential information applies to all information relating to the representation, consistent with Rule 1.6(a). As suggested by Comment [5], these rules, unlike DR 4-101(B)(3), do not expressly prohibit the lawyer from using information relating to the representation for the benefit of the lawyer or another person. Because of the peril that such use would violate another duty that the lawyer has to the client (or to a third party, for example, by reason of a confidentiality agreement), lawyers should approach such issues carefully.

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. 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.

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 Association.

Rule 1.8(g) corresponds to DR 5-106. Unlike DR 5-106, Rule 1.8(g) permits aggregate agreements in criminal cases and agreements subject to court approval.

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. A portion of Rule 1.8(h)(1) is based on Opinion 96-9 of the Board of Commissioners on Grievances and Discipline.

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.

Rule 1.8(k) may be compared to DR 5-105(D).

Comparison to ABA Model Rules of Professional Conduct

Rule 1.8 contains several 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.*

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 in November 2002, 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] See Rule 1.0(n) for a definition of "substantially related 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.

Comparison to former Ohio Code of Professional Responsibility

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 and 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.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.9 is substantively identical to Model Rule 1.9. The definition of "substantially related matter," which appears in Comment [3] of the Model Rule is moved to Rule 1.0(n).

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that 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*, no lawyer in that *firm* shall thereafter represent a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the *firm*, if the lawyer *knows* or *reasonably should know* that either of the following applies:

(1) the formerly associated lawyer represented the client in the same or a *substantially related matter*;

(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 has had *substantial* responsibility in a matter for a former client and becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent, in the same matter, a person whose interests are materially adverse to the interests of the former client.

(d) In circumstances other than those covered by Rule 1.10(c), when a lawyer becomes associated with a new *firm*, no lawyer in the new *firm* shall *knowingly* represent a person in a matter in which the lawyer is personally disqualified under Rule 1.9 unless both of the following apply:

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

(2) *written* notice is given as soon as practicable to any affected former client.

(e) A disqualification required 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 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] - [4A].

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, imputation of that lawyer's conflict to the lawyers remaining in the firm 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) prohibits lawyers in a law firm from representing a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client or any other lawyer currently in the firm has material

information protected by Rule 1.6 or 1.9(c). "Substantially related matter" is defined in Rule 1.0(n), and examples are given in Rule 1.9, Comment [3].

Removing Imputation

[5A] Divisions (c) and (d) address imputation to lawyers in a new firm when a personally disqualified lawyer moves from one law firm to another. Division (c) imputes the conflict of a lawyer who has had substantial responsibility in a matter to all lawyers in a law firm to which the lawyer moves and prohibits the new law firm from assuming or continuing the representation of a client in the same matter if the client's interests are materially adverse to those of the former client. Division (d) provides for removal of imputation of a former client conflict of one lawyer to a new firm in all other instances in which a personally disqualified lawyer moves from one firm to another, provided that the personally disqualified lawyer is properly screened from participation in the matter and the former client or client's counsel is given notice.

[5B] Screening is not effective to avoid imputed disqualification of other lawyers in the firm if the personally disqualified lawyer had substantial responsibility for representing the former client in the same matter in which the lawyer's new firm represents an adversary of the former client. A lawyer who was sole or lead counsel for a former client in a matter had substantial responsibility for the matter. Determining whether a lawyer's role in representing the former client was substantial in other circumstances 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 effective 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.

[5E] Screening will not remove imputation where screening is not timely undertaken, or where the circumstances provide insufficient assurance that confidential information known by the personally disqualified lawyer will remain protected. Factors to be considered in deciding whether an effective screen has been created are the size and structure of the firm, the likelihood of contact between the disqualified lawyer and lawyers involved in the current representation, and the existence of safeguards or procedures that prevent the disqualified lawyer from access to information relevant to the current representation.

[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.

Comparison to former Ohio Code of Professional Responsibility

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, including personal conflicts. Rule 1.10(a) imputes all conflicts, except personal conflicts that are not likely to affect adversely the representation of a client by other lawyers in the firm. Rule 1.10(b) clarifies that imputation generally ends when the personally disqualified lawyer leaves the firm, unless the firm proposes to represent a client in the same or substantially related case or another 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 holding in *Kala* that imputes to a new firm the disqualification of a lawyer who had substantial responsibility for a matter and prevents any lawyer in that firm from representing, in that matter, a client whose interests are materially adverse to the former client. Consistent with the syllabus in *Kala*, Rule 1.10(d) allows the presumption of shared confidences within the new firm to be rebutted by effective screening when a personally disqualified lawyer did not have substantial responsibility in the matter or the new firm is asked to represent a client in a different matter.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.10 corresponds to the Model Rule, with the addition of divisions (c) and (d), which separately address the issue of imputation and removing imputation to lawyers in a new firm when a lawyer changes law firms and no longer represents a former client. Rule 1.10(b) is stated in the form of a disciplinary rule. Rule 1.10 (d) permits the use of law firm screens to remove imputation, consistent with *Kala*, except in the circumstances stated in Rule 1.10(c)—that is where a lawyer who is changing firms had a substantial role in the same matter in which the lawyer's new firm

represents or proposes to represent a client with adverse interests. Comments [5A] to [5E] explain Rules 1.10(c) and (d), 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] are based on the original ABA Ethics 2000 proposal. Comment [5E] is based on *Kala*.

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 Rule 1.9(c) 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(c). For purposes of Rule 1.9(c), which applies to former government lawyers, the definition of "matter" in division (e) applies. In addition, such a lawyer may be subject to criminal statutes and other government regulations regarding conflict of interest. See R.C. Chapters 102. and 2921. Such statutes and regulations may circumscribe the extent to which and length of time before the government agency may give consent under this rule. See Rule 1.0(f) 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 [9].

[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. See R.C. 102.03(B).

[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.

Comparison to former Ohio Code of Professional Responsibility

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.

Comparison to ABA Model Rules of Professional Conduct

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 Rule 1.9(c) regarding conflicts of interest. This includes provisions of the Ohio Ethics Law contained in R.C. Chapters 102. and 2921. 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 parttime judges. Part III of the Application section of the Ohio Code of Judicial Conduct provides that a parttime judge shall not "act as a lawyer in any proceeding in which the judge served as a judge or in any other related proceeding." Although phrased differently from this rule, the provisions 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.

[6] By its terms, Rule 1.12(b) prohibits a lawyer from negotiating for employment with a party or lawyer involved in a matter in which the lawyer is presently acting as an adjudicative officer or neutral, during the time that the lawyer has such a role. The lawyer should not negotiate for such employment during the pendency of the matter, regardless of whether the lawyer is active in the matter at the time that the employment opportunity arises, except where the lawyer's role has completely ended. Thus, a lawyer who, while acting as an independent mediator, attempted to settle a matter that remains pending is not prohibited from negotiating for employment with one of the parties or one of the lawyers in the matter after the mediation has concluded but while the case is still pending. If the lawyer were to be hired, however, Rule 1.12(a) would prohibit the lawyer from being involved in the matter on behalf of a party, and Rule 1.12(c) would effect the disqualification of the rest of the firm, absent effective screening and notice to the other parties and the tribunal.

Comparison to former Ohio Code of Professional Responsibility

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. 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, or third party neutral, establishes an informed consent standard by which the lawyer may avoid personal disqualification, and provides a process through which the personally disqualified lawyer's firm may avoid disqualification.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.12 is substantively identical to Model Rule 1.12. Comment [6] has been added to provide further clarification regarding application of the rule.

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 (d).

(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(g), 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 (d) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] 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(d) 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.

Comparison to former Ohio Code of Professional Responsibility

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.

Comparison to ABA Model Rules of Professional Conduct

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 2003. 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 Model 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. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are 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.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provisions are EC 7-11 and 7-12, which discuss 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.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.14 is identical to the ABA Model Rule.

RULE 1.15: SAFEKEEPING FUNDS AND 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 authorized to do business in Ohio 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 record 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 any fee agreement with each client;

(2) maintain a record 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 record 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 a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. 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 funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other 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 Access to Justice Foundation pursuant to section 120.52 of the Revised Code.

(2) notify the Ohio Access to Justice Foundation, in a manner required by rules adopted by the Ohio Access to Justice 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. The records required by this rule may be maintained electronically.

[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 lawyer determines 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 should 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] Divisions (d) and (e) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect third-person interests of which the lawyer has actual knowledge against wrongful interference by the client. When there is no dispute regarding the funds or property in the lawyer's possession, the lawyer's ethical duty is to promptly notify and deliver the funds or property to which the client or third person is entitled. When the lawyer has actual knowledge of a dispute between the client and a third person who has a lawful interest in the funds or property in the lawyer's possession, the lawyer's ethical duty is to notify both the client and the third person, hold the disputed funds in accordance with division (a) of this rule until the dispute is resolved, and consider whether it is necessary to file an action to have a court resolve the dispute. The lawyer should not unilaterally assume to resolve the dispute between the client and the third person. When the lawyer knows a third person's claimed interest is not a lawful one, a lawyer's ethical duty is to notify the client of the interest claimed and promptly deliver the funds or property to the client.

[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, law 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.

Comparison to former Ohio Code of Professional Responsibility

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. Any fee agreements.

2. A record 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 record 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 a change from 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), (f), and (g).

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 Ohio Access to Justice Foundation, and Gov. Bar R. VI, (1)(F). This provision is the same as the requirements of DR 9-102(D) and (E).

Comparison to ABA Model Rules of Professional Conduct

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 frequency with which law firms are dissolved necessitates 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: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

(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.

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

(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.

(c) 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.

(d) As part of the 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 *reasonable* 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.

(e) 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.

Comment

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

Mandatory Withdrawal

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

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. 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 discharge 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 illegal 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

[8A] 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.

[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.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.16 governs withdrawal from representation and replaces DR 2-110.

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

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

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

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

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

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

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

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

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

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

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

Rule 1.16(d) 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(e) 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.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.16(b)(2) is revised to change "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 statutes or administrative regulations for which there are no criminal penalties.

Rules 1.16(b)(7) and (8) are added to recognize additional circumstances in which withdrawal may be permitted.

Rule 1.16(d) is revised to include a list of items typically included in "client papers and property." This provision is further modified to require that a withdrawing lawyer must afford the client a reasonable time to secure new counsel. Comment [8A] is added to elaborate on the duties of a lawyer who is contemplating or effectuating withdrawal from representation.

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 information relating to the representation 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 11.

(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 the notice required by division (e) of this rule, the representation of that client may be transferred to the purchaser only after the selling lawyer and purchasing lawyer have caused notice of the sale to be made by at least one publication in a newspaper of general circulation in the county in which the sale will occur or in an adjoining county if no newspaper is published in the county in which the sale will occur. Upon completion of the publication, the client's consent to the sale is presumed.

(h) The *written* notice to clients required by division (e) and (f) of this rule shall be provided by regular mail with a certificate of mailing or other comparable proof of mailing. In lieu of providing notice by 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] [RESERVED]

[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 conflict clearance, 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 or 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. Pursuant to Rule 1.1, the purchasing lawyer may be required to associate with other counsel in order to provide competent representation.

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. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation and to client files requires the purchaser and seller to take steps to ensure confidentiality of information related to the representation. 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 information related to the representation 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. After the confidentiality agreement has been signed and before the prospective purchaser reviews client-specific information, a conflict check should be completed to assure that the prospective purchaser does not review client-specific information concerning a client whom the prospective purchaser cannot represent because of a conflict of interest.

[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 the parties to provide notice of the proposed sale via a newspaper publication.

[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(f) 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.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.17 restates the existing provisions of DR 2-111, substituting "information relating to the representation" in place of "confidences and secrets."

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 rule, with the major exceptions being that Rule 1.17 (1) does not permit the sale of only a portion of a law practice, and (2) allows a missing client to be provided notice of the proposed sale by publication. 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] is relocated to Comment [6] where the language of the Model Rule comment is revised to address 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 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, and comments [6], [9], and [15] are modified, to reflect the fact that Rule 1.17 does not permit the sale of a part of a lawyer's practice.

Comments [7] and [7A] are modified to reflect the actual mechanisms contained in the rule respecting the preservation of information related to the representation of clients.

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.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.17 differs from Model Rule 1.17 as noted above.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information, 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 applies:

(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 consultations 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] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites

the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general interest. Such a person 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, and thus is not a "prospective client."

[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 nonrepresentation 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.

Comparison to former Ohio Code of Professional Responsibility

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 Assn v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596. 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*.

Comparison to ABA Model Rules of Professional Conduct

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.

II. COUNSELOR

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in 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.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules comparable to Rule 2.1. However, EC 7-8 addresses the scope of the rule.

Comparison to ABA Model Rules of Professional Conduct

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 impose upon the lawyer with respect to the evaluation. The legal duties, if any, that the lawyer may have to the third person are 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.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.3.

Comparison to ABA Model Rules of Professional Conduct

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 Association for Conflict 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(o)], 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.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 2.4. EC 5-21, while not specifically addressing the exact same role of the lawyer, nonetheless does embody some of the same responsibilities as contained in the rule.

Comparison to ABA Model Rules of Professional Conduct

Comment [2] is modified to include "statutes" that may govern the conduct of a third-party neutral. This is consistent with the Ohio situation in which mediators are governed by statutory requirements.

III. ADVOCATE

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.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.2: EXPEDITING LITIGATION

Note

ABA Model Rule 3.2 is not adopted in Ohio. 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].

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 duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, 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(o) 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] A practical time limit on the obligation to rectify false evidence or false statements of law or fact must be established. A final determination of the issue to which the duty relates by the highest tribunal that may consider the issue, or the expiration of the time for such consideration, is a reasonably definite point for the termination of the obligation. Division (c) modifies the rule set forth in *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260 to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

***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(c) 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.

Comparison to former Ohio Code of Professional Responsibility

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 take steps 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. This rule requires a lawyer to take remedial measures with respect to criminal or fraudulent conduct relating to a proceeding in which the lawyer represents or has represented a client.

Rule 3.3(c) provides that the duties set forth in divisions (a) and (b) continue until a final determination on the issue to which the duty relates has been made by the highest tribunal that may consider the issue or the expiration of time for such a determination. The Code provisions that correspond to Rule 3.3 have no comparable time limitation. But see *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260, which is modified by Rule 3.3(c) to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

Rule 3.3(d) has no analogous Disciplinary Rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 3.3(c) is replaced by a standard analogous to that used in Rule 3.3 of the North Dakota Rules of Professional Conduct.

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 or by a good-faith belief that such evidence may exist, 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) [RESERVED]

(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. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. 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, or if the testimony of a person with knowledge is unavailable, incomplete, or false. 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. 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. Applicable law also prohibits the use of force, intimidation, or deception to delay, hinder, or prevent a person from attending or testifying in a proceeding.

[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.

[3A] 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.

[4] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

DR 7-102, DR 7-106(C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.4 is revised to add a "good-faith belief" provision consistent with the holding in *State v. Gillard* (1988), 40 Ohio St.3d 226. Model Rule 3.4(f) is deleted because its provisions are inconsistent with a lawyer's obligations under Ohio law, and the corresponding Comment [4] also is removed. Division (g) is inserted 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 applies:

(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*;

(6) engage in undignified or discourteous conduct that is degrading to 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*" means an insignificant item or interest that could not raise a reasonable question as to the impartiality of a judicial officer, official, or employee of a tribunal.

[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, undignified, or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(o).

Comparison to former Ohio Code of Professional Responsibility

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(a)(6) corresponds to DR 7-106(C)(6).

Rule 3.5(b) is revised to add the provisions of DR 7-108(G).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.5 differs from the Model Rule in four 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. "*De minimis*" is defined in Comment [1] to incorporate the definition contained in the Ohio Code of Judicial Conduct.

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 (a)(6) that incorporates DR 7-106(C)(6). Rule 3.5(a)(5) addresses a wide range of conduct that, although disruptive to a pending proceeding, may not be directed to the tribunal itself, such as comments directed toward opposing counsel or a litigant before the jury. Rule 3.5(a)(6) speaks to conduct that is degrading to a tribunal, without regard to whether the conduct is disruptive to a pending matter. See *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048 and *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630.

The fourth change in the rule is a new division (b) that incorporates 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] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

Rule 3.6 reflects DR 7-107 in the Model Rule format. Ohio adopted Model Rule 3.6 in 1996.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.6 is identical to Model Rule 3.6 in format and substance, except for the addition to division (b) that makes clear a lawyer may not engage in trial publicity if doing so would violate a duty of confidentiality under Rule 1.6. Also, Comment [8] is stricken to reflect the deletion of Model Rule 3.8(f).

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work *substantial* hardship on the client.

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

(c) A government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law.

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 (a)(1) to (3). Division (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Division (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these exceptions, division (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the

tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

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

Conflict of Interest

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

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

[8] Government agencies are not included in the definition of "firm." See Rule 1.0(c) and Comment [4A]. Nonetheless, the ethical reasons for restrictions in serving as an advocate and a witness apply with equal force to lawyers in government offices and lawyers in private practice. Division (c) reflects the difference between relationships among salaried lawyers working in government agencies and relationships between law firm lawyers where financial ties among the partners and associates in the firm are intertwined. Division (c) permits a lawyer to testify, or offer the testimony of a lawyer in the same government agency as the lawyers participating in the case, where permitted by division (a) or by common law.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.7 replaces DR 5-101(B) and 5-102 and changes the rule governing the ability of other lawyers who are associated in a firm with a testifying lawyer to continue the representation of a client.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.7 is identical to ABA Model Rule 3.7 with the exception of the addition of division (c) and Comment [8].

Rule 3.7(c) and Comment [8] are added to recognize the difference between relationships among salaried lawyers in government agencies and relationships between law firm lawyers, where "financial ties among the partners and associates of the firm are intertwined." See *In re Disqualification of Carr*, 105 Ohio St. 3d 1233, 1235-36, 2004-Ohio-7357, ¶13-16. The testimony of a prosecutor, who is effectively screened from any participation in the case, may be permitted in extraordinary circumstances. *State v. Coleman* (1989), 45 Ohio St. 3d 298 was a death penalty case. In allowing such testimony, the Court said: "We recognize that a prosecuting attorney should avoid being a witness in a criminal prosecution, where it is a complex proceeding where substitution of counsel is impractical, and where the attorney so testifying is not engaged in the active trial of the cause and it is the only testimony available, such testimony is admissible and not a violation of DR 5-102." *Id.* at 302.

RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall not do any of the following:

(a) pursue or prosecute a charge that the prosecutor *knows* is not supported by probable cause;

(b) [RESERVED]

(c) [RESERVED]

(d) fail to 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, fail to disclose to the defense all unprivileged mitigating information *known* to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the *tribunal*;

(e) 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) [RESERVED]

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 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. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.

[2] [RESERVED]

[3] The exception in division (d) recognizes that a prosecutor may seek an appropriate 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] [RESERVED]

[6] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

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).

EC 7-13 recognizes the distinctive role of prosecutors:

> 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.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.8 modifies Model Rule 3.8 as follows:

- The introductory phrase of the rule is reworded to state a prohibition, consistent with other rules;
- Division (a) is expanded to prohibit either the pursuit or prosecution of unsupported charges and, thus, would include grand jury proceedings;
- Division (b) is deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth the duties of all lawyers in dealing with unrepresented persons;
- Division (c) is deleted because of its breadth and potential adverse impact on defendants who seek continuances that would be beneficial to their case or who seek to participate in diversion programs;
- Division (d) is modified to comport with Ohio law;
- Division (f) is deleted because a prosecutor, like all lawyers, is subject to Rule 3.6.

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 applies only 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.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.9 has no analogous provision in Ohio law. Rule 3.9 may be considered as having antecedents in DR 7-102(A)(3) and DR 9-101(C).

Comparison to ABA Model Rules of Professional Conduct

Rule 3.9 is identical to Model Rule 3.9.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not *knowingly* 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 usually 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)(3) 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.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.1 addresses the same issues contained in several provisions of the Ohio Code of Professional Responsibility. Division (a) of the rule is virtually identical to DR 7-102(A)(5). Division (b) parallels 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 Rule 3.3.

No Ohio case has construed DR 7-102(B) in the context of a lawyer failing to disclose a fraud on a person. Nevertheless, revealing such an ongoing or future fraud is justified under Rule 4.1(b) when the client refuses to prevent it, and the lawyer's withdrawal from the matter is 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)(3).

Comparison to ABA Model Rules of Professional Conduct

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. 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.

[8] The prohibition on communications with a represented person applies only 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.

Comparison to former Ohio Code of Professional Responsibility

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. Also see Advisory Opinions 96-1 and 2005-3 from the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

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.

Comparison to former Ohio Code of Professional Responsibility

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.

Comparison to ABA Model Rules of Professional Conduct

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 or electronically stored information relating to the representation of the lawyer's client and *knows* or *reasonably should know* that the document or electronically stored information 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 a document or electronically stored information that was inadvertently sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this rule requires the lawyer to promptly notify the sender. For purposes of this rule, "document or electronically stored information" includes paper and electronic documents, electronic communications, and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this rule only if the receiving lawyer knows or reasonably should know that the metadata was sent inadvertently to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was sent inadvertently. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer, subject to applicable law that may govern deletion. See Rules 1.2 and 1.4.

Comparison to former Ohio Code of Professional Responsibility

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).

Comparison to ABA Model Rules of Professional Conduct

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).

V. LAW FIRMS AND ASSOCIATIONS

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) [RESERVED]

(b) [RESERVED]

(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* or government agency 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] [RESERVED]

[2] Lawyers with managerial authority within a firm or government agency should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm or government agency will conform to the Ohio Rules of Professional Conduct. Such policies and procedures could 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 may be advisable depending 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 firm's policies may be appropriate. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be prudent. 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 lawyers with managerial authority should not assume that all lawyers associated with the firm will inevitably conform to the rules. These principles apply to lawyers practicing in government agencies.

[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 or government agency, 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. Lawyers with managerial authority have at least indirect responsibility for all work being done by the firm or government agency, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm or government agency 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] [RESERVED]

[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 or government agency to abide by the Ohio Rules of Professional Conduct. See Rule 5.2(a).

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.1

Comparison to ABA Model Rules of Professional Conduct

Rule 5.1 revises Model Rule 5.1 to delete divisions (a) and (b) and insert references to "government agency" in division (c)(2) and the corresponding comments. Some of the principles contained in Model Rule 5.1(a) and (b) are retained as aspirational provisions of the comments. The addition of "government agency" is consistent with deletion of the reference to "government" in Rule 1.0, Comment [3] and the addition of Rule 1.0, Comment [4A]. 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.

Comparison to former Ohio Code of Professional Responsibility

There is no Disciplinary Rule comparable to Rule 5.2.

Comparison to ABA Model Rules of Professional Conduct

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 lawyer who individually or together with other lawyers possesses managerial authority in a *law firm* or government agency shall make *reasonable* efforts to ensure that the *firm* or government agency has in effect measures 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 has managerial authority in the *law firm* or government agency 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] Division (a) requires lawyers with managerial authority within a law firm or government agency to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm or government agency, and nonlawyers outside the firm or agency who work on firm or agency matters, will act in a way compatible with the professional obligations of the lawyer. See Rule 1.1, Comment [6]. Division (b) applies to lawyers who have supervisory authority. Division (c) specifies the circumstances in which a lawyer is responsible for the conduct of a nonlawyer, within or outside the firm or government agency, that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers within the Firm or Agency

[2] 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.

Nonlawyers Outside the Firm or Agency

[3] A lawyer may use nonlawyers outside the firm or government agency to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, or using an Internet-based service to store client information. When using such services outside the firm or agency, the lawyer must make reasonable efforts to ensure that the services are provided in a manner compatible with the lawyer's professional obligations. The extent of the obligation to make reasonable efforts will depend on the circumstances, including the education, experience, and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm or agency, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] When the client directs the selection of a particular nonlawyer service provider outside the firm or agency, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these rules.

Comparison to former Ohio Code of Professional Responsibility

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 and *Mahoning Cty. Bar Assn v. Lavelle*, 107 Ohio St.3d 92, 2005-Ohio-5976.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.3 is similar to the Model Rule with changes to conform the rule and comments to Rule 5.1.

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 applies:

(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).

Comparison to former Ohio Code of Professional Responsibility

Rule 5.4 addresses the same subject addressed by DR 3-102(A), which prohibits dividing fees with nonlawyers, DR 3-103 and DR 5-107(C), which prohibit forming a partnership or practicing in a 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 provisions in the Ohio Code. Slight modifications in language between Ohio Code provisions and the Model Rule are intended to promote clarity of meaning. Rule 5.4(a) is substantially the same as DR 3-102(A). Rule 5.4(b) is identical to DR 3-103. Rule 5.4(c) is substantially the same as DR 5-107(B). Rule 5.4(d) is substantially the same as DR 5-107(C).

Comparison to ABA Model Rules of Professional Conduct

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; REMOTE 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 one or more of the following apply:

(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 through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 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 or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6;

(4) the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction, provided the lawyer does not do any of the following:

(i) solicit or accept clients for representation within this jurisdiction or appear before Ohio tribunals, except as otherwise authorized by rule or law;

(ii) state, imply, or hold himself or herself out as an Ohio lawyer or as being admitted to practice law in Ohio;

(iii) violate the provisions of Rules 5.4, 7.1, and 7.5.

(e) A lawyer who is practicing pursuant to division (d)(2) or (4) of this rule and the lawyer's law firm shall indicate the jurisdictional limitations of the lawyer. If any Ohio presence is indicated on any lawyer or law firm materials available for public view, such as the lawyer's letterhead, business cards, website, advertising materials, fee agreement, or office signage, the lawyer and the law firm should affirmatively state the lawyer is not admitted to practice law in Ohio. See also Rule 7.1 and 7.5.

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. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[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)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law of this jurisdiction. 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) through (d)(4), 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] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal 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, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII,

Section 1(A), as "a court, legislative body, administrative agency, or other body acting in an adjudicative capacity."

[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 tribunal, 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 tribunal. 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 four 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) through (d)(4), 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] Lawyers practicing remotely in Ohio must determine whether additional safeguards are necessary to comply with their duties of confidentiality, competence, and supervision, including, without limitation, their use of technology to facilitate working remotely. These measures may include ensuring secure transmission of information to the lawyer's remote computer; procedures to securely store and back up confidential information; mitigation of an inadvertent disclosure of confidential information; and security of remote forms of communication to minimize risk of interference or breach.

[17] If a lawyer employed 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 requirements set forth in Gov. Bar R. VI, Section 6.

[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 Ohio 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 in Ohio by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in Ohio is governed by Rules 7.1 to 7.5.

[22] Division (d)(4) allows an attorney admitted in another United States jurisdiction to practice the law of that jurisdiction while working remotely from Ohio. A lawyer practicing remotely will not be found to have engaged in the unauthorized practice of law in Ohio based solely on the lawyer's physical presence in Ohio, though the lawyer could through other conduct violate the rules governing the unauthorized practice of law. A lawyer practicing remotely in Ohio must continue to comply with the rules of the lawyer's home jurisdiction regarding client trust accounts, and any client property consisting of funds should be handled as if the lawyer were located in the lawyer's home jurisdiction.

Comparison to former Ohio Code of Professional Responsibility

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 was formerly a matter within the sole discretion of the tribunal before which the out-of-state lawyer sought to appear, without any registration requirements. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Effective January 1, 2011, however, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 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).

Comments [9] and [11] are modified effective January 1, 2011, to recognize Gov. Bar R. XII, which also became effective on that date. Gov. Bar R. XII governs *pro hac vice* registration and defines "tribunal" for purposes of such registrations.

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.

Comparison to former Ohio Code of Professional Responsibility

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 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."

Comparison to ABA Model Rules of Professional Conduct

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 both of the following:

(1) every lawyer in a *firm* who *knows* that another lawyer in his or her *firm* controls or owns an interest in a business that provides a law-related service;

(2) 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.

[12] Division (d) makes the prohibitions and disclosures imposed in divisions (b) and (c) applicable to all lawyers in a lawyer's firm where the lawyer knows that another lawyer in the firm 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.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility contains no provision analogous to Rule 5.7. However, the rule is consistent with Advisory Opinion No. 94-7 of the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

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 (1) all lawyers in a lawyer's firm who know about the lawyer's interest in a law-related business, and (2) all lawyers who work in a firm that controls or owns an interest in a business that provides a law-related service.

Model Rule 5.7(b) has been redesignated as division (e) with no substantive changes.

VI. PUBLIC SERVICE

RULE 6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

Note

The Supreme Court of Ohio has deferred consideration of Model Rule 6.1 in light of recommendations contained in the final report of the Supreme Court Task Force on Pro Se and Indigent Representation and recommendations from the Ohio Access to Justice Foundation.

RULE 6.2: ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a court 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.

Comparison to former Ohio Code of Professional Responsibility

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.

Comparison to ABA Model Rules of Professional Conduct

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. In addition, the word "court" is substituted for "tribunal" in the first line of the rule to reflect that the inherent authority to make appointments is limited to courts and does not extend to other bodies included within the Rule 1.0(o) definition of "tribunal."

RULE 6.3: MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

Note

ABA Model Rule 6.3 is not adopted in Ohio. 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].

RULE 6.4: LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

Note

ABA Model Rule 6.4 is not adopted in Ohio. The substance of Model Rule 6.4 is addressed by other provisions of the Ohio Rules of Professional Conduct that address conflicts of interest.

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 both 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 communicate with the client, preferably in writing, regarding 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.

Comparison to former Ohio Code of Professional Responsibility

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 (formerly DR 5-105) in order to encourage lawyers in firms to participate in short-term legal service projects sponsored by courts or nonprofit organizations.

Comparison to ABA Model Rules of Professional Conduct

Rule 6.5 contains no substantive changes to the Model Rule.

VII. INFORMATION ABOUT LEGAL SERVICES

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 the public.

[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.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.1 corresponds to DR 2-101. Rule 7.1 does not contain the prohibitions 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.

Comparison to ABA Model Rules of Professional Conduct

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.

(d) A lawyer shall not seek employment in connection with a matter in which the lawyer or *law firm* does not intend to participate actively in the representation, but that the lawyer or *law firm* intends to refer to other counsel. This provision shall not apply to organizations listed in Rules 7.2(b)(2) or (3) or if the advertisement is in furtherance of a transaction permitted by Rule 1.17.

Comment

[1] To assist the public in learning about and 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, email address, website, 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 and other forms of advertising, advertising going beyond specified facts about a lawyer, or "undignified" advertising. Television, the Internet, and other forms of electronic communication are among the most powerful media for getting information to the public, particularly persons of low and moderate income. Prohibiting television, Internet, or other forms of electronic advertising 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. But see Rule 7.3(a) for the prohibition against solicitation through a real-time electronic exchange initiated by the lawyer.

[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 recommending the lawyer's services or channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. 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, Internet-based advertisements, 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. Moreover, a lawyer may pay others for generating client leads, including Internet-based client leads, provided the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5 and 5.4, and the lead generator's communications are consistent with Rule 7.1. To comply with Rule 7.1, a lawyer shall not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Rules 5.3 and 8.4(a).

[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 people who seek 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 the public 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 the public, 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 the public 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]

Comparison to former Ohio Code of Professional Responsibility

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.

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

- 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).

Comparison to ABA Model Rules of Professional Conduct

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 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 7.2(d) is added to incorporate the prohibition contained in DR 2-101(A)(2) relative to soliciting employment where the lawyer does not intend to participate in the matter but instead will refer the matter to other counsel.

RULE 7.3: SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment 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 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 any of the following applies:

(1) the person being solicited has made *known* to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment;

(3) the lawyer *knows* or *reasonably should know* that the person to whom the communication is addressed is a minor or an incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

(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 anyone whom the lawyer *reasonably believes* 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 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 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 anyone is sent 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” shall 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. 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 division (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] A solicitation is a communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is (a) directed to the general public, such as through a billboard, an Internet-based advertisement, a web site, or a commercial, (b) in response to a request for information, or (c) automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone, or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject the person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, 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.

[3] This potential for abuse inherent in direct in-person, live telephone, or real-time electronic solicitation justifies its prohibition, particularly since a lawyer has alternative means of conveying necessary information to those who may be in need of legal services. Communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communication make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the person's judgment. In using any telephone or other electronic communication, a lawyer remains subject to all applicable state and federal telemarketing laws and regulations.

[4] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to the public, 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 contact 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.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, a person 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 members or beneficiaries.

[6] 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 someone 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 as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient may violate Rule 7.3(b).

[7] 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 people who are seeking legal services for themselves. 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.

[8] None of the requirements of Rule 7.3 applies to communications sent in response to requests from clients or others. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a person known to be in need of legal services within the meaning of this rule.

[8A] The use of written, recorded, and electronic communications to solicit persons 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 that may be foreign to them. Accordingly, the information contained in division (e) must be communicated 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.

[9] 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).

Comparison to former Ohio Code of Professional Responsibility

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).

Comparison to ABA Model Rules of Professional Conduct

Rule 7.3 contains the following substantive changes to Model Rule 7.3:

- With the modifications discussed above, 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. Because a lawyer is not likely to have actual knowledge [Rule 1.0(g)] of a prospective client's need for legal services, the Model Rule standard contained in division (c) is changed to "* * * soliciting professional employment from a prospective client whom the lawyer *reasonably believes* to be in need of legal services * * *." See Rule 1.0(j).

- 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 trademark practice may use the designation "Trademarks," "Trademark Attorney," or a *substantially* similar designation.

(d) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a *substantially* similar designation.

(e) A lawyer shall not state or imply that a lawyer is 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.

[2] Divisions (b) and (c) recognize the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the office. Division (d) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Division (e) permits a lawyer to state that the lawyer is 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.

Comparison to former Ohio Code of Professional Responsibility

Rule 7.4 is comparable to DR 2-105 except that it permits a lawyer to state that he or she is a "specialist," practices a "specialty," or "specializes in" particular fields, subject to the "false and misleading" standard contained in Rule 7.1.

Comparison to ABA Model Rules of Professional Conduct

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. Division (c) is added from DR 2-105(A)(1) and the remaining divisions are relettered.

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 name that is misleading as to the identity of the lawyer or lawyers practicing under the name, or a *firm* name containing surnames 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 limited liability 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 surname 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. The use of the surname of a deceased partner to designate law firms is 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 may include the phrase "legal clinic" or words of similar import. The name of any active lawyer 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.

Comparison to former Ohio Code of Professional Responsibility

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."

RULE 7.6: POLITICAL CONTRIBUTIONS TO OBTAIN GOVERNMENT LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

Note

ABA Model Rule 7.6 is not adopted in Ohio. 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.

VIII. MAINTAINING THE INTEGRITY OF THE PROFESSION

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.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.1 is comparable to DR 1-101.

Comparison to ABA Model Rules of Professional Conduct

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 not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

(c) A lawyer who is a retired or former judge or magistrate may use a title such as "justice," "judge," "magistrate," "Honorable" or "Hon." when the title is preceded or followed by the word "retired," if the lawyer retired in good standing with the Supreme Court, or "former," if the lawyer, due to the loss of an election, left judicial office in good standing with the Supreme Court.

(d) A lawyer who is a retired or former judge shall not state or imply that the lawyer's former service as a judge enables the lawyer to improperly influence any person or entity, including a government agency or official, or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law.

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.

[4] This rule controls over any conflicts with Advisory Opinion 93-8 and Advisory Opinion 2013-3 of the Board of Commissioners on Grievances and Discipline.

Comparison to former Ohio Code of Professional Responsibility

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).

Comparison to ABA Model Rules of Professional Conduct

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 8.2(b) is recast in terms of an express prohibition consistent with DR 1-102(A)(1).

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.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs 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.

Comparison to ABA Model Rules of Professional Conduct

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.

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[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.

Comparison to former Ohio Code of Professional Responsibility

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."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). 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 20 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*. Effective January 1, 2011, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII. 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 that 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. With respect to conflicts of interest and determining a lawyer's reasonable belief pursuant to division (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that division may be considered if the agreement was obtained with the client's informed consent, confirmed in the agreement.

[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.

Comparison to former Ohio Code of Professional Responsibility

The Ohio Code of Professional Responsibility has no provision analogous to Rule 8.5.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.5 is substantively identical to Model Rule 8.5. Comment [1A] is modified, effective January 1, 2011, to reflect Ohio law regarding extension of *pro hac vice* status to out-of-state lawyers.

Form of Citation, Effective Date, Application

(a) These rules shall be known as the Ohio Rules of Professional Conduct and cited as "Prof. Cond. Rule _____."

(b) The Ohio Rules of Professional Conduct shall take effect February 1, 2007, at which time the Ohio Rules of Professional Conduct shall supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of lawyers occurring on or after that effective date. The Ohio Code of Professional Responsibility shall continue to apply to govern conduct occurring prior to February 1, 2007 and shall apply to all disciplinary investigations and prosecutions relating to conduct that occurred prior to February 1, 2007.

(c) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5(d) and Comment [17] of the Ohio Rules of Professional Conduct effective September 1, 2007.

(d) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 7.4 of the Ohio Rules of Professional Conduct effective April 1, 2009.

(e) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.15 of the Ohio Rules of Professional Conduct effective January 1, 2010.

(f) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 5.5 and 8.5 of the Ohio Rules of Professional Conduct effective January 1, 2011.

(g) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.4, Comment [8], and 7.5 of the Ohio Rules of Professional Conduct effective January 1, 2012.

(h) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 8.2(c) and (d) and Comment [4] of the Ohio Rules of Professional Conduct effective June 1, 2014.

(i) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.3, Comment [5], 1.17(e)(5), and 8.5, Comment [1] of the Ohio Rules of Professional Conduct effective January 1, 2015.

(j) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.0, 1.1, 1.4, 1.6, 1.12, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, 7.3, and 8.5 effective April 1, 2015.

(k) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5 effective December 1, 2015.

(l) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.7, Comment [36] effective March 15, 2016.

(m) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.2(d) and Comments [9] and [12] of the Ohio Rules of Professional Conduct effective September 20, 2016.

(n) The Supreme Court of Ohio adopted amendments to Prof. Cond. R. 1.13, Comment [6] of Prof.Cond.R. 1.13, and Comment [15] of Prof. Cond. R. 5.5 effective May 2, 2017.

(o) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rules 1.15 and 6.1 effective February 11, 2020.

(p) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 7.5 and Comments [1] and [4] of Prof. Cond. R. 7.5 effective June 17, 2020.

(q) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 5.5 and Comments [4], [5], [15], [16], and [22] of Prof. Cond. R. 5.5 effective September 1, 2021.

APPENDIX A

CORRELATION TABLE
OHIO RULES OF PROFESSIONAL CONDUCT TO
OHIO CODE OF PROFESSIONAL RESPONSIBILITY

The following is a numerical listing of the Ohio Rules of Professional Conduct with cross-references to provisions of the Ohio Code of Professional Responsibility or other Ohio law that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility or other Ohio law has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment of corresponding provisions.

Ohio Rules of Professional Conduct	Ohio Code of Professional Responsibility or 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)(1), EC 7-7, 7-8, 7-10
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)	None
Rule 1.6(b)(2)	DR 4-101(C)(3)
Rule 1.6(b)(3)	DR 7-102(B)(1)
Rule 1.6(b)(4)	None
Rule 1.6(b)(5)	DR 4-101(C)(4)

Rule 1.6(b)(6)	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)(1), (2), & (3)	DR 5-107(A) & (B)
Rule 1.8(f)(4)	None
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(i)	DR 5-103(A)
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 5-19
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 1.15(h)	DR 9-102(D) & (E)
Rule 1.16 Terminating Representation	
Rule 1.16(a)	DR 2-110(B)
Rule 1.16(b)	DR 2-110(A)(2), (C)(1), (C)(2), (C)(5), (C)(6), & (C)(7)
Rule 1.16(c)	DR 2-110(A)(1)
Rule 1.16(d)	DR 2-110(A)(2)
Rule 1.16(e)	DR 2-110(A)(3)
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 5-21
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 7-102(A)(8) & 7-109(A); EC 7-27

Rule 3.4(b)	DR 7-102(A)(6) & 7-109(C); EC 7-26 & 7-28
Rule 3.4(c)	DR 7-106(A)
Rule 3.4(d)	DR 7-106(C)(7); EC 7-25
Rule 3.4(e)	DR 7-106(C)(1) & (4); EC 7-24
Rule 3.4(g)	DR 7-109(B); EC 7-27
Rule 3.5 Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	DR 7-106(C)(6), 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(d)	DR 7-103(B), EC 7-13
Rule 3.8(e)	None
Rule 3.8(g)	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 a 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 & *Mahoning Cty. Bar Assn v. Lavelle* (2005), 107 Ohio St.3d 92
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 Clients	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 7.4 Communication of Fields of Practice and Specialization	DR 2-105
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 B

CORRELATION TABLE
OHIO CODE OF PROFESSIONAL RESPONSIBILITY TO
OHIO MODEL RULES OF PROFESSIONAL CONDUCT

The following is a numerical listing of the Ohio Code of Professional Responsibility with cross-references to provisions of the Ohio Rules of Professional Conduct that address substantially similar subject-matter. A cross-reference does not indicate that a provision of the Ohio Code of Professional Responsibility has been incorporated in the Ohio Rules of Professional Conduct. Please consult the code comparisons that follow each rule for a more detailed treatment 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)	Rules 8.2(b) & 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)	Rule 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)
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DR 2-101 Publicity	Rules 7.1, 7.2(a), (c), & (d), & 7.3(a), (c), (d), & (e)
DR 2-102 Professional Notices, Letterheads, and Offices	Rules 7.5 & 8.2(b)
DR 2-103 Recommendation 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
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DR 2-105 Limitation of Practice	Rule 7.4
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DR 2-106(A) & (B)	Rule 1.5(a)
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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
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DR 5-104(B)	Rule 1.8(d)
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DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer	Rule 3.8
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EC 2-19 Contingent Fee Arrangements	Rule 1.5(d)(1)
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EC 7-10 Zealous Advocacy	Rule 1.2(a)
EC 7-11 Varying Responsibilities Dependent Upon Client	Rule 1.14
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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)

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KMK Law Corporate & Securities Blog

FinCEN Extends the Corporate Transparency Act Reporting Deadline for Newly Created Entities

BY ALLISON A. WESTFALL ON 11.30.2023

The Corporate Transparency Act ("CTA") reporting requirements take effect on January 1, 2024. The CTA requires many entities to disclose ownership information to the Financial Crimes Enforcement Network ("FinCEN"). Under the original requirements, entities formed in 2024 needed to file an initial report with FinCEN within 30 days of formation. On November 29, 2023, FinCEN issued a final rule change extending the initial filing deadline from 30 days to 90 days for companies formed in 2024. Updates to reports are still due within 30 days to report changes to information in the initial reports or to correct any incorrect or incomplete information.

Entities formed on or after January 1, 2025 will have the original 30 day deadline to file their initial reports. KMK Law will continue to monitor the CTA and will provide updates if any further changes are proposed.

Tags: Corporate Transparency Act

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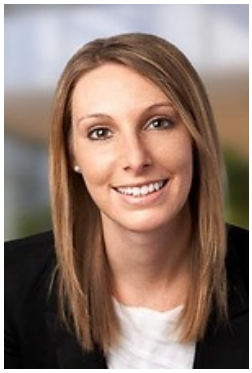
Allison A. Westfall



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As a partner in the firm's Business Representation & Transactions Group, Allie Westfall's insight and proven analytical skills help translate the complexities of the often-challenging securities laws. Allie's counsel ...

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Amendments to 40 CFR 120.2 and 33 CFR 328.3

The EPA Administrator, Michael S. Regan, signed the final rule amending the "Revised Definition of 'Waters of the United States'" on August 28, 2023, and the Assistant Secretary of the Army (Civil Works), Michael L. Connor, signed the final rule on August 25, 2023. EPA is providing this document describing the amendments to the Code of Federal Regulations (CFR) solely for the convenience of interested parties. It is not a final rule. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this document, the official version of the final rule will be published in the *Federal Register* and will be available on Regulations.gov (https://www.regulations.gov) in Docket No. EPA-HQ-OW-2023-0346**.**

Title 33 — Navigation and Navigable Waters
Chapter II — Corps of Engineers, Department of the Army, Department of Defense
Part 328 — Definition of Waters of the United States

Authority: 33 U.S.C. 1251 *et seq.*

Source: 51 FR 41250, Nov. 13, 1986, unless otherwise noted.

§ 328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters~~, including interstate wetlands~~;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section~~:~~

~~(i)~~ ~~T~~that are relatively permanent, standing or continuously flowing bodies of water; ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

(5) Intrastate lakes and ponds~~, streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section~~:~~

~~(i)~~ ~~T~~tthat are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)~~(i)~~ of this section. ~~; or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (*e.g.,* gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."~~

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other

physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

Title 40 — Protection of Environment
Chapter I — Environmental Protection Agency
Subchapter D — Water Programs
Part 120 — Definition of Waters of the United States

Authority: 33 U.S.C. 1251 *et seq.*

Source: 85 FR 22340, Apr. 21, 2020, unless otherwise noted.

§ 120.2 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) *Waters of the United States* means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(ii) The territorial seas; or

(iii) Interstate waters~~, including interstate wetlands~~;

(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

(3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section~~:~~

~~(i)~~ ~~T~~that are relatively permanent, standing or continuously flowing bodies of water; ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)~~(i)~~ of this section and with a continuous surface connection to those waters; ~~or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

(5) Intrastate lakes and ponds~~, streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section~~:~~

~~(i)~~ ~~T~~that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)~~(i)~~ of this section. ~~; or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

(b) The following are not "waters of the United States" even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section:

(1) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(2) Prior converted cropland designated by the Secretary of Agriculture. The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(3) Ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water;

(4) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(5) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(6) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons;

(7) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States; and

(8) Swales and erosional features (*e.g.,* gullies, small washes) characterized by low volume, infrequent, or short duration flow.

(c) In this section, the following definitions apply:

(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(2) *Adjacent* means having a continuous surface connection. ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."~~

(3) *High tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other

physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) *Ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) *Tidal waters* means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

~~(6) *Significantly affect* means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~

~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~

~~(C) Retention and attenuation of floodwaters and runoff;~~

~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~

~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~

~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~

~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~

~~(D) Landscape position and geomorphology; and~~

~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

Fact Sheet for the Final Rule: Amendments to the Revised Definition of "Waters of the United States"

August 2023

Overview

On August 29, 2023, the U.S. Environmental Protection Agency (EPA) and Department of the Army (the agencies) announced a final rule amending the 2023 definition of "waters of the United States."[1] The amendments conform with the U.S. Supreme Court's May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency.* While EPA's and Army's 2023 rule defining "waters of the United States" was not directly before the Supreme Court, the decision in *Sackett* made clear that certain aspects of the 2023 rule are invalid. Therefore, the agencies have amended key components of the regulatory text to conform it to the Supreme Court decision. The final rule provides clarity for protecting our nation's waters consistent with the Supreme Court's decision while advancing infrastructure projects, economic opportunities, and agricultural activities.

Changes to the "Waters of the United States" Categories and Definitions [2]

The agencies' amendments change the parts of the 2023 definition of "waters of the United States" that are invalid under the *Sackett* decision. For example, the rule removes the significant nexus test from consideration when identifying tributaries and other waters as federally protected. It also revises the adjacency test when identifying federally jurisdictional wetlands, clarifies that interstate wetlands do not fall within the interstate waters category, and clarifies the types of features that can be considered under the "additional waters" category.

Changes that the agencies have made to the January 2023 Rule categories:

Jurisdictional Category	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Traditional Navigable Waters	No changes	(a)(1)
Territorial Seas	No changes	(a)(1)
Interstate Waters	Removing interstate wetlands from the text of the interstate waters provision	(a)(1)
Impoundments	No changes	(a)(2)
Tributaries	Removing the significant nexus standard	(a)(3)
Adjacent Wetlands	Removing the significant nexus standard	(a)(4)
Additional Waters	Removing the significant nexus standard; removing wetlands and streams from the text of the provision	(a)(5)

[1] The "Revised Definition of 'Waters of the United States'" rule published in the Federal Register on January 18, 2023.
[2] These tables are provided for informational purposes; the rule establishes the requirements defining "waters of the United States."

Changes that the agencies have made to the January 2023 Rule definitions:

Definition	Key Changes to the January 2023 Rule Regulation Text	Regulatory Text Paragraph
Wetlands	No changes	(c)(1)
Adjacent	Revised definition to mean "having a continuous surface connection."	(c)(2)
High tide line	No changes	(c)(3)
Ordinary high water mark	No changes	(c)(4)
Tidal waters	No changes	(c)(5)
Significantly affect	Deleted definition	(c)(6)

No Changes to the Exclusions from "Waters of the United States"

The amendments to the January 2023 Rule do not change the eight exclusions from the definition of "waters of the United States" that provide clarity, consistency, and certainty. **The exclusions are:**

- **Prior converted cropland**, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985.
- **Waste treatment systems**, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act.
- **Ditches** (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water.
- **Artificially irrigated areas,** that would revert to dry land if the irrigation ceased.
- **Artificial lakes or ponds,** created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- **Artificial reflecting pools or swimming pools,** and other small ornamental bodies of water created by excavating or diking dry land.
- **Waterfilled depressions,** created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of "waters of the United States."
- **Swales and erosional features** (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Additionally, the agencies' amended definition of "waters of the United States" does not affect the longstanding activity-based permitting exemptions provided to the agricultural community by the Clean Water Act.

For More Information

Additional information is available on EPA's Waters of the United States website.

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
FEBRUARY 6, 2023

RESOLUTION

RESOLVED, That the American Bar Association urges organizations that design, develop, deploy, and use artificial intelligence ("AI") systems and capabilities to follow these guidelines:

1) Developers, integrators, suppliers, and operators **("**Developers**")** of AI systems and capabilities should ensure that their products, services, systems, and capabilities are subject to human authority, oversight, and control;

2) Responsible individuals and organizations should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their actions or use of AI systems or capabilities, unless they have taken reasonable measures to mitigate against that harm or injury; and

3) Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while protecting associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems and capabilities.

FURTHER RESOLVED, That the American Bar Association urges Congress, federal executive agencies, and State legislatures and regulators, to follow these guidelines in legislation and standards pertaining to AI.

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REPORT

I. LEGAL ISSUES WITH AI

Artificial Intelligence ("AI") systems and capabilities create significant new opportunities for technological innovation and efficiencies to benefit our society, but they also raise new legal and ethical questions. AI enables computers and other automated systems to perform tasks that have historically required human cognition, such as drawing conclusions and making predictions.[1] AI systems operate at much faster speeds than humans.[2]

With AI and machine learning (ML)[3] already changing the way in which society addresses economic and national security challenges and opportunities, these technologies must be developed and used in a trustworthy and responsible manner. As private sector organizations and governments move rapidly to design, develop, deploy, and use AI systems and capabilities,[4] now is a critical time for the American Bar Association (ABA) to articulate principles that are essential to ensuring that AI is developed and deployed in accordance with the law and well-accepted legal standards.[5]

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[1] AI is not a single piece of hardware or software, but rather a constellation of technologies that give a computer system the ability to solve problems and to perform tasks that would otherwise require human intelligence. National Security Commission on Artificial Intelligence (NSCAI), *Final Report*, Artificial Intelligence in Context, pages 31-40, https://www.nscai.gov/ [hereinafter "NSCAI Final Report"].
National Artificial Intelligence Research and Development Strategic Plan: 2019 Update (Nov. 12, 2020), https://catalog.data.gov/dataset/the-national-artificial-intelligence-research-and-development-strategic-plan-2019-update.

According to the National Institute of Standards and Technology (NIST), AI is:

> (1) A branch of computer science devoted to developing data processing systems that performs functions normally associated with human intelligence, such as reasoning, learning, and self-improvement.
>
> (2) The capability of a device to perform functions that are normally associated with human intelligence such as reasoning, learning, and self-improvement.

NIST *U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools* (Aug. 2019), https://www.nist.gov/system/files/documents/2019/08/10/ai_standards_fedengagement_plan_9aug2019.pdf.

[2] U.S. Government Accountability Office (GAO), *Artificial Intelligence: Status of Developing and Acquiring Capabilities for Weapons Systems*, GAO-22-104765 (Feb. 2022), https://www.gao.gov/assets/gao-22-104765.pdf. [hereinafter "GAO AI Report."]

[3] *Championing ethical and responsible machine learning through open-source best practices*, THE FOUNDATION FOR BEST PRACTICES IN MACHINE LEARNING, v. 1.0.0 (May 21, 2021), https://www.nist.gov/system/files/documents/2021/08/18/ai-rmf-rfi-0010-attachment3.pdf.

[4] NSCAI Final Report at 28, *supra* note 1. ("We now know the uses of AI in all aspects of life will grow and the pace of innovation will accelerate.")

[5] This Resolution does not purport to alter lawyers' obligations under applicable rules of professional conduct. Lawyers may wish to consider the issues raised in Daniel W. Linna Jr. and Wendy J. Muchma, Ethical Obligations to Protect Client Data when Building Artificial Intelligence Tools: Wigmore Meets AI (Oct. 2, 2020),

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Fundamental concepts such as accountability, transparency, and traceability play an important role in ensuring the trustworthiness of AI systems. These concepts also play key roles in our legal system.[6] This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, such as developers, integrators, suppliers, and operators **(“**developers**”)** of AI systems and capabilities, should assess these fundamental issues with AI. It states that in the context of AI, individual and enterprise accountability and human authority, oversight, and control are required and it is not appropriate to shift legal responsibility to a computer or an “algorithm” rather than to responsible people and other legal entities.

This Resolution will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability.

By focusing on these principles related to AI, this Resolution will help to ensure that accountability, transparency, and traceability are built into AI products, services, systems, and capabilities “by design” from the beginning of the development process. Following the proposed guidelines will enhance AI by maximizing the benefits from the use of AI in a trustworthy and responsible manner and help to minimize the risks.

Further, the Resolution urges Congress, federal executive agencies, and State legislatures and regulators to follow the guidelines in legislation and standards pertaining to AI.

II. OVERVIEW OF AI

AI holds great potential to bring innovation and efficiency across a number of industry sectors. New AI-enabled systems are benefitting many parts of society and the economy, from commerce and healthcare to transportation and cybersecurity. Consider just a few examples of recent AI innovations:

- Artificial intelligence is being deployed as a dialog agent for customer service. Several of these efforts have passed the Turing test – the eponymous idea developed by early computer pioneer Alan Turing which posited that the true test

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https://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/ethical-obligations-protect-client-data-when-building-artificial-intelligence-tools-wigmore-meets-ai/.
Risks to protect client confidentiality are present in the latest AI-augmented capabilities such as ChatGPT, and are heightened if counsel is unaware of the ways such capabilities involve human reviewers:

> “Ethical concerns arise because the conversations that happen within ChatGPT are not merely an exchange between a user and a computer program—humans are reviewing these ChatGPT conversations.”

Foster J. Sayers, *ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality*, NYLJ (January 31, 2023), p. 3.

[6] Other important legal issues with AI have been identified, such as intellectual property infringement, algorithmic bias, access to justice, fairness in decision-making, discrimination, unfairness, and privacy and data protection/ cybersecurity. These issues may be appropriate for future ABA resolutions.

of computer intelligence will be met when individuals cannot tell the difference between a computer and a human interaction;

- Self-driving cars are under wide development by virtually every major manufacturer in the world (as well as most of the larger tech companies). While they are still in the testing stage, there is every reason to anticipate that geo-fenced cars will be on the market within 5-10 years;

- The AI product named Watson defeated the human champion in a game of Jeopardy and one named Alpha Go defeated the world Go champion;

- A system known as Deep Patient is now being deployed, successfully, as a diagnostic assistant to clinicians in a hospital setting, helping them make improved diagnoses in difficult cases. It is capable of predicting the onset of certain psychological diseases like schizophrenia in situations where the symptoms are not apparent to human clinicians;

- An artwork created by AI recently sold for over $400,000 at auction;

- More than two years ago a TV station in China began using an AI-powered announcer as the news anchor;

- Recent tests of autonomous self-directed weapons systems have successfully demonstrated that military systems can identify and target adversaries without human intervention; and

- New AI programs that go by the generic name of Deep Fakes can create fake video that can be virtually indistinguishable from reality.

Recently, governments and other organizations have been working on proposed AI governance frameworks and principles with the goal of mitigating the risks that can result through implementation of AI systems and capabilities. For example, NIST has developed an AI Risk Management Framework to provide guidance regarding the trustworthiness of AI systems.[7] Specifically, the framework is intended to help incorporate trustworthiness considerations into the design, development, use, and evaluation of AI systems, and it highlights accountability and transparency as two key guiding principles."[8]

The White House Office of Science and Technology Policy (OSTP) has acknowledged the "extraordinary promise of AI" as well as its pitfalls, and the need to "advance development, adoption, and oversight of AI in a manner that aligns with our democratic

[7] NIST *AI Risk Management Framework,* (AI RMF 1.0) NIST AI 100-1 (Jan. 2023), https://www.nist.gov/itl/ai-risk-management-framework [hereinafter "NIST AI Risk Management Framework"].
[8] *Id.* at 13.

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values."[9] In recognition of the importance of ensuring that the American public has appropriate protections in the age of AI, OSTP released its Blueprint for an AI Bill of Rights "for building and deploying automated systems that are aligned with democratic values and protect civil rights, civil liberties, and privacy." [10] OSTP explained:

> Our country should clarify the rights and freedoms we expect data-driven technologies to respect. What exactly those are will require discussion, but here are some possibilities: your right to know when and how AI is influencing a decision that affects your civil rights and civil liberties; your freedom from being subjected to AI that hasn't been carefully audited to ensure that it's accurate, unbiased, and has been trained on sufficiently representative data sets; your freedom from pervasive or discriminatory surveillance and monitoring in your home, community, and workplace; and your right to meaningful recourse if the use of an algorithm harms you.[11]

III. ACCOUNTABILITY AND HUMAN OVERSIGHT, AUTHORITY, AND CONTROL

The ABA urges organizations that design, develop, deploy, and use AI systems and capabilities to follow these guidelines:

- Developers, integrators, suppliers, and operators ("developers") of AI systems and capabilities should ensure that their products, services, systems, and capabilities are subject to human authority, oversight, and control.

- Responsible individuals and enterprises should be accountable for the consequences caused by their use of AI products, services, systems, and capabilities, including any legally cognizable injury or harm caused by their use, unless they have taken reasonable measures to mitigate against that harm or injury.

Accountability and human authority, oversight and control are closely interrelated legal concepts. In the context of AI, they present key concerns, given that AI is increasingly being used in a variety of contexts to make decisions that can significantly impact

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[9] L. Parker and R. Richardson, *OSTP's Continuing Work on AI Technology and Uses That Can Benefit Us All*, OSTP Blog (Feb. 3, 2022), https://www.whitehouse.gov/ostp/news-updates/2022/02/03/ostps-continuing-work-on-ai-technology-and-uses-that-can-benefit-us-all/.

[10] White House Office of Science and Technology Policy (OSTP), *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (October 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf. The Blueprint focuses on five principles for automated decision-making systems: (1) Safe and effective systems; (2) Algorithmic discrimination protections; (3) Data privacy; (4) Notice and explanation; and (5) Human alternatives, consideration and fallback.

[11] E. Lander & A. Nelson, *ICYMI: WIRED (Opinion): Americans Need a Bill of Rights For An AI-Powered World*, OTSP Blog (Oct. 22, 2022), https://www.whitehouse.gov/ostp/news-updates/2021/10/22/icymi-wired-opinion-americans-need-a-bill-of-rights-for-an-ai-powered-world/.
See, Ben Winters, AI Bill of Rights Provides Actionable Instructions for Companies, Agencies, and Legislators, EPIC (Oct. 11, 2022), https://epic.org/ai-bill-of-rights-leaves-actionable-instructions-for-companies-agencies-and-legislators/.

people's lives, including evaluating applicants for jobs, determining who receives access to loans, assessing criminal defendants' likelihood of being a repeat offender in connection with bail proceedings, screening rental applicants, and determining how self-driving cars should navigate through complex traffic and driving situations.

The Defense Advanced Research Projects Agency (DARPA) recently announced that it is starting a program to evaluate the use of AI to make complex decisions in modern military operations. DARPA explained that this In the Moment (ITM) program "aims to evaluate and build trusted algorithmic decision-makers for mission-critical Department of Defense (DoD) operations."[12]

Various organizations have recognized the importance of accountability with AI systems. In its AI Risk Management Framework (AI RMF 1.0), NIST stated that:

> Organizations need to establish and maintain the appropriate accountability mechanisms, roles and responsibilities, culture, and incentive structures for risk management to be effective. …
>
> Trustworthy AI depends upon accountability. Accountability presupposes transparency. *Transparency* reflects the extent to which information about an AI system and its outputs is available to individuals interacting with such a system – regardless of whether they are even aware that they are doing so. …
>
> When consequences are severe, such as when life and liberty are at stake, AI developers and deployers should consider proportionally and proactively adjusting their transparency and accountability practices.[13]

The Organization for Economic Cooperation and Development (OECD) Principles for AI includes Principle 1.5 on Accountability, which provides:

> Organizations and individuals developing, deploying or operating AI systems should be held accountable for their proper functioning in line with the OECD's values-based principles for AI.[14]

Australia has issued a voluntary framework of eight AI Ethics Principles which includes accountability, stating:

> People responsible for the different phases of the AI system lifecycle should be identifiable and accountable for the outcomes of the AI systems, and human oversight of AI systems should be enabled.[15]

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[12] *Developing Algorithms That Make Decisions Aligned With Human Expert*, DARPA Notice (March 3, 2022), https://www.darpa.mil/news-events/2022-03-03.
[13] NIST AI Risk Management Framework, at 9, 15, and 16, *supra* note 7,
[14] OECD AI Principles, https://oecd.ai/en/dashboards/ai-principles/P7. [hereinafter "OECD AI Principles."]
[15] *Australia's AI Ethics Principles, Principles at a Glance*,

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In addition, large technology companies have also recognized the importance of accountability with regard to their AI products. For example, one of Microsoft's Six Principles for Responsible AI is accountability: "people should be accountable for AI systems."[16] Similarly, Google includes accountability in its Objectives for AI Applications, and states that AI should "be accountable to people. We will design AI systems that provide appropriate opportunities for feedback, relevant explanations, and appeal. Our AI technologies will be subject to appropriate human direction and control."[17]

Human accountability is of particular importance given that with ML, a subset of AI, computers are able to learn from data sets without being given explicit instructions from humans. Instead, the computer model learns from experience and trains itself to find patterns and make predictions.[18] There has been widespread recognition of the critical role that humans should play in overseeing and implementing AI systems that are making such important decisions. For example, the term "human-centered artificial intelligence" has been used to describe the view that AI systems "must be designed with awareness that they are part of a larger system consisting of human stake-holders, such as users, operators, clients, and other people in close proximity."[19]

Accountability is important given the increasing concern about understanding AI decision-making and ensuring fairness in AI models, including with regard to the potential discriminatory impact of certain AI systems. For example, Amazon started a program to automate hiring by using an algorithm to review resumes. However, the program had to be discontinued after it was discovered that it discriminated against women in certain technical positions, such as software engineer, because the software analyzed the credentials of its existing employee base, which was predominantly male.[20] In addition, researchers found a gender and skin-type bias with commercial facial analysis programs, with an error rate of 0.8 percent for light-skinned men, versus 34.7 for dark-skinned women.[21]

There have been recent efforts to prohibit AI systems from violating anti-discrimination and privacy laws. For example, the Equal Employment Opportunity Commission (EEOC) launched an initiative to ensure that AI used in hiring and other employment

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https://www.industry.gov.au/data-and-publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles.

[16] Microsoft *Responsible AI principles in practice*, https://www.microsoft.com/en-us/ai/responsible-ai?activetab=pivot1%3aprimaryr6, [hereinafter "Microsoft *Responsible AI Principles*"].

[17] Google *AI Principles*, https://ai.google/principles/.

[18] S. Brown, *Machine Learning Explained*, MIT Management: Ideas Made to Matter (April 21, 2021), https://mitsloan.mit.edu/ideas-made-to-matter/machine-learning-explained.

[19] M. Riedl, *Human-Centered Artificial Intelligence and Machine Learning*, arXiv:1901.11184[cs.AI].

[20] J. Dastin, *Amazon Scraps Secret AI Recruiting Tool That Shows Bias Against Women*, Reuters (Oct. 10, 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

[21] L. Hardesty, *Study Finds Gender and Skin-Type Bias in Commercial Artificial Intelligence Systems*, MIT NEWS (Feb. 11, 2018), https://news.mit.edu/2018/study-finds-gender-skin-type-bias-artificial-intelligence-systems-021.

decisions does not violate anti-discrimination laws.[22] New York City passed a new law to take effect in 2023 that prohibits the use of AI machine learning products in hiring and promotion decisions unless the tools have first been audited for bias.[23] In 2018, California passed the California Consumer Privacy Act (CCPA), a consumer protection law intended to protect the privacy of California residents. In 2020, it passed the California Privacy Rights Act (CPRA), amending the CCPA to add measures including the right to limit use and disclosure of sensitive personal information and the right to obtain information about how companies use automated decision-making technology.[24] In addition, questions have also been raised about the protection of privacy because of the processing of personal data in AI systems.[25]

Existing laws and regulations can be used to prevent potential violations of anti-discrimination and privacy laws by AI systems. For example, Federal Trade Commission (FTC) Commissioner Rebecca Kelly Slaughter explained her view that the FTC's existing tools, including section 5 of the FTC Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Children's Online Privacy Protection Act, can and should be used to protect consumers against algorithmic harms.[26]

In light of the need to ensure compliance with laws and regulations being used to prevent harms from AI systems, it is essential that the humans and enterprises with responsibility for these AI systems be held accountable for the consequences of the uses of these systems.

Under our legal system, in order to be held accountable, an entity must have a specific legal status that allows it to be sued, such as being an individual human or a corporation. On the other hand, property, such as robots or algorithms, does not have a comparable legal status.[27] Thus, it is important that legally recognizable entities such as humans and corporations be accountable for the consequences of AI systems, including any legally cognizable injury or harm that their actions or those of the AI systems or

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[22] EEOC Artificial Intelligence and Algorithmic Fairness Initiative (2021), https://www.eeoc.gov/ai; EEOC *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees,* https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

[23] N. Lee and S. Lai, *Why New York City Is Cracking Down on AI in Hiring*, BROOKINGS TECHTANK (Dec. 20, 2021), https://www.brookings.edu/blog/techtank/2021/12/20/why-new-york-city-is-cracking-down-on-ai-in-hiring/.

[24] B. Justice, *CPRA Countdown: It's Time to Brush Up on California's Latest Data Privacy Law*, NATIONAL LAW REVIEW (Dec. 18, 2021), https://www.natlawreview.com/article/cpra-countdown-it-s-time-to-brush-california-s-latest-data-privacy-law.

[25] C. Tucker, *Privacy, Algorithms and Artificial Intelligence*, in *The Economics of Artificial Intelligence: An Agenda*, NATIONAL BUREAU OF ECONOMIC RESEARCH (2019), https://www.nber.org/books-and-chapters/economics-artificial-intelligence-agenda/privacy-algorithms-and-artificial-intelligence.

[26] R. Slaughter, *Algorithms and Economic Justice*, ISP DIGITAL FUTURE WHITEPAPER & YALE JOURNAL OF LAW & TECHNOLOGY SPECIAL PUBLICATION (Aug. 2021)

[27] Michalski, Roger (2018), *How to Sue a Robot*, UTAH LAW REVIEW: Vol. 2018: No. 5, Article 3, https://dc.law.utah.edu/ulr/vol2018/iss5/3.

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capabilities cause to others, unless they have taken reasonable measures to mitigate against that harm or injury.[28]

IV. TRANSPARENCY AND TRACEABILITY

The ABA urges organizations that design, develop, deploy, and use artificial intelligence ("AI") products, services, systems and capabilities to follow this guideline:

- Developers should ensure the transparency and traceability of their AI products, services, systems, and capabilities, while protecting associated intellectual property, by documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes underlying their AI products, services, systems, and capabilities.

A. Transparency

In the context of AI, transparency is about responsible disclosure to ensure that people understand when they are engaging with an AI system, product, or service and enable those impacted to understand the outcome and be able to challenge it if appropriate.[29] NIST stated that "explainable AI" is one of several properties that characterize trust in AI systems.[30]

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[28] In developing rules of liability, the supplier/component part doctrine would apply. Under that doctrine, the manufacturer of a non-defective component is not liable for harm caused by a defect in a larger system sold by a manufacturer into which the component was integrated.

[29] OEDC adopted Transparency and Explainability Principle 1.3 that states:

AI Actors should commit to transparency and responsible disclosure regarding AI systems. To this end, they should provide meaningful information, appropriate to the context, and consistent with the state of art:

- to foster a general understanding of AI systems,
- to make stakeholders aware of their interactions with AI systems, including in the workplace,
- to enable those affected by an AI system to understand the outcome, and,
- to enable those adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision.

OECD AI Principles, *supra* note 12.

[30] NIST *Artificial Intelligence*, https://www.nist.gov/artificial-intelligence; NIST *Four Principles of Explainable Artificial Intelligence*, NIST Interagency/Internal Report (NISTIR) - 8312, https://doi.org/10.6028/NIST.IR.8312.

Four principles of explainable AI – for judging how well AI decisions can be explained:

- *Explanation* – AI systems should deliver accompanying evidence or reasons for all their outputs.
- *Meaningful* – Systems should provide explanations that are meaningful or understandable to individual users.
- *Explanation Accuracy* – The explanation correctly reflects the system's process for generating the output.
- *Knowledge Limits* – The system only operates under conditions for which it was designed or when the system reaches a sufficient confidence in its output. (The idea is that if a system has insufficient confidence in its decision, it should not supply a decision to the user.)

See, https://www.nist.gov/artificial-intelligence/ai-fundamental-research-explainability.

Lack of transparency with AI can negatively affect individuals who are denied jobs, refused loans, refused entry or are deported, imprisoned, put on no-fly lists or denied benefits. They are often not informed of the reasons other than the decision was processed using computer software. Human rights principles that may be impacted are rights to a fair trial and due process, effective remedies, social rights and access to public services, and rights to free elections. [31]

OECD has explained that the term transparency carries multiple meanings:

> In the context of this Principle [1.3], the focus is first on disclosing when AI is being used (in a prediction, recommendation or decision, or that the user is interacting directly with an AI-powered agent, such as a chatbot). Disclosure should be made with proportion to the importance of the interaction. The growing ubiquity of AI applications may influence the desirability, effectiveness or feasibility of disclosure in some cases.
>
> Transparency further means enabling people to understand how an AI system is developed, trained, operates, and deployed in the relevant application domain, so that consumers, for example, can make more informed choices. Transparency also refers to the ability to provide meaningful information and clarity about what information is provided and why. Thus transparency does not in general extend to the disclosure of the source or other proprietary code or sharing of proprietary datasets, all of which may be too technically complex to be feasible or useful to understanding an outcome. Source code and datasets may also be subject to intellectual property, including trade secrets.
>
> An additional aspect of transparency concerns facilitating public, multi-stakeholder discourse and the establishment of dedicated entities, as necessary, to foster general awareness and understanding of AI systems and increase acceptance and trust.

Numerous organizations around the world have developed AI principles. A researcher who reviewed them reported that "[f]eatured in 73/84 sources, transparency is the most prevalent principle in the current literature."[32] Varied terminology is used to express this concept of transparency, comprising efforts to increase explainability, interpretability, intelligibility or other acts of communication and disclosure.

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[31] Rowena Rodrigues, *Legal and human rights issues of AI: Gaps, challenges and vulnerabilities*, JOURNAL OF RESPONSIBLE TECHNOLOGY, Vol. 4, Dec. 2020, 100005, https://doi.org/10.1016/j.jrt.2020.100005.

[32] Anna Jobin, *et. al., Artificial Intelligence: the global landscape of ethics guidelines*, HEALTH ETHICS & POLICY LAB, ETH Zurich, 8092 Zurich, Switzerland (2019), https://www.researchgate.net/profile/Anna-Jobin/publication/334082218_Artificial_Intelligence_the_global_landscape_of_ethics_guidelines/links/5d19ec7d299bf1547c8d2be8/Artificial-Intelligence-the-global-landscape-of-ethics-guidelines.pdf?origin=publication_detail.
European Union member state reports on AI can be found at https://futurium.ec.europa.eu/en/european-ai-alliance/pages/official-documents-and-reports.

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Intelligibility can uncover potential sources of unfairness, help users decide how much trust to place in a system, and generally lead to more usable products. It also can improve the robustness of AI systems by making it easier for data scientists and developers to identify and fix bugs.[33]

The FTC published guidance regarding the commercial use of AI technology, acknowledging that while AI has significant positive potential, it also presents negative risks, such as unfair or discriminatory outcomes or the entrenchment of existing disparities.[34] The FTC urged companies to:

- Be transparent with consumers;
- Explain how algorithms make decisions;
- Ensure that decisions are fair, robust, and empirically sound; and
- Hold themselves accountable for compliance, ethics, fairness and non-discrimination.

B. Traceability

It is important to ensure that the complex processes in data science — from data processing through modeling to deployment in production — can be documented in a way that is understood easily.[35] Traceability is considered a key requirement for trustworthy AI. It would allow companies to better understand the entire reasoning process, and builds trust with AI implementations.[36]

According to NIST, "[t]rustworthy AI refers to AI capabilities that exhibit characteristics such as resilience, security, and privacy so that relevant people can adopt them without fear."[37] An AI capability must be traceable, meaning that it is developed and deployed such that relevant personnel possess an appropriate understanding of the technology, development processes, and operational methods applicable to AI capabilities, including

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[33] Microsoft *Responsible AI principles, supra* note 14. Microsoft Research Collection: *Research Supporting Responsible AI* (April 13, 2020), https://www.microsoft.com/en-us/research/blog/research-collection-research-supporting-responsible-ai/.

[34] FTC *Using Artificial Intelligence and Algorithms* (April 8, 2020), https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms; FTC, *Aiming for truth, fairness, and equity in your company's use of AI* (April 19, 2021), https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai.

[35] Andreas Gödde, *Traceability for Trustworthy AI: A Review of Models and Tools*, SAS, https://www.mdpi.com/2504-2289/5/2/20/htm. https://blogs.sas.com/content/hiddeninsights/2018/03/12/interpretability-traceability-clarity-ai-mandate/. *See,* Association for Computing Machinery, *Outlining Traceability: A Principle for Operationalizing Accountability in Computing Systems,* FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (March 2021), pages 758–771, https://dl.acm.org/doi/10.1145/3442188.3445937.

[36] Sanjay Srivastava, *The path to explainable AI*, CIO (May 21, 2018), https://www.cio.com/article/221668/the-path-to-explainable-ai.html.

[37] NIST, Draft –Taxonomy of AI Risk (Oct. 2021), https://www.nist.gov/system/files/documents/2021/10/15/taxonomy_AI_risks.pdf*; see* GAO AI Report, *supra* note 2.

with transparent and auditable methodologies, data sources and design procedures and documentation.[38]

C. Documenting key decisions made with regard to the design and risk of the data sets, procedures, and outcomes.

As AI algorithms become more complex, the need for greater transparency grows. Experts are developing software tools that will address the "black box" problem[39] – not knowing how algorithms arrive at their final output – by analyzing complex AI systems and documenting how the system processes information, answers questions, and provides results.[40]

Traceability is related to the need to maintain a complete account of the provenance of data, processes, and artifacts involved in the production of an AI model – and it should encompass all elements of an AI system, product or service, namely the data, the system, and the business model. It requires documentation of the data sets, procedures, and outcomes for the AI system or capability.[41]

Practical Considerations – In establishing traceability for AI products, services, systems, and capabilities, developers should create contemporaneous records that document key decisions made with regard to the design and risk of the AI data sets. This means using automated tools when appropriate and available, or otherwise using documentation techniques (online or manual) appropriate for the software development lifecycle and for

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[38] The Department of Defense (DoD) adopted *5 Principles of Artificial Intelligence Ethics* that commits the Department to this principle of traceability. U.S. Department of Defense, *5 Principles of Artificial Intelligence Ethics*, https://www.defense.gov/News/News-Stories/Article/Article/2094085/dod-adopts-5-principles-of-artificial-intelligence-ethics/. *See AI Principles: Recommendations on the Ethical Use of Artificial Intelligence* by the Department of Defense, Defense Innovation Board, *available at* https://media.defense.gov/2019/Oct/31/2002204458/-1/-1/0/DIB_AI_PRINCIPLES_PRIMARY_DOCUMENT.PDF.

Similarly, the *Principles of Artificial Intelligence Ethics for the Intelligence Community*[38] provide:

> *Transparent and Accountable* – We will provide appropriate transparency to the public and our customers regarding our AI methods, applications, and uses within the bounds of security, technology, and releasability by law and policy, and consistent with the Principles of Intelligence Transparency for the IC. We will develop and employ mechanisms to identify responsibilities and provide accountability for the use of AI and its outcomes.

[39] Cliff Kuang, *Can A.I. Be Taught to Explain Itself*? THE NEW YORK TIMES MAGAZINE (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/magazine/can-ai-be-taught-to-explain-itself.html

[40] Neil Savage, *Breaking into the black box of artificial intelligence: Scientists are finding ways to explain the inner workings of complex machine-learning models*, NATURE (Mar. 29, 2022), https://www.nature.com/articles/d41586-022-00858-1.

[41] The assessment for traceability includes:

- *Procedures*: Methods used for designing and developing the algorithmic system: how the algorithm was trained, which input data was gathered and selected, and how this occurred.
- *Data*: Methods used to test and validate the algorithmic system: information about the data used to test and validate.
- *Outcomes*: The outcomes of the algorithms or the subsequent decisions taken on the basis of these outcomes, as well as other potential decisions that would result from different cases (*e.g.,* for other subgroups of users).

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conducting AI risk assessments. Computer scientists are developing data models and tools to fully document data, procedures and outcomes for AI systems. They enable some form of automated repetition of the construction of the artifacts.[42]

Examples of the types of key decisions to be documented throughout the AI lifecycle include:

- *Business* – business-oriented requirements, expected uses and outcomes, key performance features (including when AI is used or relied upon in decision making). Human control over the selection of inputs and generation of outputs in order to reduce the risks of unintended adverse consequences.
- *Data* – types, quantities, and sources of data to be used in training the AI systems and capabilities; modeling, analysis, evaluation.[43]
- *AI risk assessment* – risks assessed, unintended bias, or hazardous use.
- *Cybersecurity risks* – risks of unauthorized access to, and compromise of the integrity of, the AI algorithms, software, training data, and/or model.
- *Design and development* – key design trade-offs, risks mitigated by the design. Review of algorithm(s), software code and the AI model.
- *Testing* – involvement of humans with detailed understanding of AI processes and industry domain issues. Testing of implementing software, model with data sets, and adjustments and correction of errors. Problems observed in generating desired outputs. Performance deficiencies, malfunctions, unintended outputs, and discovered risks observed.
- *Deployment*
- *Developers should respond promptly* to avert or mitigate AI risks that are identified at any point in the AI system/product life cycle.

In the event of a gap between actual and desired performance with an AI system, capability, product, or service, recurring errors or failures with specific processes and undesirable events reoccurring, traceability will enable root cause analysis, a process for understanding 'what happened' and solving a problem through looking back and drilling down to find out 'why it happened' in the first place. Then, looking to rectify the issue(s) so that it does not happen again, or reduce the likelihood that it will happen again.[44]

The many benefits of root cause analysis include reducing risk and preventing recurring failures, improving performance, as well as the potential for cost reduction. It provides a logical approach to problem solving using data that already exist and a learning process

[42] *Traceability for Trustworthy AI: A Review of Models and Tools*, https://www.mdpi.com/2504-2289/5/2/20/htm.

[43] The key is to fully understand the data's behavior. Best practices include documenting assumptions around completeness of the data, addressing data biases, and reviewing new rules identified by the machine before implementing. If AI is being used to identify anomalies, companies can put checks and balances in place to manually test and determine if the results make sense.

[44] Chartered Institute of Internal Auditors, *Root Cause Analysis* (Sept. 22, 2020), https://www.iia.org.uk/resources/delivering-internal-audit/root-cause-analysis?downloadPdf=true.

for better understanding of relationships, causes and effect, and solutions. The process should lead to more robust AI systems and capabilities.

V. EXISTING ABA POLICY

The ABA House of Delegates passed two Resolutions that address AI. This Resolution builds on and is consistent with those existing ABA policies.

- ABA urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law, including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI. 19A112.

- ABA urges federal, state, local, territorial and tribal governments to:
  - Ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated; and
  - Recognize that an individual's criminal history and other criteria may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious bias. 22M700.

VI. CONCLUSION

This Resolution addresses important legal issues concerning AI by focusing on the principles of accountability, transparency and traceability. It states that in the context of AI, human and enterprise accountability and human authority, oversight, and control are required and it is not appropriate to shift legal responsibility to a computer or an "algorithm" rather than to responsible people and other legal entities.

It will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability. Passage of this Resolution will enhance AI by maximizing the benefits from the use of AI in a trustworthy and responsible manner and help to minimize the risks.

Respectfully Submitted,

Claudia Rast and Maureen Kelly, Co-Chairs
Cybersecurity Legal Task Force

February 2023

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APPENDIX

LAWS, COURT DECISIONS, AND LEADING REPORTS

An exhaustive analysis of federal, state, and international laws applicable to AI is outside the scope of this Report. Below are some of the highlights:

National Conference of State Legislatures (NCLS) ***State AI Legislation***
https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx

General AI bills or resolutions were introduced in at least 17 states in 2021-22, and were enacted in Alabama, Colorado, Illinois, Mississippi, Vermont, and Washington.

General Data Protection Regulation (GDPR) Article 22 – AI Requirements[45]

GDPR imposes legal requirements on whoever uses an AI system for profiling and/or automated decision-making (regardless of the *means* by which personal data are processed), even if they acquired the system from a third party. These requirements include Fairness; Transparency, including meaningful information about the logic involved in the AI system; and the right to human intervention, enabling the individual to challenge the automated decision.

Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) (25 November 2022), approved by the Council on December 6, 2022.

2021/0106(COD), https://data.consilium.europa.eu/doc/document/ST-14954-2022-INIT/en/pdf.

The Regulation introduces new obligations for vendors of AI systems, and includes requirements for high-risk AI systems and users.

European Parliament, The impact of the General Data Protection Regulation (GDPR) on artificial intelligence, PE 641.530 (June 2020),
https://www.europarl.europa.eu/RegData/etudes/STUD/2020/641530/EPRS_STU(2020)641530_EN.pdf.

Holbrook v. Prodomax Automation Ltd.**,** 2021 U.S. Dist. LEXIS 178325 (Sept. 20, 2021) U.S. Dist. Ct., W.D. Mich.

[45] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119 04.05.2016, p. 1, CELEX: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R0679).

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Man Whose Wife Was Killed by Factory Robot Settles Mid-Trial, BLOOMBERG (Nov. 9, 2021), https://news.bloomberglaw.com/product-liability-and-toxics-law/man-whose-wife-was-killed-by-factory-robot-settles-mid-trial.
Eric L. Alexander, *Unintended Consequences for Software Liability*? REED SMITH (Nov. 26, 2021), https://www.lexology.com/library/detail.aspx?g=54e4a579-500d-4db0-adc2-065bc9b06263.

Leading Reports

White House Office of Science and Technology Policy (OSTP), *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (October 2022)
https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

The Blueprint focuses on principles for automated decision-making systems: (1) Safe and effective systems; (2) Algorithmic discrimination protections; (3) Data privacy; (4) Notice and explanation; and (5) Human alternatives, consideration and fallback.

National Security Commission on Artificial Intelligence (NSCAI), *Final Report*
https://www.nscai.gov/.

Presents the strategy for the U.S. to win in the AI era by responsibly using AI for national security and defense, defending against AI threats, and promoting AI innovation. *Blueprints for Action* provide plans to implement the recommendations.

House Committee on Transportation and Infrastructure

Boeing 737 MAX Investigation, https://transportation.house.gov/committee-activity/boeing-737-max-investigation.
Final Committee Report on the Design, Development, and Certification of the Boeing 737 MAX (Sept. 2020).

NIST AI Risk Management Framework: Second Draft (August 2022)
https://www.nist.gov/system/files/documents/2022/08/18/AI_RMF_2nd_draft.pdf.

Intended for voluntary use "in addressing risks in the design, development, use, and evaluation of AI products, services, and systems."

Artificial Intelligence and the Courts: Materials for Judges, American Association for the Advancement of Science (AAAS) (Sep. 2022)
https://www.aaas.org/ai2/projects/law/judicialpapers.

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With the support of NIST, this AAAS project is developing resources to support judges as they address an increasing number of cases involving AI.

Stanford HAI, *Artificial Intelligence Index Report 2021*, Stanford Human-Centered Artificial Intelligence
https://aiindex.stanford.edu/wp-content/uploads/2021/11/2021-AI-Index-Report_Master.pdf.

Presents unbiased, globally sourced data that will enable policy-makers, researchers, executives, and the public to develop intuitions about AI.

Industry IoT Consortium, *Industrial IoT Artificial Intelligence Framework* (Feb. 22, 2022)
https://www.iiconsortium.org/pdf/Industrial-AI-Framework-Final-2022-02-21.pdf.

Provides guidance in the development, training, documentation, communication, integration, deployment, and operation of AI-enabled industrial IoT systems.

OECD AI Principles (May 2019)
https://oecd.ai/en/ai-principles.

Promotes the use of innovative and trustworthy AI and respects human rights and democratic values.

European Commission, European AI Alliance
https://futurium.ec.europa.eu/en/european-ai-alliance/pages/official-documents-and-reports.

Council of Europe, Karen Yeung, Responsibility and AI, DGI(2019)05
https://rm.coe.int/responsability-and-ai-en/168097d9c5.

A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework.

Katherine B. Forrest, When Machines Can Be Judge, Jury, And Executioner: Justice In The Age Of Artificial Intelligence (2021)

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GENERAL INFORMATION FORM

Submitting Entity: Cybersecurity Legal Task Force

Submitted By: Claudia Rast and Maureen Kelly, Co-chairs

1. Summary of Resolution(s).

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders – developers, integrators, suppliers, and operators **("**developers**")** of AI systems and capabilities – should assess three fundamental issues with AI: accountability, transparency and traceability.

The Resolution will ensure that courts and participants in the legal process have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the design, development, deployment, and use of AI to ensure transparency and traceability.

2. Indicate which of the ABA's four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This Resolution meets Goal 4 – Advance the Rule of Law. The Resolution is designed to help mitigate the risks that can result through implementation of AI systems and capabilities and enhance the use of AI in a trustworthy and responsible manner.

3. Approval by Submitting and Co-sponsoring Entities.

The Cyberspace Legal Task Force voted to sponsor this Resolution on December 2, 2022.
The Antitrust Law Section voted to co-sponsor this Resolution on December 2, 2022.
The Tort, Trial & Insurance Practice (TIPS) Section voted to co-sponsor this Resolution on November 16, 2022.
The Science & Technology Law Section voted to co-sponsor this Resolution on December 20, 2022.
The Standing Committee on Law and National Security voted to co-sponsor this Resolution on November 19, 2022.

4. Has this or a similar resolution been submitted to the House or Board previously? No.

5. What existing Association policies are relevant to this resolution and how would

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they be affected by its adoption?

The ABA House of Delegates has passed resolutions that address issues with AI. This Resolution builds on and is consistent with those ABA policies.

- ABA urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law, including (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI. 19A112.

- ABA urges federal, state, local, territorial and tribal governments to:
  - Ensure due process and refrain from using pretrial risk assessment tools unless the data supporting the risk assessment is transparent, publicly disclosed, and validated to demonstrate the absence of conscious or unconscious racial, ethnic, or other demographic, geographic, or socioeconomic bias; and
  - Recognize that an individual's criminal history and other criteria may reflect structurally biased application of laws, policies or practices, as well as conscious or unconscious bias. 22M700.

6. If this is a late report, what urgency exists which requires action at this meeting of the House?

This is not a late report. As private sector organizations and governments move rapidly to design, develop, deploy, and use AI systems and capabilities, now is a critical time for lawyers to articulate principles that are essential to ensuring that AI is developed and implemented in accordance with the law and well-accepted legal standards.

7. Status of Legislation. (If applicable)

S. 1605, FY 2022 National Defense Authorization Act – enacted
Legislation to strengthen the U.S. government's artificial intelligence (AI) readiness, support long-term investments in AI ethics and safety research, and increase governmental AI transparency, were passed as part of the FY 2022 *National Defense Authorization Act (NDAA)*.

Artificial Intelligence Capabilities and Transparency (AICT) Act.
The A/CT Act would implement recommendations of the National Security Commission on Artificial Intelligence's (NSCAI) final report. Congress established the NSCAI through the FY 2019 *National Defense Authorization Act (NDAA)* in order to consider the methods and means necessary to advance the development and improve the government's use of AI and related technology.

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S. 2551 — Artificial Intelligence Training for the Acquisition Workforce Act or the AI Training Act
This bill requires the Office of Management and Budget (OMB) to establish or otherwise provide an AI training program for the acquisition workforce of executive agencies (*e.g.*, those responsible for program management or logistics) to ensure that the workforce has knowledge of the capabilities and risks associated with AI.

U.S. States

General AI bills or resolutions were introduced in at least 17 states in 2021-22, and were enacted in Alabama, Colorado, Illinois, Mississippi, Vermont, and Washington.

National Conference of State Legislatures (NCLS), *State AI Legislation,* https://www.ncsl.org/research/telecommunications-and-information-technology/2020-legislation-related-to-artificial-intelligence.aspx.

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This Resolution will be disseminated to members of Congress and State legislators in coordination and cooperation with the ABA Governmental Affairs Office, as well as executives of large and small companies that design, develop, deploy, and use AI systems, capabilities, products, and services.

It will alert them to the ABA's newly-adopted policy and encourage them to take action consistent with the ABA policy. We also encourage its use in Amicus Curiae briefs by the ABA.

9. Cost to the Association. (Both direct and indirect costs).
None.

10. Disclosure of Interest. (If applicable)
Not Applicable.

11. Referrals.

Sections:
Business Law
Civil Rights & Social Justice
Criminal Justice
Environment, Energy & Resources
Intellectual Property
International Law
Litigation
Public Contract Law
Science & Technology Law

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State and Local Government Law
Tort, Trial & Insurance Practice

Standing Committees:
Cybersecurity Legal Task Force
Professional Responsibility

Divisions:
Young Lawyers
Senior Lawyers
Law Practice

12. Contact Name and Address Information. (Prior to the meeting)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, such as developers, integrators, suppliers, and operators **(“**developers**”)** of AI systems and capabilities, should assess fundamental issues with AI by addressing the principles of accountability, transparency and traceability.

2. Summary of the Issues that the Resolution Addresses

This Resolution states that in the context of AI individual and enterprise accountability and human authority, oversight, and control is required and it is not appropriate to shift legal responsibility to a computer or an “algorithm” rather than to responsible people and other legal entities.

By focusing in the context of AI on the key issues accountability, transparency and traceability, passage of this Resolution will help mitigate the risks that can result through implementation of AI systems and capabilities and enhance the use of AI in a trustworthy and responsible manner.

3. Please Explain How the Proposed Policy Position Will Address the Issue

This Resolution presents guidance on how the legal system and its participants, including attorneys, regulators, and stakeholders, including developers, integrators, suppliers, and operators **(“**developers**”)** of AI systems and capabilities, should assess fundamental issues with AI by addressing the principles of accountability, transparency and traceability. It states that in the context of AI individual and enterprise accountability and human authority, oversight, and control is required and it is not appropriate to shift legal responsibility to a computer or an “algorithm” rather than to responsible people and other legal entities.

Further, this Resolution would ensure that courts and participants in the legal process will have the capacity to evaluate and resolve legal questions and disputes by specifying the essential information that must be included in the development, deployment and use of AI to ensure transparency and traceability.

4. Summary of Minority Views

None.

AI, Pursuit of Justice & Questions Lawyers Should Ask

*Contributed by **Julia Brickell**, Columbia University, **Jeanna Matthews**, Clarkson University, Denia Psarrou, University of Athens & **Shelley Podolny**, Columbia University*

April 2022

The acceleration of AI and automated decision-making systems in business, including the business of law, impels a close look at the potential impact of artificial intelligence on legal systems and the role of lawyers and judges within those systems. From facial recognition to gunshot tracking, from probabilistic genotyping to sentencing to discovery, the pervasive use of AI tools impacts society and the legal system in ways that are important to ascertain.

To protect the rule of law and the fundamental values it is intended to serve, it is necessary to understand the risks and benefits that AI and automated systems present, not in the abstract, but in the actual context of a particular use. For lawyers, this is a matter of both professional ethics and social morality, as misuse or misrepresentation (intentional or otherwise) can undermine both the perception and the reality of a legal system's functioning fairly, transparently, and without bias. Some harms—sentencing based on algorithms using biased data or a resume sent to the trash pile—cannot be remedied after the fact.

A number of industry and governmental entities have begun to articulate principles for the ethical use of AI systems. The American Bar Association issued **Resolution 112**, cautioning lawyers to recognize that competence is required to understand when the risk of AI outweighs its benefits. The U.S. government has launched **initiatives** to promote the trustworthy adoption and use of AI systems. The Council of Europe, through the European Commission for the Efficiency of Justice, has propounded an **ethical charter** on the use of AI in legal systems. The Institute for Electrical and Electronic Engineers (IEEE) is proposing multiple **standards** designed to build trust in AI systems.

Model Rules Alone Cannot Protect the Justice System

Lawyers in the U.S. should increasingly expect to be held accountable for understanding the impact of the AI systems that they employ or any system on which they advise. This includes systems that they or their opponents use to generate discovery or evidence presented to a court. This also encompasses the need to address the accuracy and fairness of an AI system and its impacts on individuals and society.

The use of automated systems in sentencing is one striking example of the potentially dire consequences to the quest for a just legal system. As the 2016 case *Wisconsin v. Loomis*, **881 N.W.2d 749** (Wis. 2016) demonstrates, the use of automated decision-making systems in sentencing strikes at the heart of due process. In this case, the defendant was denied, on grounds of trade secret, an opportunity to understand an algorithm used by the prosecutor to rate his likelihood of recidivism. There was an absence of evidence of the weights and scores the tool assigned in making its recidivism evaluation but there was evidence that the algorithm was racially biased against people of color and in favor of whites. In addition, the system was based on a sample of national data not validated for applicability to Wisconsin, relied on group data not calibrated for assessment of an individual, and was developed to inform post-sentencing support, not for use in sentencing.

What would a defense attorney need to know to effectively convince a court not to admit for consideration in sentencing any result from a recidivism-assessment tool that is opaque, biased, and designed for a different purpose? What would a prosecutor need to be convinced of not to propose using the automated ranking in the first place? As AI systems increasingly appear in juror selection and sentencing or generate or "identify" evidence for civil and criminal trials and other legal processes, the societal importance of lawyers' competent use of AI systems is increasing.

ABA Resolution 112 & Model Rules

ABA Resolution 112 specifically calls out the expectation that lawyers understand the risks of AI, including the risks of bias and harm to the legal system. Indeed, the ABA **model rules ofprofessional conduct** can already be seen as holding lawyers accountable for understanding AI tools.

Rule 1.1 Competence and Comment [8] requires a lawyer to competently represent each client, "keep[ing] abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." In the context of AI systems, competence should reasonably be understood to require knowledge and assurance, based on assessment by a competent assessor, first, of the reliability of the AI system in producing fair, unbiased, and accurate results, and second, of the accuracy of the results actually obtained. It should also require an understanding of risks, including to security, privacy, and confidentiality (e.g. from access to or exfiltration of data), and potential risks and impacts of intentional or unintentional misuse on clients, opponents, customers, targets, bystanders, and the legal system as a whole.

To date, 39 states have addressed technical competence in connection with Rule 1.1. Similarly, codes of judicial conduct are beginning to address the risks of technology. See, Indiana Code of Judicial Conduct Rule 2.5, Comment 1 (competence requires knowledge and skill "including the benefits and risks associated with the technology relevant to the service as a judicial officer.")

Rule 1.4 Communication requires reasonable consultation with clients about methods and choices for accomplishing the client's objectives. That should include accurately communicating the availability, effectiveness, risk, and overall impact on costs of relevant AI systems, including obtaining competencies for effective

operation. Depending on the intended use—e.g., e-discovery or regulatory reporting—the potential impact of inaccurate communication may be significant, and pose client risk.

Rule 1.5 Fees charges lawyers with responsibility not to demand unreasonable fees, necessitating consideration of AI's potential for accelerating work (such as by high recall, high precision document review). Conversely, unreliable outcomes (attributable, for example, to system flaws, lack of competent operators, or lack of fitness for the intended use), may incur manual re-work or even regulatory or court fines. And is it ever reasonable to charge for a lawyer's learning curve or inferior results from deploying technology in-house rather than engaging third-party expertise?

Rule 1.6 Confidentiality requires understanding the operation and security of AI systems to avoid unintended access to client information—e.g., by unsecure systems, "smart" assistants that transmit to the vendor, use of AI trained on a different client's data, open-source licenses that require sharing.

Rules 1.7, 1.9 Conflict of Interest may implicate reuse of AI systems trained on client data, or taking a trained technology to a new firm.

Rule 2.1 Advisor requires exercise of independent professional judgment, implicating lawyer understanding of the design, training, and operation of AI systems on whose outcomes the lawyer relies.

Rules 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel) and 4.1 (Truthfulness in Statements to Others) require sound information on the effectiveness (as operated) of AI systems that provide information on which a lawyer relies in making factual assertions—e.g., a prosecutor's sentencing memo containing algorithmic assessment of recidivism risk, a rule 26(g) representation of reasonable completion of production, assertions on reliability of evidence emanating from AI systems.

Rules 5.1, 5.3 Supervision impose on senior lawyers responsibility to supervise subordinates and third parties to ensure compliance with the rules of ethics; this in turn generates need for significant information on the trustworthiness of outputs from AI systems in order to supervise the uses of and representations about those outputs.

Rule 8.4(d) Misconduct requires avoidance of conduct prejudicial to the administration of justice. The responsible lawyer must not only know the effectiveness of AI systems whose output is offered to or used by the court, but also envision both the impact on participants in the justice system and the ability of the justice system to police for bias, prejudice, and other unintended consequences.

Rule 8.4(g) Misconduct prohibits professional conduct that a lawyer reasonably should know is discriminatory. Accordingly, a lawyer must understand potential biases of AI systems they employ—insight that the system designer or distributor may not have gathered. For example, hiring algorithms trained on the data of a non-diverse firm's current partners will likely select resumes reflecting similar schools, hobbies, zip codes, and accordingly candidates. An AI system that recommends prospective trial teams based on successes from prior non-diverse teams may well replicate their characteristics.

The appropriate implementation of these professional standards, while daunting in the age of AI, is fundamental to the protection of a just legal system. Indeed, in a justice system that depends on a full exchange of facts to derive a just result, effective and competent deployment of systems by which the facts are uncovered is fundamental to fairness and protection of the rule of law.

The impacts of an AI system may be difficult to discern. As a concrete example, we can look at the unforeseen and yet far-reaching impact of the Facebook algorithms' manipulation of users' social media feeds and the negative consequences for individuals and society. How can lawyers meet these ethical obligations? How can they assess and demonstrate the trustworthiness of an implemented AI system for a particular use? The expertise needed to understand AI systems—statistics, computer science, data science—is beyond the ken of the average lawyer.

Role of Measurement & Transparency in Developing Trust

The solution lies in measurement and transparency. If a system is measured to be effective at meeting a task, operated by those with due competence, transparent, and fair in apportionment of accountability for explaining design, training, and implementation decisions—including to the designers, developers, and operators of the system—the ethical obligation can be met.

The frameworks mentioned at the top of this article align in this direction. While the specifics vary, a common focus is the promotion of the trustworthy adoption and use of AI systems. See e.g., United States government initiative **Guidance for Regulation of Artificial Intelligence Applications** (White House Office of Management and Budget, 2020) in which the first principle, "Public Trust in AI," expounds on need for trust in systems to be deployed, in view of risks, inter alia, to civil liberties, and the concomitant need for promotion of "reliable, robust, and trustworthy AI applications, which will support public trust in AI."

Trust in AI system use and operation is fundamental to support the rule of law, which requires trust in the recommendations and judgements of the legal system itself. Conversely, AI systems associated with opaque or biased decision-making undermine trust in the legal system; expediency is an inadequate justification for the damage they engender. Importantly, AI systems are often trained on historical data that reflects embedded historical biases that can promote further inequality. Without requirements for evaluations of trustworthiness, therefore, AI systems can institutionalize both intentional and unintentional biases, potentially augmenting abuse of power and undermining democratic ideals. See **Global Governance of AI Summary Report 2018 Roundtable** at 32.

A prime example is the use of the gunshot detection system ShotSpotter, which installs microphones to locate and identify the sound of gunshots. Police assert that they pick the neighborhoods to be surveilled based on where the most shootings take place, but the system is overwhelmingly employed in communities of color. Research has shown that ShotSpotter is regularly susceptible to false positives and that its placement only in particular neighborhoods inflates gunfire

statistics. This in turn is used to justify heightened policing when, in fact, the validity and reliability of the technology has not been established. Similarly, AI predictive policing systems may perpetuate historical bias. Crimes are more likely to be detected where the systems are deployed, thus the practice, in both instances, reinforces historical bias under the guise of objective evidence.

Evaluating the Trustworthiness of AI Systems

It is important to evaluate the use of an automated system in the operational context in which it is to be deployed. Developers of systems may offer generic testing results, but one should ask what evidence exists that the system will be effective and accurate in the desired use case. For example, probabilistic genotyping software, used to match evidence samples found at crime scenes to possible suspects, may be used in cases where the software has not been proven reliable, e.g., cases with a larger number of contributors or small evidence samples and cases involving multiple people who are genetically related. Similarly, e-discovery software may advertise 99% accuracy on some benchmarks, but the recall of relevant data in a particular case may vary substantially.

For valuable guidance as we seek to evaluate the trustworthiness of AI systems, lawyers may turn to the IEEE **Ethically Aligned Design** principles. The framework for "informed trust" is designed to be practically applicable to a variety of circumstances, and to enable lawyers to avoid the risks of untrustworthy systems being applied in the legal context in a manner that undermines trust in the immediate process or, more importantly, in the legal system as a whole. IEEE set out four basic principles to guide the ethical adoption of AI systems:

- **Effectiveness**. Solid information about the capabilities and limitations of an AI system to ensure fitness for the intended purpose.
- **Competence**. Certainty that operators have the skills and knowledge required for the effective operation of the AI system and adhere to those competency requirements.
- **Accountability**. Clear lines of responsibility to provide the rationale for decisions made in the design, development, procurement, deployment, operation, and validation of effectiveness for system outcomes.
- **Transparency**. Those affected by the output of an AI system have access to appropriate information about its design, development, procurement, deployment, operation, and validation of effectiveness.

To pursue these trust principles, lawyers may start their evaluation of an AI system by learning, for example:

- Under what conditions did the developers test the systems? How might the environment of the intended use differ?
- Is there research on bias and the potential for disparate impact in systems of this type? Are there key demographic groups for which the system was not tested? Might this system in this instance with this data have a disparate impact?
- How is effectiveness to be tested in the context of the current use? What samples need to be drawn?
- What are the competencies needed to evaluate the effectiveness of the AI system and to deploy it effectively?
- What evidence is there that the system has been tested on use cases similar to the proposed use?

Lawyers contemplating or confronting use of AI systems should seek evidence supporting these four trust conditions for information to evaluate the trustworthiness of the AI system in question. The greater the potential impact of the system's outputs—considering proposed use, potential impact of inaccuracies or bias on the rule of law or fundamental human values, likelihood of bias, pernicious impact of ostensible objectivity—the greater and more sound the evidence required to support its use.