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As of: December 8, 2020 2:46 PM Z

In re Capacitors Antitrust Litig. (No. III)

United States District Court for the Northern District of California

November 3, 2020, Decided; November 3, 2020, Filed

Case No. 17-md-02801-JD

Reporter
2020 U.S. Dist. LEXIS 206508 *; 2020 WL 6462393

IN RE CAPACITORS ANTITRUST LITIGATION (NO. III)

Subsequent History: Appeal filed, 11/18/2020

Prior History: In re Capacitors Antitrust Litig. No. III, 285 F. Supp. 3d 1353, 2017 U.S. Dist. LEXIS 200502, 2017 WL 6031757 (J.P.M.L., Dec. 5, 2017)

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For United States of America, Intervenor: Christopher James Carlberg, LEAD ATTORNEY, U.S. Department of Justice, Antitrust Division, San Francisco, CA USA; Alexandra Jill Shepard, United States Attorneys Office, San Francisco, CA USA; Andrew Jon Mast, Mikal J. Condon, U.S. Department of Justice, Antitrust Division, San Francisco, CA USA; Howard J. Parker, U.S. Dept. of Justice, Antitrust Division, San Francisco, CA USA; Jacklin Chou Lem, United States Department of Justice, Antitrust Division, San Francisco, CA USA; Paradi Javandel, United States Department of Justice, Antitrust Division, San Francisco, CA USA.

Judges: JAMES DONATO, United States District Judge.

Opinion by: JAMES DONATO

Opinion

ORDER RE INDIRECT PURCHASER PLAINTIFFS' CLASS CERTIFICATION MOTION

In re Capacitors Antitrust Litig. (No. III)

Re: Dkt. No. 1681 (Case No. 14-cv-3264-JD)

In this multi-district antitrust litigation, several groups of plaintiffs have alleged that the defendant corporations engaged in a long-running, global price-fixing conspiracy in the capacitor industry. The indirect purchaser plaintiffs (IPPs) are one of the plaintiff groups. After a substantial amount of motion practice and other proceedings, the IPPs have [*23] settled on a class basis with all of the defendants they sued except Shinyei Technology Co., Ltd. and Shinyei Capacitor Co., Ltd. (together, Shinyei) and Taitsu Corporation (Taitsu). This order resolves the IPPs' request to certify a litigation class under Rule 23 of the Federal Rules of Civil Procedure in anticipation of a trial of their claims against Shinyei and Taitsu. Dkt. Nos. 1681, 2444.[1] Certification is denied.

BACKGROUND

The Court has detailed the factual background of this case in other orders, *see, e.g.*, Dkt. No. 1003, and the parties' familiarity with the record is assumed. The IPPs' case is adjacent to the direct purchaser plaintiffs' (DPPs') class action, which is bound for a new trial in January 2021 after the pandemic derailed a prior trial during the presentation of evidence.

The DPP and IPP cases are different in two important respects. First, the DPPs alleged one overarching conspiracy among all the manufacturer defendants to fix the prices of electrolytic and film capacitors. The IPPs have alleged two separate price-fixing conspiracies for electrolytic and film capacitors. The two remaining IPP defendants, Shinyei and Taitsu, make film capacitors, and are in the alleged film [*24] capacitor conspiracy only. Second, the direct purchaser plaintiffs bought capacitors directly from a manufacturer defendant; the indirect purchaser plaintiffs bought capacitors from direct purchasers, such as a distributor. As a result, the IPP case necessarily requires proof that the direct purchasers paid prices for capacitors that had been artificially inflated by a price-fixing conspiracy.

The Fifth Consolidated Complaint is the IPPs' operative complaint. *See* Dkt. No. 1589 (Indirect Purchaser Plaintiffs' Fifth Consolidated Complaint, or "Compl."). Seven of the eleven named plaintiffs say they bought film capacitors: CAE Sound and Toy-Knowlogy Inc., which are California companies; AGS Devices Co., a Florida company; AGS Devices Ltd., a New York company; Nebraska Dynamics, Inc., a Nebraska company; Angstrom, Inc., a Michigan company; and In Home Tech Solutions, Inc., a Minnesota company. *Id.* ¶¶ 30, 32-34, 36-37, 39. The complaint asserts three legal claims: (1) violations of the Sherman Act, 15. U.S.C. § 1, for which the indirect purchaser plaintiffs seek only "the issuance of an injunction" and no monetary damages; (2) violations of the antitrust and restraint of trade laws of California, Iowa, [*25] Michigan, Minnesota, Nebraska, and New York; and (3) violations of the consumer protection and unfair competition laws of California, Florida, Nebraska, and New York. *Id.* ¶¶ 404-42. Each state law claim is asserted on behalf of a putative class of residents of that respective state who purchased from a distributor, capacitors that were manufactured by a defendant or co-conspirator during the class period. So, for example, the California Damages Class alleges that defendants have violated California Business and Professions Code §§ 16700 *et seq.*, the Florida Damages Class alleges that defendants have violated the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. §§ 501.201 *et seq.*, and so on. *Id.* ¶¶ 424, 440.

The IPPs' class certification motion was filed before they settled with most of the remaining defendants in their case, so the motion raises issues and arguments that are no longer relevant, such as those relating to the proposed certification of electrolytic capacitor classes. Relevant to the two remaining defendants, Shinyei and Taitsu, are IPPs' requests to certify: (1) a nationwide Film Injunctive Class under the Sherman Act and Rule 23(b)(2); (2) a Film Damages Class under California law and Rule 23(b)(3) that "include[s] purchasers from the thirty-one states that permit recovery [*26] by indirect purchaser plaintiffs in price-fixing cases"; and (3) if the Court declines to certify a multi-state class under California law, an alternative certification of six separate state classes, namely a California Film Class, Florida Film Class, Michigan Film Class, Minnesota Film Class, Nebraska Film Class, and New York Film Class. Dkt. No. 1681, Notice of Motion and Motion at 1-3.

While the IPPs' motion was pending, a number of developments happened in the MDL action as a whole. These included the certification of a class of direct purchaser plaintiffs under Rule 23(b)(3) for a single claim of price fixing in violation of Section 1 of the Sherman Act. The class consisted of direct purchasers who were inside the United States and were billed or invoiced for capacitors by one or more defendants, or outside the

[1] Unless otherwise noted, all docket number references are to the ECF docket for *In re Capacitors Antitrust Litigation*, Case No. 3:14-cv-03264-JD.

United States and were billed or invoiced for capacitors by defendants, where such capacitors were imported in the United States by a defendant. Dkt. No. 2231. Defendants filed petitions to appeal the class certification order, which the circuit court declined. Dkt. No. 2280.

To bring the IPPs' certification motion up to date following these and other events, the Court invited the IPPs, Shinyei, [*27] and Taitsu to file supplemental briefs. *See* Dkt. No. 2444, MDL Dkt. No. 983.[2] After these briefs were filed, the Court turned its resources to the massive pre-trial and trial proceedings for the DPPs' jury trial, which was tried in March 2020 before ending in a mistrial caused by the COVID-19 pandemic. At no time during the significant period devoted to the DPP proceedings did IPPs ask to revise or amend their certification requests.

DISCUSSION

I. LEGAL STANDARDS

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (quotations omitted). To proceed under this special exception, the party seeking class certification must satisfy through evidentiary proof, and not just through pleading, that all of the requirements of Federal Rule of Civil Procedure 23 have been met. *Id.* That includes each of the four requirements of Rule 23(a) -- "sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" -- and at least one of the provisions of Rule 23(b). *Id.*

For the proposed Film Injunctive Class, the IPPs' notice of motion and motion cited Rule 23(b)(2), which provides for certification when "the party opposing the [*28] class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." But the IPPs' arguments in their motion papers focused exclusively on proposed damages classes under Rule 23(b)(3). Why this change in focus happened was not explained. In any event, Rule 23(b)(3) allows for certification if the Court finds that "questions of law or fact common to class members predominate over any questions affecting only individual members," and a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." One of the "matters pertinent to these findings" is manageability, meaning "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D).

For both the Rule 23(a) and Rule 23(b) requirements, the Court's analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465-66, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *Comcast*, 569 U.S. at 33-34. This is because "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (quotations omitted). But the rigorous analysis must not be confused with [*29] a "license to engage in free-ranging merits inquiries at the certification stage"; merits questions should "be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 466.

The purpose of Rule 23 is "to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'" *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015) (quoting *Amgen*, 568 U.S. at 460, alteration in original). Consequently, class certification is not summary judgment by another name. The plaintiffs' burden is to present enough evidence to warrant adjudication of their claims on a class basis, not to win their case.

For the commonality inquiry under Rule 23(a)(2), what matters "is not the raising of common 'questions' . . . but rather, the capacity of a class-wide proceeding to generate common *answers*." *Wal-Mart*, 564 U.S. at 350 (quotations omitted, emphasis in original). Plaintiffs must show that their claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* For Rule 23(b)(3), plaintiffs must also show that the proposed [*30] class is "'sufficiently cohesive to warrant adjudication by representation'" in that common issues predominate over questions affecting only individual class members. *Amgen*, 568 U.S. at 469 (quoting

[2] "MDL Dkt. No." references are to the ECF docket for Case No. 3:17-md-02801-JD.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). Plaintiffs need not prove that each element of their claim is susceptible to classwide proof. *Id.* The "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). As these principles indicate, the Court's predominance inquiry is guided by the elements of the underlying causes of action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011).

II. THE PROPOSED MULTI-STATE CLASS UNDER CALIFORNIA LAW

The IPPs' original certification motion, Dkt. No. 1681, and the supplemental brief, Dkt. No. 2444, made clear that their main request is for the Court to "certify the 31 'indirect purchaser states' under California law." Dkt. No. 2444 at 10. This request is less straightforward than it might seem.

In the initial complaints in this case, the IPPs proposed a nationwide class under California law -- the Cartwright Act and Unfair Competition Law (UCL). Dkt. No. 400 ¶¶ 368-70, 379. Defendants moved to strike these [*31] nationwide class allegations, which the Court found appropriate to consider at the pleadings stage. Dkt. No. 710 at 23-24. Applying *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985), and other opinions, the Court determined that "the potential conflict with the laws of other states (which surely would have an interest in this case if the Court were to certify a nationwide class) 'looms large,'" and that "the IPPs' complaint alleges hardly any contacts at all with the state of California." *Id.* Instead, the complaint said that "[m]ost of the defendants are headquartered abroad, and the meetings and conduct at issue are also mostly alleged to have taken place outside of the United States." *Id.* at 24. Consequently, the Court struck "all references to a nationwide class in indirect purchasers' claims under California's Cartwright Act and Unfair Competition Law." *Id.*

In response to this order, the IPPs dropped their nationwide class allegations in favor of sub-classes under the antitrust and consumer protection laws of California and 31 other states, even though the named plaintiffs hailed only from California and Virginia. Dkt. No. 1003 at 4; Dkt. No. 741 ¶¶ 387-445. This too was untenable. In a second round of pleadings motions, the Court determined [*32] that "Article III standing must be measured claim by claim" with "a named plaintiff who must possess the requisite standing" for each claim. Dkt. No. 1003 at 6 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)). After a detailed analysis, the Court concluded that "in-state injury in the form of an in-state purchase of a capacitor at a supracompetitive price is required here to satisfy Article III standing for each of the state law claims asserted," and so "[f]or each of IPPs' state law claims, they need a plaintiff who has been injured in-state in that way." *Id.* at 9-10. The IPPs acknowledged that they did not "have such plaintiffs for any of the thirty-one states whose laws [we]re asserted other than California," and so the Court dismissed "the non-California state law claims for lack of Article III standing." *Id.* at 11. The IPPs were given "one last opportunity to renew claims under those laws if they are able to locate a named plaintiff who can assert an Article III injury-in-fact consistent with this order." *Id.*

These events led to the operative Fifth Consolidated Complaint. In response to the Court's second dismissal order, the IPPs added named plaintiffs in Florida, Nebraska, New York, Michigan, and Minnesota, who purchased film capacitors. [*33] Dkt. No. 1589 ¶¶ 33-34, 36-37, 39. The Fifth Consolidated Complaint included claims under the antitrust laws of California, Nebraska, New York, Michigan and Minnesota, *id.* ¶¶ 415-29, and claims under the consumer protection and unfair competition laws of California, Florida, Nebraska and New York. *Id.* ¶¶ 430-42. Significantly, the complaint defined the "State Damages Classes" as residents of a specified state who indirectly purchased a relevant capacitor, *id.* ¶ 394, and each state law claim was asserted on behalf of the corresponding state damages class only. So, for example, the "California Damages Class" was limited to "residents of California" only, and the claim under the Cartwright Act as well as under the Unfair Competition Law were asserted only "on behalf of the California Damages Class." *Id.* ¶¶ 394, 424, 439. The same approach was used for all of the state law claims in the Fifth Consolidated Complaint, and no state law was invoked on behalf of anyone who is not a resident of that state.

Despite all this, the issue of a nationwide class under California law turned out to be dead in name only. The IPPs jolted it back to life in their certification motion, which seeks certification [*34] of a single Rule 23(b)(3) class under California law for indirect purchasers in 31 states: Alabama, Arizona, Arkansas, California, District of

Columbus, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. Dkt. No. 1681, Notice of Motion and Motion at 1 n.1. The IPPs say that these are "the thirty-one states that permit recovery by indirect purchaser plaintiffs in price-fixing cases." *Id.* at 1. The IPPs' supplemental brief reaffirmed that they are continuing to seek certification of "the 31 'indirect purchaser states' under California law." Dkt. No. 2444 at 10.

This request raises a number of concerns. To start, it sounds awfully like an end-run around the Court's ruling striking the IPPs' allegations on behalf of a nationwide class under California law. The IPPs say it is not, because instead of seeking to have California law applied nationwide, they are seeking to have California law applied to "only those purchasers from states that permit indirect purchaser lawsuits." Dkt. No. [*35] 1778 at 3. That is more a matter of degree than substance, but even so, why was there no reference whatsoever to a putative 31-state class under California law in the Fifth Consolidated Complaint? The complaint clearly stated that it sought to apply California law only to claims on behalf of a California class. Dkt. No. 1589 ¶¶ 424, 439. Indirect purchasers in Alabama, Arizona, Arkansas, District of Columbus, Hawaii, Illinois, Kansas, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, West Virginia and Wisconsin were never identified in the complaint, and were not even ostensible plaintiffs in this case. The first time this vast pool of nominal plaintiffs was identified was in the IPPs' class certification motion. The IPPs made no effort to amend the complaint to allege a foundation for this request, and have not offered any explanation for this sharp departure from the Fifth Consolidated Complaint.

Other problems abound. The proposal to apply California law to a 31-state class raises serious questions concerning: (1) the Due Process Clause of the United States Constitution; (2) California's choice-of-law rules; and (3) [*36] the territorial reach of the California Cartwright Act and Unfair Competition Law, which are the two California laws IPPs are seeking to apply to their proposed 31-state class. These are substantial and distinct issues that are easily confused. As our circuit has said, "[i]n this complex and murky area, it is indeed easy to lose one's bearings and to slip from a focus on the constitutional limitations on choice of law to the choice of law rules themselves." *AT&T Mobility LLC v. AU Optronics Corp.*, 707 F.3d 1106, 1113 n.12 (9th Cir. 2013) (citation omitted).

The IPPs did not tackle this analysis with aplomb. For the constitutional question, "[t]o the extent a defendant's conspiratorial conduct is sufficiently connected to California, and is not 'slight and casual,' the application of California law to that conduct is 'neither arbitrary nor fundamentally unfair,' and the application of California law does not violate that defendant's rights under the Due Process Clause." *Id.* at 1107 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)). The "requirements of the Due Process Clause must be satisfied individually with respect to each defendant in a case." *Id.* at 1113 n.15. Under California's choice-of-law rules, which both sides agree are applicable, the class action proponent bears the initial burden to show that application of California law is constitutional. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589-90 (9th Cir. 2012).

It is not [*37] at all clear that IPPs have met this burden for Shinyei and Taitsu. As the Court has determined, "the IPPs' complaint alleges hardly any contacts at all with the state of California," Dkt. No. 710 at 24, and all three of the Shinyei and Taitsu entities named by the complaint are Japanese corporations with their principal places of business in Japan. Dkt. No. 1589 ¶¶ 83-84 (Shinyei Technology Co., Ltd. and Shinyei Capacitor Co., Ltd.), ¶ 89 (Taitsu Corp.). In addition, the IPPs' due process arguments are made in connection with the electrolytic capacitor conspiracy, and not the separate film capacitor conspiracy involving Shinyei and Taitsu. For example, the criminal guilty pleas the IPPs rely on, and the other evidence they cite, are for electrolytic capacitors. *See* Dkt. No. 1681 at 31-33 (purpose of one meeting was reported as "regarding prices of electrolytic capacitors"; defendant's employee responded to a customer request "for electrolytic capacitor pricing" from "his California office"). While the IPPs say that Taitsu and Shinyei had U.S. subsidiaries, Taitsu America, Inc. and Shinyei Electronics Corporation of America, which were both California corporations registered to do [*38] business, and doing business, in California, *id.* at 34, these subsidiaries are not named as defendants.

The Court is mindful that "the Cartwright Act can be lawfully applied without violating a defendant's due process rights when more than a *de minimis* amount of that defendant's alleged conspiratorial activity leading to the sale of price-fixed goods to plaintiffs took place in

In re Capacitors Antitrust Litig. (No. III)

California." *AT&T Mobility*, 707 F.3d at 1113. The same goes for claims under the California Unfair Competition Law. *Id.* at 1108 n.1. The *de minimis* bar may be cleared even though "[n]one of plaintiffs' purchases at issue . . . was made in California," where defendants are alleged to have "engaged in and implemented their conspiracy in the U.S. through the offices they maintained in California," "entered into agreements to fix the prices of [relevant products] in California," and "specific employees of particular Defendants, operating from offices in California, participated in illegally obtaining and sharing their co-conspirators' pricing information." *Id.* at 1108-09.

None of this helps the IPPs. There is much less factual support here than in *AT&T Mobility*, especially for the film capacitor conspiracy. But even if the Court were to assume purely for discussion that the IPPs have [*39] cleared the *de minimis* bar, the California choice-of-law rules pose another barrier to certification. Once the proponent of California law has established that it can be applied constitutionally, "the burden shifts to the other side to demonstrate 'that foreign law, rather than California law, should apply to class claims.'" *Mazza*, 666 F.3d at 590 (quotation omitted); *see also Freedline v. O Organics*, No. 19-cv-01945-JD, 2020 U.S. Dist. LEXIS 199873, 2020 WL 6290352 (N.D. Cal. Oct. 27, 2020). "California law may only be used on a classwide basis if 'the interests of other states are not found to outweigh California's interest in having its law applied.' To determine whether the interests of other states outweigh California's interest, the court looks to a three-step governmental interest test." *Mazza*, 666 F.3d at 590. First, the Court determines whether the relevant laws are the same or different; if there is a difference, the Court examines each jurisdiction's interest in the application of its own law "under the circumstances of the particular case to determine whether a true conflict exists"; and if there is a true conflict, then the Court compares the nature and strength of each jurisdiction's interest and "applies the law of the state whose interest would be more impaired if its law were not applied." [*40] *Id.*

The question here is not whether California law may be used on a "classwide" basis -- most of the 31 states were not alleged to be a part of any class to begin with -- but whether the California Damages Class can now be expanded from California-residents-only to a 31-state class. Defendants have established that this is not appropriate. *Mazza* determined that the class members' claims had constitutionally sufficient contacts with California, even though the issue had not been directly disputed by the defendant, "because Honda's corporate headquarters, the advertising agency that produced the allegedly fraudulent misrepresentations, and one fifth of the proposed class members are located in California." *Mazza*, 666 F.3d at 590. But the court found differences among the relevant state laws on the first step of the governmental interest test. It found that "at least some differences that Honda identifies are material," for example, the California consumer protection laws at issue had "no scienter requirement," where many other states did, and California required named class plaintiffs to demonstrate reliance, while some other state statutes did not. *Id.* at 591. There were also material differences in the remedies provided [*41] by different states. *Id.*

So too, here. The IPPs do not materially dispute defendants' showing that the prudential standing factors in *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), do not apply to Cartwright Act claims, but do apply under the antitrust laws of Nebraska, New Mexico and Washington, D.C. *See* Dkt. No. 1749 at 15-16. The IPPs also do not dispute that the statutes of limitations are different among the potentially applicable laws, and that some states require indirect purchaser plaintiffs to prove that a portion of the alleged overcharge was "passed on" to them from the direct purchasers, while others do not. *Id.* at 16-17. "[T]hese are not trivial or wholly immaterial differences." *Mazza*, 666 F.3d at 591. Each of these differences could "spell the difference between the success and failure of" a plaintiff's claim. *Id.*

Mazza also weighs in defendants' favor on the second and third steps of the governmental interest test. As principles of comity and federalism counsel, "each state has an interest in setting the appropriate level of liability for companies conducting business within its territory," and striking its own desired "balance and boundaries between maintaining consumer protection, on the one hand, and encouraging an attractive business climate, [*42] on the other hand." *Mazza*, 666 F.3d at 592. On the issue of which state interest is most impaired, the *Mazza* court observed that "each foreign state has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." *Id.* at 593. Further, "California recognizes that 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest," and California "considers the 'place of the wrong' to be the state where the last event necessary to make the actor liable occurred." *Id.* As in *Mazza*, the last event necessary

for liability here was the indirect purchaser plaintiffs' purchase of the price-fixed capacitors and the payment of the overcharges. Consequently, each proposed class member's claim "should be governed by the consumer protection [and antitrust] laws of the jurisdiction in which the transaction took place." *Id.* at 594.

These conclusions are also wholly consistent with *AT&T Mobility*. As noted, there is a degree of equivalency between the Cartwright Act and the UCL, *AT&T Mobility*, 707 F.3d at 1107 n.1, and the due process analysis is not the same as the [*43] choice-of-law analysis, *id.* at 1113 ("Because the Due Process Clause does nothing but circumscribe the universe of state laws that can be constitutionally applied to a given case, we 'need not . . . balance the competing interests of California and [other states].' Objections based on the interests of other states are more properly raised under a choice of law analysis") (internal citations omitted). To be sure, in *Mazza*, which the *AT&T Mobility* court embraced, the circuit conducted an aggregation of contacts analysis for the due process question, but ultimately focused on place of purchase and rejected the application of California law to foreign class members under the choice-of-law analysis. This approach yields the same result here.

The limits on the extraterritorial application of the California Cartwright Act and UCL are another reason to doubt the propriety of a multi-state class. The IPPs refer to *AT&T Mobility* for the proposition that "[t]he Cartwright Act does not limit its reach to 'residents' of California, or even only to those entities or persons that purchased products within its borders." Dkt. No. 1778 at 3. But that decision is crystal clear in stating that the "question of whether the Cartwright [*44] Act provides a cause of action based exclusively on out-of-state purchases is distinct from the inquiry of whether such application would violate the Due Process Clause, and is not at issue in this case." *AT&T Mobility*, 707 F.3d at 1110 n.8. The IPPs did not present a substantive reason that might justify the application of the Cartwright Act outside of California, and did not address at all the same issue for the UCL.

Overall, the IPPs have not established that California law can or should be applied to their proposed 31-state class. Even if the Court were to permit residents of states not identified in the complaint to join the case, the proposed 31-state class could not be certified as one class under Rule 23(b)(3) because variations in state law would defeat predominance. Certification of a multi-state class under California law is denied.

III. THE PROPOSED CERTIFICATION OF SIX STATE CLASSES UNDER RULE 23(B)(3)

As an alternative to a multi-state class under California law, the IPPs propose the certification of six separate state classes, namely a California Film Class, Florida Film Class, Michigan Film Class; Minnesota Film Class; Nebraska Film Class, and New York Film Class. Dkt. No. 1681, Notice of Motion and Motion at 1-3. This request is also denied. The [*45] IPPs offered virtually no argument in support of this alternative. For example, despite the fact that the predominance inquiry is to be guided by the elements of the underlying cause of action, *see Erica P. John Fund, Inc.*, 563 U.S. at 809, the IPPs set out the elements for the Sherman Act Section 1 claim only. Dkt. No. 1681 at 13. The IPPs presented no substantive discussion at all of the state laws they rely upon for the state classes. This scant record does not permit the Court to evaluate whether these classes are certifiable and may proceed to a trial.

IV. RULE 23(A)

The discussion so far has focused on the Rule 23(b)(3) requirements. Since a class cannot be certified under this provision, a detailed review of the Rule 23(a) factors is not warranted. Even so, the Court notes for the sake of completeness that the IPPs come up short here, too. For example, defendants pointed out that the IPPs had made no factual showing on the numerosity of the six proposed state law classes. Dkt. No. 1749 at 40. IPPs responded only with a statement by counsel in the reply brief about the supposed numbers of purchasers in each class. Dkt. No. 1778 at 30. Commonality is also questionable for the same reasons that a Rule 23(b)(3) class is not certifiable. *See In re Capacitors Antitrust Litigation (No. III)*, No. 17-md-02801-JD, 2018 U.S. Dist. LEXIS 195310, 2018 WL 5980139, at *3 (N.D. Cal. Nov. 14, 2018). [*46]

V. THE PROPOSED INJUNCTIVE CLASS UNDER RULE 23(B)(2)

The IPPs have offered little in the way of support for a Rule 23(b)(2) injunctive relief class. The putative injunction class is mentioned in the IPPs' notice of motion and motion, but is effectively abandoned in their briefs and arguments. The question of how or why an injunctive relief class might be warranted when the primary relief IPPs seek is monetary damages, *see Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195-96 (9th Cir.

2001), is left unanswered. Certification of a Rule 23(b)(2) class is denied.

CONCLUSION

Class certification is denied in all respects. The Court need not reach defendants' *Daubert* motion to exclude the IPPs' expert, Dr. Russell L. Lamb, which is terminated as moot. A status conference is set for December 10, 2020, at 10:00 a.m. The IPPs, Shinyei and Taitsu are directed to file by December 3, 2020, a status update, including a jointly proposed schedule for pre-trial filings and trial.

IT IS SO ORDERED.

Dated: November 3, 2020

/s/ James Donato

JAMES DONATO

United States District Judge

Neutral
As of: December 8, 2020 3:05 PM Z

In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

United States District Court for the Eastern District of New York

May 5, 2020, Decided; May 5, 2020, Filed

18-MD-2819 (NG) (LB)

Reporter
335 F.R.D. 1 *; 2020 U.S. Dist. LEXIS 82725 **; 106 Fed. R. Serv. 3d (Callaghan) 1164; 2020-1 Trade Cas. (CCH) P81,208

IN RE RESTASIS (CYCLOSPORINE OPHTHALMIC EMULSION) ANTITRUST LITIGATION; THIS DOCUMENT APPLIES TO: ALL END-PAYOR PLAINTIFF CLASS CASES

Outcome
Plaintiffs' motion for class certification is granted.

Prior History: In re Restasis (Cyclosporine Ophthalmic Emulsion) Anti. Litig., 289 F. Supp. 3d 1332, 2018 U.S. Dist. LEXIS 17210, 2018 WL 672031 (J.P.M.L., Jan. 31, 2018)

Case Summary

Overview
HOLDINGS: [1]-The court granted class action certification to end-payor plaintiffs who alleged antitrust injuries arising from the pharmaceutical company's alleged actions in delaying market entry of the drug's generic version because the requirements of Fed. R. Civ. P. 23(a) were met where, inter alia, the class included over one million customers and the plaintiff's proposed methodology to try the case was replete with common evidence; [2]-The Rule 23(b) predominance requirement was met because, inter alia, plaintiffs presented a reasonable methodology to eliminate brand retainers' purchases from the damages calculation and to remove them from the class before judgment. Further, predominance was not defeated by a relatively small number of uninjured class members, choice-of-law considerations, or the need for a jury to determine scienter under one or two state statutes.

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In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

MA USA.

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For Philadelphia Federation of Teachers Health And Welfare Fund, Plaintiff: Marc H. Edelson, LEAD ATTORNEY, Edelson & Associates, LLC, Doylestown, PA USA.

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For Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund, On behalf of itself and all others similarly situated, Plaintiff: D. Sean Nation, Matthew C. Weiner, Steve D. Shadowen, [**5] LEAD ATTORNEYS, Hilliard & Shadowen LLP, Austin, TX USA; Frazar Wright Thomas, LEAD ATTORNEY, Hilliard & Shadowen, Austin, TX USA; Jayne A. Goldstein, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah LLP, Fort Lauderdale, FL USA; Natalie Finkelman Bennett, LEAD ATTORNEY, Shepherd Finkelman Miller & Shah, LLP - Media, PA, Media, PA USA; Robert Christopher Bunt, LEAD ATTORNEY, Parker, Bunt & Ainsworth, P.C., Tyler, TX USA; Christina H.C. Sharp, Girard Gibbs LLP, San Francisco, CA USA.

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For Plumbers & Pipefitters Local 178 Health & Welfare Trust Fund, on behalf of itself and all others similarly situated, Plaintiff: Gregory B. Linkh, Lee Albert, LEAD ATTORNEYS, Glancy Prongay & Murray LLP, New York, NY USA; Robert Christopher Bunt, LEAD ATTORNEY, Parker, Bunt & Ainsworth, P.C., Tyler, TX USA.

For Self Insured Schools of California, on behalf of itself and all others similarly situated, Plaintiff: Joseph R. Saveri, LEAD ATTORNEY, San Francisco, CA USA; Kyla Gibboney, Nicomedes Sy Herrera, Ryan J McEwan, V Chai Oliver Prentice, LEAD ATTORNEYS, Joseph Saveri Law Firm Inc, San Francisco, CA USA; Gaston Kroub, Zachary D. Silbersher, Kroub, Silbersher & Kolmykov PLLC, New York, NY USA; Christina H.C. Sharp, Girard Gibbs LLP, San Francisco, CA USA.

For Louisiana Health Service And Indemnity Company, on behalf of itself and all others similarly situated, doing business as, Blue Cross Blue Shield Of Louisiana, Hmo Louisiana, Inc, on behalf of itself and all others similarly situated, Plaintiffs: Bonnie Adele Kendrick, LEAD ATTORNEY, Dugan Law Firm, PLC, Ste 1000, New Orleans, LA USA; Charles A. O'Brien, III, LEAD ATTORNEY, Baton Rouge, LA USA; David S. Scalia, [**7] LEAD ATTORNEY, The Dugan Law Firm, New Orleans, LA USA; Douglas R Plymale, LEAD ATTORNEY, The Dugan Law Firm, New Orleans, LA USA.

For Kph Healthcare Services, Inc., A/K/A Kinney Drugs, Inc., Individually And on Behalf of All Others Similarly Situated, Plaintiff: Dianne M. Nast, Erin Burns, LEAD ATTORNEYS, NastLaw LLC, Philadelphia, PA USA; Debra G. Josephson, Michael L. Roberts, Stephanie Egner Smith, PRO HAC VICE, Roberts Law Firm, P.A., Little Rock, AR USA; Karen S. Halbert, PRO HAC VICE, Roberts Law Firm, Little Rock, AR USA.

For Direct Purchaser Class Plaintiffs, Plaintiff: Thomas M. Sobol, Hagens Berman Sobol Shapiro LLP, Cambridge, MA USA.

For End-Payor Plaintiffs, Plaintiff: Joseph R. Saveri, San Francisco, CA USA.

For Walgreen Co., The Kroger Co., Albertsons Companies, Inc., Heb Grocery Company L.P., Plaintiffs: Scott E. Perwin, LEAD ATTORNEY, Kenny Nachwalter, P.A., Miami, FL USA; Anna Theresa Neill, Richard A. Arnold, PRO HAC VICE, Kenny Nachwalter, P.A., Miami, FL USA; Joshua Barton Gray, Kenny Nachwalter, P.A., Washington, DC USA; Lauren Carol Ravkind, PRO HAC VICE, Kenny Nachwalter P.A., Four Seasons Tower, Miami, FL USA.

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Judges: NINA GERSHON, United States District Judge.

Opinion by: NINA GERSHON

Opinion

[*7] **OPINION AND ORDER ON END-PAYOR PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

GERSHON, United States District Judge:

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In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

I. INTRODUCTION

This case, brought as a class action, involves allegations that defendant Allergan, Inc., a pharmaceutical company, took several unlawful actions to delay the market entry of generic versions of its product Restasis (cyclosporine ophthalmic emulsion). The named plaintiffs are entities that provide prescription drug coverage for Restasis to their members.[1] These End-Payor Plaintiffs ("plaintiffs" or "EPPs") allege that, if a generic version of Restasis had entered the market, it would have cost significantly less than what they paid for brand Restasis [**10] and that they were damaged by paying overcharges. EPPs now seek certification under Federal Rules of Civil Procedure 23(a) and 23(b)(3) of a class of all end-payors, including consumers. For the reasons set forth below, plaintiffs' motion for class certification is granted.

Plaintiffs also move under Federal Rule of Evidence 702 to exclude the testimony of two of defendant's expert witnesses offered on this motion. Today, I separately issue a decision granting those motions (the "Daubert Decision").

II. BACKGROUND

A. Factual Background

I presume familiarity with EPPs' allegations, which are set forth in my decision [*9] denying defendant's motion to dismiss for lack of causation. *See In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 333 F. Supp. 3d 135 (E.D.N.Y. 2018). I will summarize them briefly.

Restasis, an oil-in-water emulsion containing the active ingredient cyclosporine, is prescribed by doctors to treat dry-eye disease. It is an extremely successful drug, with annual sales of over $1.5 billion. Plaintiffs allege that, to maintain its monopoly on Restasis after its patents for the drug expired on May 17, 2014, Allergan worked to delay approval by the Food and Drug Administration ("FDA") of generic versions of Restasis by (1) filing sham citizen petitions with the FDA; (2) defrauding the U.S. Patent and Trademark Office into issuing second [**11] wave patents for Restasis; (3) using those patents to file baseless patent infringement lawsuits against generic drug makers; and (4) frustrating attempts to invalidate its patents by selling them to the Saint Regis Mohawk Tribe, which licensed them back, in order to rent the Tribe's sovereign immunity.

EPPs claim that defendant's efforts allowed it to maintain a monopoly on Restasis after its patents expired. They allege that Allergan had a strong incentive to foreclose generic entry because, once a generic enters the market, there is a quick and dramatic reduction in sales of the brand drug.

The proliferation of generic drugs was spurred by the passage of the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act"), 98 Stat. 1585, which changed the terms under which generic products could enter the market and compete with brand drugs. Since the Hatch-Waxman Act's introduction, there has been a rapid increase in drugs' generic penetration rates—that is, the rates at which consumers purchase generic equivalents to brand name drugs when such an option is available. Between 2008 and 2013, the average generic penetration rate increased from 91 to 97 percent for all prescriptions, [**12] and it remained at 97 percent from 2013 to 2017.

It is not disputed that generic drugs are favored because they are generally much cheaper than their brand name counterparts. Between 2011 and 2013, within eight months of their market entry, generic drugs cost an average of 74 percent less than the price of the corresponding brand drug before generic entry; they cost 90 percent less within two and a half years of entry.

The American health care system incentivizes consumers' purchase of generic drugs. All states but one have laws that either require or permit a pharmacist who is filling a prescription for a brand drug to substitute an equivalent generic when available. Higher dispensing fees and performance targets encourage pharmacists to

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[1] The named plaintiffs are 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund.

take advantage of these laws and substitute generic drugs when possible. Health insurance plans and pharmacy benefit managers (PBMs), which many plans hire to administer their prescription drug programs, also promote the use of generics, mostly through tiered formularies that assign lower copayments or coinsurance to generic drugs compared to their brand equivalents.

The FDA has not yet approved a generic version of Restasis.

B. Procedural Background

[**13] This multi-district litigation was transferred to me in January 2018.[2] On April 4, 2018, I appointed Eric B. Fastiff of Lieff Cabraser Heimann & Bernstein, LLP; Dena C. Sharp of Girard Sharp LLP; and Joseph R. Saveri of Joseph Saveri Law Firm, Inc. as End-Payor Interim Co-Lead Counsel, and I appointed Dan Drachler of Zwerling, Schachter & Zwerling, LLP as Interim Liaison Counsel. EPPs filed a Consolidated Class [*10] Action Complaint on that same day. Because *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977), precludes EPPs from asserting federal damages claims under federal antitrust law, they bring their claims exclusively under various state antitrust and consumer protection laws.[3]

On September 18, 2018, I denied Allergan's motion to dismiss plaintiffs' complaint for failure to allege causation. *In re Restasis*, 333 F. Supp. 3d at 160. And on November 13, 2018, I granted in part and denied in part defendant's motion to dismiss certain of plaintiffs' state law claims. *In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litig.*, 355 F. Supp. 3d 145, 162 (E.D.N.Y. 2018). EPPs filed a Corrected First Amended Consolidated Class Action Complaint on December 20, 2018, in which they incorporated my rulings on defendant's motion to dismiss and added new state law claims.

On April 10, 2019, with discovery nearly complete, EPPs moved to certify the following class:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015,[4] through the present (in the case of Arkansas [**14] only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

The states marked with an asterisk are those in which EPPs assert claims only on behalf of people, not corporations.

The proposed class includes insured consumers, uninsured consumers ("cash payors"), and third-party payors ("TPPs"). TPPs are entities that pay or provide reimbursement for all or some of the cost of a drug for people whom they insure. Consumers covered by a health insurance plan offered by a TPP pay a portion of a prescribed drug's cost either through coinsurance or a copayment; the TPP pays the remainder.

EPPs have excluded the following from the proposed class:

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[2] In addition to EPPs, the litigation includes other groups of plaintiffs. While the motion for class certification of the Direct Purchaser Plaintiffs ("DPPs") was pending, they announced that they and Allergan had agreed to a class settlement which awaits the court's approval. Another group of plaintiffs—referred to as the Retailer Plaintiffs—are DPPs who, in effect, opted out of the class action and also recently reached a settlement with Allergan. Finally, three entities proceeding as assignees of claims held by indirect purchasers—MSP Recovery Claims, Series LLC; MSPA Claims 1, LLC; and MAO-MSO Recovery II, LLC, Series PMPI—jointly filed a complaint in this court on May 3, 2019. These plaintiffs and defendant agreed to stay that action until I issue a ruling on EPPs' class certification motion.

[3] EPPs also brought claims for injunctive relief under the Clayton Act and for declaratory relief under the Sherman Act. They withdrew these federal claims in their class certification motion. This court retains jurisdiction over this action under the Class Action Fairness Act of 2005, which grants federal district courts original jurisdiction over "any civil action in which [] the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2).

[4] Plaintiffs originally sought certification of a class period that begins on May 17, 2014, the date the Restasis patents expired. But EPPs clarified at oral argument that the class period should begin on May 1, 2015, as a result of the conclusions of one of their merits experts that a reasonable date for generic entry would have been in May 2015.

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan or its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" [**15] consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and any members of their immediate families.

Although not suggested by EPPs, I will also exclude all members of the chambers staff of all judges assigned to this case as well as those staff members' immediate families.

Plaintiffs' class certification motion generated extensive briefing, initially resulting in seven submissions. As discussed in the Daubert Decision, plaintiffs also filed two separate motions challenging the admissibility of [*11] evidence proffered by Dr. Laura Masselam Hatch and Dr. Kyriakos (Ken) Mandadakis—two experts Allergan relied on to oppose class certification.

On September 6, 2019, I granted defendant's request for an evidentiary hearing on class certification. At the hearing, which occurred during full day sessions on September 26 and September 27, 2019, I heard testimony from all six of the parties' experts—Todd Clark, Laura R. Craft, and Dr. Richard G. Frank for plaintiffs, and Dr. Hatch, Dr. James W. Hughes, and Dr. Mandadakis for defendant.

On October 23, 2019, I heard extensive oral [**16] argument on EPPs' three motions. At the proceeding, I also requested that the parties provide supplemental briefing addressing several issues relating to plaintiffs' state law claims, as described below.

As in many antitrust class actions, EPPs' ability to achieve class certification depends on whether they can satisfy Rule 23(b)'s predominance requirement by showing that individualized inquiries into the elements of injury-in-fact and damages will not overwhelm the common issues. Plaintiffs rely on the analysis of Dr. Frank, principally, and also on that of Ms. Craft to show that they can prove the element of injury-in-fact through common evidence and the element of damages through substantially common evidence. Dr. Frank's analysis predicts the conditions of the but- for world—a hypothetical world free of defendant's alleged anticompetitive actions. Defendant's critiques of Dr. Frank's analysis are at the heart of its opposition to class certification.

III. LEGAL STANDARD

A plaintiff who seeks certification of a class action under Rule 23(b)(3) bears the burden of satisfying the requirements of Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—as well as those of Rule 23(b)(3): (1) that "'the questions [**17] of law or fact common to class members predominate over any questions affecting only individual members'" and (2) that "'a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017) (quoting Fed. R. Civ. P. 23(b)(3)). In addition to these enumerated requirements, the Second Circuit has recognized an "implied requirement of ascertainability" in Rule 23. *Brecher v. Republic of Argentina*, 806 F.3d 22, 24 (2d Cir. 2015). A plaintiff must establish each Rule 23 requirement by a preponderance of the evidence. *Johnson v. Nextel Communs., Inc.*, 780 F.3d 128, 137 (2d Cir. 2015).

A court may certify a class action only if it concludes, after a "rigorous analysis," that the proposed class meets the requirements of Rule 23(a) and (b). *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013) (internal quotation marks omitted). Such analysis may "entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011); *accord Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010). But courts may decide merits issues at class certification "only to the extent [] they are relevant to" the application of Rule 23. *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013).

IV. ANALYSIS

A. Requirements of Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires a class to be "so numerous that joinder of all members is impracticable." In the Second Circuit, numerosity is presumed for classes of 40 or more. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiffs estimate that the class includes between 30,000 and 40,000 TPPs and over one million consumers. The numerosity requirement [**18] is satisfied.

2. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." A question is common to the class if it is "capable of classwide resolution—which means that determination of its truth or falsity [*12] will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. Consideration of the commonality requirement obligates a district court to determine whether class members have "suffered the same injury." *Id.* at 349-50 (internal quotation marks omitted). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson*, 780 F.3d at 137-38 (internal quotation marks omitted).

EPPs' proposed trial plan makes clear that there are a host of common issues of both law and fact.[5] Plaintiffs will attempt to show through common proof that Allergan willfully maintained monopoly power by engaging in anticompetitive conduct; that such conduct delayed market entry of generic Restasis; that absent Allergan's unlawful actions, multiple generic manufacturers would have entered the market; and that the relevant market is Restasis and generic versions of the drug. In addition, EPPs proffer that [**19] they will prove classwide injury by showing that consumers and TPPs pay significantly less for generic drugs than they do for brand drugs, with Restasis being no exception, and that many institutional mechanisms promote or require the substitution of less expensive generic drugs for brand versions once a generic drug enters the market.

Plaintiffs further intend to establish classwide damages by presenting evidence of generic Restasis' penetration rate and price in the but-for world as well as the number of Restasis prescriptions purchased during the class period. Using this common proof, the jury would then be asked to decide whether it found that the class paid more for Restasis than it would have paid if generic Restasis had been available and, if so, how much.[6]

Finally, EPPs' proposed claims administration process relies extensively on data collected from common sources in the pharmaceutical industry to identify plaintiffs, exclude uninjured ones, and allocate individualized damages. In a thorough, uncontested report, Ms. Craft, EPPs' expert who specializes in pharmaceutical data management and analysis, showed that, for every purchase of Restasis, data is available to discern [**20] who bought it, who paid for it, and how much every payor paid.[7] This is because each

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[5] EPPs and DPPs submitted, with their respective class certification motions, proposed trial plans, both of which contemplated joint trials. On September 25, 2019, I ordered EPPs, DPPs, and Retailer Plaintiffs to meet and confer about their plans and to provide additional detail as to how they intend to try their cases to avoid inconsistent verdicts. The plaintiffs then jointly submitted a plan proposing bifurcated trials at which all plaintiffs would present, to one jury, common evidence to show that Allergan violated the laws at issue and delayed the entry of generic Restasis. Next, depending on the jury's findings, there would be separate trials on impact and damages. The plaintiffs proposed bifurcation to satisfy *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491-94, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968), which prohibits the admission at a direct purchaser trial of evidence that they may have passed on their overcharges to other parties, including end-payors. Retailer Plaintiffs have settled and, assuming I approve DPPs' proposed settlement, I expect EPPs to adjust their trial plan accordingly.

[6] In an antitrust case alleging overcharges, the typical measure of damage is the difference between the price that was actually charged and the price that a consumer would have been charged in the but-for world. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 292 F. Supp. 3d 14, 101 (D.C.C. 2017), *aff'd*, 934 F.3d 619, 443 U.S. App. D.C. 86 (D.C. Cir. 2019).

[7] Ms. Craft is the president of OnPoint Analytics, Inc., which provides data analytics for complex litigation. In many antitrust class actions, including those involving the pharmaceutical industry, she has developed databases of discrete transactions from multiple data sources, and she has used them to identify and remove class members who were uninjured or subject to specific exclusions.

Although defendant does not challenge her credentials, I note that a court recently denied a motion to exclude Ms. Craft's opinion. *See In re Loestrin 24 Fe Antitrust Litig.*, 410 F. Supp. 3d 352, 386 (D.R.I. 2019) ("[Ms. Craft] is highly experienced in pharmaceutical data management and compilation for complex litigation. She has worked closely - and managed those working closely - with pharmaceutical sales, marketing, and reimbursement data. The Court thus is convinced that she is

prescription drug purchase generates detailed and uniform data, including the product purchased, the patient's name and insurance plan, the TPP's identity, and the amounts [*13] paid by the consumer and the TPP. Indeed, data sets from the top seven PBMs and the 15 largest pharmacy operators alone would offer data for up to 97 to 99 percent of U.S. prescription drug sales. This data can be organized relatively easily because the industry uses a uniform coding system.

In sum, EPPs' proposed methodology to try this case is replete with common evidence, and the commonality requirement is easily met here. *See, e.g., In re Loestrin*, 410 F. Supp. 3d at 397; *In re Flonase Antitrust Litig.*, 284 F.R.D. 207, 217 (E.D. Pa. 2012).

3. Typicality

Rule 23(a)(3) requires a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993); *see also Brown*, 609 F.3d at 475. EPPs satisfy their burden here. The claims of all class [**21] members, whether named or unnamed, arise from the same alleged conduct and rest on similar legal arguments.

In a footnote in its final submission, Allergan argues that plaintiffs have not satisfied Rule 23(a)'s typicality and adequacy requirements. It claims that the named plaintiffs, which are all TPPs, are not "fulfilling their fiduciary duties to absent consumer class members" because they have requested that I certify a TPP-only class, if I conclude that the class's inclusion of consumers defeats Rule 23(b)'s predominance requirement.

Like the court in *Loestrin*, 410 F. Supp. 3d at 398, I reject this contention. EPPs have strenuously argued that I certify their entire class. Their alternative proposal shows that they are pragmatic and responsive to Allergan's arguments, not conflicted.

4. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." To determine if this requirement is met, courts must inquire into whether a "1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons*, 502 F.3d 91, 99 (2d Cir. 2007) (internal quotation marks omitted). "This process 'serves to [**22] uncover conflicts of interest between named parties and the class they seek to represent.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)).

Other than the argument I rejected in the context of typicality, defendant does not challenge the named plaintiffs' or plaintiffs' counsel's adequacy. I find that the named plaintiffs are adequate class representatives and that class counsel are qualified, experienced, and able to conduct this litigation. There are no antagonistic interests between the named plaintiffs and the putative class or their counsel. Moreover, through my extensive observations of counsel, I am assured that they are well qualified to litigate this class action.

B. Requirements of Rule 23(b)(3)

Having found that plaintiffs meet Rule 23(a)'s requirements, I now must consider whether they have met the demands of Rule 23(b)(3). That rule's predominance and superiority requirements "ensure[] that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Cordes*, 502 F.3d at 104 (quoting *Amchem*, 521 U.S. at 615).

It is at this point that Allergan's central opposition to class certification arises. [**23] Relying largely on the First Circuit's decision in *In re Asacol Antitrust Litig.*, 907 F.3d 42 (1st Cir. 2018), Allergan contends that the proposed class contains large numbers of uninjured class members, that individualized inquiries are needed to cull the uninjured from the injured, and that these inquiries would overshadow the common questions of [*14] law or fact, compelling denial of class certification under Rule 23(b)(3).

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knowledgeable about the types of data available, their presentation and formatting, and their use in analytical applications.").

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1. Predominance

A district court may certify a class under Rule 23(b)(3) only if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Therefore, "the predominance criterion is far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 623-24. A plaintiff satisfies the requirement by showing that: "(1) resolution of any material legal or factual questions can be achieved through generalized proof, and (2) these common issues are more substantial than the issues subject only to individualized proof." *In re Petrobras*, 862 F.3d at 270 (internal quotation marks and alterations omitted).

"[P]redominance is a comparative standard[.]" *Id.* at 268. A court must "give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. ___, 136 S.Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016). "An individual question is one where 'members [**24] of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof.'" *Id.* (quoting 2 W. Rubenstein, Newberg on Class Actions § 4:50, at 196-97 (5th ed. 2012)) (alteration omitted). "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Id.* (quoting Newberg on Class Actions § 4:49, at 195-96). The analysis is "'more qualitative than quantitative.'" *In re Petrobras*, 862 F.3d at 271 (quoting Newberg on Class Actions, § 4:50, at 197) (alteration omitted). The essential question is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

a) Elements of an Antitrust Claim

Determining whether common questions of law or fact predominate "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011). To establish a claim under the antitrust laws, a plaintiff must prove (1) a violation of antitrust law; (2) injury and causation; and (3) damages. *Cordes*, 502 F.3d at 105 (internal quotation [**25] marks and alternations omitted).[8]

"Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws." *Amchem*, 521 U.S. at 625. For, "where plaintiffs were 'allegedly aggrieved by a single policy of the defendant[]', and there is 'strong commonality of the violation and the harm,' this is 'precisely the type of situation for which the class action device is suited.'" *Brown*, 609 F.3d at 484 (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001)).

Defendant does not dispute that EPPs will use common proof to attempt to prove the first element of an antitrust claim—a violation of antitrust law—and this "concession does not eliminate a common issue from the predominance calculus." *See Cordes*, 502 F.3d at 108 (internal quotation marks omitted). Indeed, as detailed above, every aspect of plaintiffs' allegations of anticompetitive conduct can be proven through common evidence, as these allegations focus exclusively on Allergan's actions and will not vary among class members. *See id.* at 105.

The second element of an antitrust violation presents two different questions. One is [*15] legal—whether the injury at issue "is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant['s] acts unlawful." *See Cordes*, 502 F.3d at 106 (internal quotation marks omitted). [**26] It is uncontested that this question also will be answered through common proof—adding to the common proof in this case. *See id.* at 108. The second question—causation or "injury-in-fact," *id.* at 106—is the focus of defendant's arguments.

b) Whether, When Some Class Members Are Uninjured, Plaintiffs Can Show Injury-in-Fact Through Common Proof

[8] Although EPPs raise only state law claims, the parties analyze the elements of a federal antitrust claim. This is because the state antitrust statutes generally adopt these same elements and require proof of injury-in-fact and damages—the elements at issue here. Below I separately address Allergan's arguments that differences in the state statutes cause individual issues to predominate.

Defendant also asserts that "[i]njury or impact" is an element of all of EPPs' consumer protection and unjust enrichment claims. EPPs have not argued otherwise, and thus I will assume for purposes of this motion that Allergan is correct.

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EPPs have offered Dr. Frank's methodology to demonstrate that they can prove injury-in fact through common evidence. Dr. Frank is a professor of health economics at Harvard Medical School and a Research Associate at the National Bureau of Economic Research. From 2009 to 2016, he served in several senior capacities, including Assistant Secretary for Planning and Evaluation, at the U.S. Department of Health and Human Services. He has extensively studied, and published papers on, the economics of the pharmaceutical industry.

Dr. Frank used a commonly accepted two-step method to prove classwide injury-in-fact. *See Castro v. Sanofi Pasteur Inc.*, 134 F. Supp. 3d 820, 847-48 (D.N.J. 2015) (collecting cases approving of the use of the same two-step model). This approach shows, first, that class members paid artificially inflated prices and, second, that "this price inflation occurred to substantially all class members." *Id.* at 847. Dr. Frank attempted to [**27] satisfy the second step by showing that generic Restasis would have achieved rapid and effective penetration of the market so that most purchases in the but-for world would have been for the generic.

Since a generic is not yet on the market, Dr. Frank lacked actual data regarding generic Restasis. He therefore used a yardstick approach to predict the price and penetration rate of generic Restasis in the but-for world. The approach examines the actual prices and quantities that occurred in a similar market that was not affected by defendant's behavior. Dr. Frank selected Pfizer's drug Xalatan, which is used to treat glaucoma, as his market yardstick. TPPs, insured consumers, and cash payors all paid significantly less for generic Xalatan than they had paid for Xalatan before generic entry. Additionally, the generic penetration rate for Xalatan averaged 94.3 percent over the damages period he measured.[9] Assuming that generic Restasis would have experienced the same penetration rate, Dr. Frank used common evidence to conclude that at least 94.3 percent of class members were injured by defendant's alleged conduct.

Based on his conclusion that 5.7 percent of prescriptions in the but-for world [**28] would have been for brand Restasis, Dr. Frank acknowledged that the class includes brand retainers—people who were uninjured because they would have purchased only brand Restasis even with generic alternatives.[10] Plaintiffs assert that the existence of those consumers does not defeat their ability to show classwide impact.

Allergan disagrees. It argues first that, in the Second Circuit, a class simply cannot be certified if it contains uninjured plaintiffs. Alternatively, it argues that the uninjured plaintiffs in the proposed class are too numerous and cannot be eliminated through common proof, which will cause individualized issues to predominate over the many common issues to be decided.

[*16] **(1) Whether a Class May Contain Uninjured Consumers**

Allergan's first proposition is simply incorrect. The Supreme Court and the Second Circuit have recognized that the existence of uninjured plaintiffs does not bar class certification. In *Tyson Foods*, 136 S.Ct. at 1044, the Supreme Court affirmed certification of a class under the Fair Labor Standards Act ("FLSA") that contained over 200 uninjured class members.[11] *See Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276, 134 S. Ct. 2398, 189 L. Ed. 2d 339 (2014) (noting that predominance would still be satisfied if a class contained uninjured class members that "defendant might [**29] attempt to pick off" through individualized inquiries).

In *Seijas v. Republic of Argentina*, 606 F.3d 53, 56-58 (2d Cir. 2010), the Second Circuit affirmed certification of

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[9] Dr. Frank measured damages from February 2016 (when he assumed for purposes of his analysis a generic would have entered in the but-for world) to January 2019 (the last month for which he had data). His methodology can be adjusted to reflect the damages period found by the jury.

For TPPs and insured customers, Xalatan's generic penetration rate was 92.2 percent after six months, 96.3 percent after 12 months, and 97.8 percent after two years. For cash payors, the generic penetration rate was 89.2 percent after six months, 91.9 percent after 12 months, and 94.8 percent after two years. These penetration rates are consistent with the rates observed in the industry as a whole.

[10] Allergan refers to these people as "brand loyalists." But, as Ms. Craft explained, powerful institutional factors, which are unrelated to a consumer's preference for a particular brand, drive brand retention rates. I will thus use the term "brand retention" instead of "brand loyalty."

[11] In its petition for certiorari, the employer, Tyson Foods, asked the Court to decide, among other things, "whether a class may be certified if it contains members who were not injured and have no legal right to any damages." *Id.* at 1049 (internal quotation marks omitted). But, in its merits brief, Tyson Foods conceded that federal courts had the authority to certify such a class. *Id.*

eight classes of holders of defaulted Argentine bonds, expressing no concern that summary judgment briefing revealed that "[c]omplicated questions existed [] as to which bondholders were class members and as to how much each class member could recover." Similarly, in *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 91 (2d Cir. 2015), the Court concluded that the possibility of uninjured plaintiffs did not defeat predominance "given the myriad common issues" in the case. And, in *Cordes*, 502 F.3d at 95-97, the Court, after reversing the district court's denial of class certification, remanded with instructions to the district court to reconsider whether the plaintiffs had satisfied Rule 23(b)'s predominance requirement even though the Court indicated that "[m]ore than ninety percent of" (and thus not all) class members were injured and the defendants argued that individualized inquiries were needed to determine whether each class member sustained antitrust injury-in-fact. *See also In re Petrobras*, 862 F.3d at 259, 261 (reversing class certification and remanding for consideration in the predominance analysis of the potential need for individualized inquiries to determine if each class member purchased its Petrobras [**30] Note in a "domestic transaction," as required by the Exchange Act and the Securities Act).

Consistent with this precedent, district courts in this Circuit have certified classes that likely or certainly contained uninjured class members. *See Dial Corp. v. News Corp.*, 314 F.R.D. 108, 120 (S.D.N.Y. 2015); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *44-45 (E.D.N.Y. Oct. 15, 2014), *adopted*, 2015 U.S. Dist. LEXIS 90402, 2015 WL 5093503 (E.D.N.Y. July 10, 2015); *In re Elec. Books Antitrust Litig.*, 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *22 (S.D.N.Y. 2014); *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 166-67 (S.D.N.Y. 2000).

Circuit Courts in other circuits have also accepted that class certification does not require proof that all class members are injured. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016); *Mims v. Stewart Title Guar. Co.*, 590 F.3d 298, 307-08 (5th Cir. 2009); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677 (7th Cir. 2009); *see In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014), *aff'g*, 2013 U.S. Dist. LEXIS 69784, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liability Litig.*, 678 F.3d 409, 420 (6th Cir. 2012), *vacated*, 569 U.S. 901, 133 S. Ct. 1722, 185 L. Ed. 2d 782 (2013), *reinstated*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 71 U.S. 1196, 134 S.Ct. 1277, 188 L. Ed. 2d 298 (2014).

There is, in short, no support for defendant's contention that the mere existence of uninjured class members in this putative class compels denial of EPPs' motion.[12] I now will address each of the categories [*17] of class members that defendant alleges are uninjured. The first category, brand retainers, gives rise to the core disputes on this motion.

(2) Consumers Who Would Have Purchased Only the Brand in the But-For World

While defendant does not dispute that generic Restasis would have been cheaper than brand Restasis,[13] it claims there would have been more brand retainers than EPPs acknowledge, that Dr. Frank's methodology is unsound, and that individualized inquiries will therefore predominate. Relying on *Asacol*, Allergan [**31] further asserts that EPPs' proposal to use classwide proof to establish injury-in-fact violates its due process and Seventh Amendment rights to conduct individualized inquiries before the jury to identify each brand retainer, and that it also violates the Rules Enabling Act, which does not permit federal rules to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

The parties vigorously dispute the percentage of prescriptions that brand Restasis would have retained in the but-for world, which they use to approximate the number of brand retainers. This dispute occupies the bulk

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[12] I also reject defendant's claim that *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006), which held that a class must be defined to ensure that all class members have Article III standing, shows that the Second Circuit does not permit certification of a class containing uninjured members. To satisfy Article III standing, a class member must have been affected in a personal and individual way, but the member "'need not be capable of sustaining a valid cause of action.'" *Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567, 574 (2d Cir. 2018) (quoting *Denney*, 443 F.3d at 264). Here, because they purchased Restasis, all class members have standing—whether or not they paid an overcharge. *See Torres*, 835 F.3d at 1137 n.6 (clarifying that *Denney*'s holding "signifies only that it must be possible that class members have suffered injury, not that they did suffer injury, or that they must prove such injury at the certification phase"). Notably, the *Asacol* Court found Article III standing satisfied there. 907 F.3d at 50-51.

[13] The parties' experts disagree over the extent of the price differential, but that question will be resolved by the jury through the use of common evidence.

of their briefing and was the focus of the witnesses' testimony at the evidentiary hearing.

While not abandoning its claim that the Second Circuit conditions class certification on a fully injured putative class, defendant asserts that it has not "staked its claims on the premise that *every single* class member must be uninjured for a class to be certified." Allergan's Sur-Reply in Further Opposition to End-Payor Plaintiffs' Motion for Class Certification at 3 n.7. It then notes that EPPs have not cited a case in the Second Circuit in which over four percent of class members were uninjured—referring to the certified class in *In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *55 [**32] .

The Supreme Court and Second Circuit, however, have never suggested that a certain percentage or number of uninjured plaintiffs would automatically bar class certification. And the Seventh Circuit explicitly eschewed such an approach. It has held that a class may be certified unless "it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen*, 571 F.3d at 677. And it later made clear that "[t]here is no precise measure for 'a great many,'" the determination of which is "a matter of degree, and will turn on the facts as they appear from case to case." *Messer v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012); *see also In re Rail Freight*, 292 F. Supp. 3d at 137-38 ("Beyond percentages, the number of uninjured class members in relationship to the size of the class also may matter.").

In any event, a review of the specific percentages addressed in other cases indicates that the percentage of uninjured class members proffered by EPPs here is well within the range that courts routinely accept. District courts in this and other Circuits have held that a class may be certified so long as a "*de minimis*" number of class members were uninjured or, conversely, "virtually all" class members were injured. *In re Rail Freight*, 292 F. Supp. 3d at 134-35; *In re Lidoderm Antitrust Litig.*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017); *In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *44-45. Although the concept of *de minimis* is not well defined, [**33] one court recently "suggest[ed] that 5% to 6% constitutes the outer limits of a *de minimis* number of uninjured class members." *In re Rail Freight*, 292 F. Supp. 3d at 137 (comparing *In re Lidoderm*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *19, [*18] and *In re Nexium (Esomeprazole) Antitrust Litig.*, 297 F.R.D. 168, 179 (D. Mass. 2013), *aff'd*, 777 F.3d 9 (1st Cir. 2015), with *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *20 (E.D. Pa. June 10, 2015)); *see also Mayo v. USB Real Estate Sec., Inc.*, 2012 U.S. Dist. LEXIS 135454, 2012 WL 4361571, at *3 (W.D. Mo. Sept. 21, 2012) (finding that a class where "at least 94%" of its members were injured was not overbroad, but declining class certification on other grounds). And recently the district court in *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litig.*, 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *32-36 (D. Kan. Mar. 10, 2020), which involved, among other allegations, delayed generic entry, certified a class where the plaintiffs' expert concluded that approximately five percent of the consumers were uninjured. Conversely, the district court in *Rail Freight*, 292 F. Supp. 3d at 141, denied certification of a class in large part because at least 12.7 percent of its members were uninjured.

EPPs argue that Dr. Frank's methodology, which yielded a 5.7 percent brand retention rate, shows that only a *de minimis* number of plaintiffs were uninjured and that a finding of classwide injury-in-fact can be made. Indeed, they claim that the number of uninjured consumers is almost certainly lower than 5.7 percent. Because a consumer need incur only one overcharge to experience antitrust injury, an individual who purchased a single generic prescription in the but- for world—even if all of his or her other purchases [**34] were for the brand drug—was injured.[14] *See In re Nexium*, 777 F.3d at 27; *In re Rail Freight*, 292 F. Supp. 3d at 136; *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *15 (D. Ma.

[14] Defendant contests Dr. Frank's assertion that the percentage of patients remaining on the brand after generic entry would be lower than the percentage of brand prescriptions. Dr. Frank deemed Restasis a chronic condition, citing one study that listed the median duration of treatment as 23 months. Allergan claims that Dr. Frank misconstrued the facts, that the study he cites described a small set of people with an incurable eye disease, and that less than a quarter of patients remain on Restasis after 12 months. At oral argument, defendant also asserted that most consumers using the brand drug at the time of generic entry would have remained on the brand rather than switch to the generic. I need not resolve this dispute, as I find that class certification is appropriate even if 5.7 percent of consumers were uninjured. But I do note that defendant's own experts, whose expertise treating dry-eye disease EPPs have not challenged, testified that the disease "needs to be treated chronically," *see* Class Cert. Hr'g Tr. at 82 (Dr. Hatch), and that Restasis is "a lifelong treatment regimen," *id.* at 292 (Dr. Mandadakis).

Oct. 16, 2017); *In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *45.

To decide if the class contains only a *de minimis* number of uninjured plaintiffs, I must evaluate Dr. Frank's methodology to determine whether "no reasonable juror could have believed" it. *Tyson Foods*, 136 S.Ct. at 1049; *see Comcast*, 569 U.S. at 35 (criticizing lower court for not deciding whether the plaintiffs' "methodology was a just and reasonable inference or speculative" (internal quotation marks and alterations omitted)). Or, as other courts have framed it, I must determine whether EPPs have "advance[d] a workable methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *See, e.g., Dial Corp.*, 314 F.R.D. at 115. I therefore must assess whether Dr. Frank's decision to use Xalatan as an analog (the source of his determination of the brand retention rate) was "sufficiently reliable to merit the court's consideration of it as proof common to the class." *In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *59.

(a) Dr. Frank's Methodology to Predict But-For Brand Retention

As an initial matter, Allergan does not contest Dr. Frank's use of a yardstick approach to measure the but-for world—this is unsurprising as this approach is a generally accepted way to measure antitrust damages. *See, e.g., SourceOne Dental, Inc. v. Patterson Cos.*, 2018 U.S. Dist. LEXIS 79291, 2018 WL 2172667, at *4 (E.D.N.Y. May 10, 2018). Rather, Allergan takes issue with Dr. Frank's [**35] choice of Xalatan as a yardstick, contending that his conclusion that Restasis, like Xalatan, would have had a 5.7 percent brand retention rate "appears to be unreasonably low." Expert Report of Professor James W. Hughes ("Hughes Rep.") ¶ 72.

[*19] I will first state the obvious: neither side will ever prove whether its predictions are correct. The but-for world is, by definition, hypothetical. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.").

Dr. Frank selected Xalatan as his market yardstick because it is also an ophthalmic product, it faced generic entry within the last 10 years, and it is featured in Allergan's own forecasting of generic entry as a useful analog. He also noted that Xalatan's generic penetration rate is consistent with the average penetration rates in the pharmaceutical industry.

The parties' arguments generally presume that a drug's generic penetration rate increases with the number of initial generic entrants.[15] In 2011, three generic versions of Xalatan initially entered the market nearly simultaneously, and a fourth entered approximately 18 months [**36] later.[16] Dr. Frank explained that his choice of Xalatan was conservative for two reasons. First, between 2011 and 2014, drugs with over $1 billion in sales in the year before generic entry averaged 8.9 generic entrants, while those with sales between $250 million and $1 billion averaged 4.9 generic entrants. With retail sales of at least $1.5 billion in the year before Dr. Frank's predicted generic launch date of February 2016,[17] Restasis falls into the former category. Xalatan, which had about $502 million in annual sales before generic entry, falls into the latter. Moreover, Xalatan had three generic entrants—fewer than the average drug with similar revenue. Second, the overall generic penetration rate in this country increased significantly after 2011. While Xalatan's generics launched in March 2011, EPPs proffer that a generic Restasis would not have entered the but-for world until 2015.[18]

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[15] Plaintiffs, through Ms. Craft's rebuttal report, offer a critique of this view. According to Ms. Craft, "the number of simultaneous generics may affect price discounts," but "its effect on the brand retention rate is not well established." Rebuttal Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ("Craft Reb.") ¶ 74. According to her, "[t]he institutional mechanisms that drive generic adoption" can cause rapid generic penetration even with only one generic entrant. Craft Reb. ¶ 75.

[16] The exact contours of Xalatan's generic entry are not clear from the parties' submissions. According to Dr. Frank, there were initially five generic entrants, but the sales for two of them were small and quickly diminished to minimal level, so that the remaining three generic entrants accounted for 85 percent to nearly 100 percent of generic sales during the first two years. But, in a declaration submitted in the Restasis patent infringement litigation, David LeCause, Allergan's Vice President of U.S. Eye Care Sales, stated that four generics initially entered. Despite this confusion, at oral argument, counsel for both sides agreed that, for practical purposes, there were initially three generic entrants and a fourth entrant 18 months later.

[17] According to Dr. Frank, when adjusted to account for mail-order prescriptions, Restasis' sales were approximately $1.8 billion that year.

[18] Dr. Frank relied on these same factors to respond to

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Defendant's first line of attack on Dr. Frank's proposal is to offer the conclusions of its expert Dr. Hughes.[19] Dr. Hughes recently retired as the Thomas Sowell Professor of Economics at Bates College. He has served as an expert in numerous pharmaceutical antitrust cases.[20] Relying exclusively on the projections [**37] of Company A and Company B,[21] [*20] two large companies that intended to enter the generic Restasis market, Dr. Hughes concluded that at least 14 to 25 percent of Restasis prescriptions would have remained for the brand product in the but-for world.

In 2018, Company A forecasted that there would be three initial generic entrants, a fourth six months later, and a total of six after two years. It also predicted a brand retention rate that declined over time and leveled out at 14 percent after two years. Also in 2018, Company B predicted that brand Restasis would retain a steady 25 percent of the market throughout a five-year period. Company B's prediction of the number of generic entrants was unclear. A note on the forecast indicated that it would "only assume 1 - 2 enter," but, in a different section, the forecast appeared to predict three companies at launch and a fourth after six months.[22]

Dr. Hughes's prediction of brand retention does not demonstrate the unreliability of Dr. Frank's. Rather than doing any independent analysis, Dr. Hughes merely reasoned that, because the two companies whose forecasts he relied on were "deciding whether to invest the money to enter the market," he "would [**38] expect their work in the forecast[s] to be quite diligent." Class Cert. Hr'g Tr. at 241; *accord, e.g. id.* at 164. But there are reasons to question these forecasts' reliability. Indeed, Company A's representative testified that its forecasts are conservative to avoid overstating anticipated revenues. This may explain why the company predicted a generic entry rate almost identical to Xalatan's but a lower generic penetration rate.

As for Company B, although brand retention rates are known to decrease over time, that company forecasted that Restasis' brand retention rate would remain flat at 25 percent over five years. Dr. Hughes initially testified that the generic manufacturers' forecasts are "very serious" because "[t]hey try to take a lot of factors into account." *Id.* at 183. But, when asked about Company B's prediction of an unchanging rate, he speculated that the company "used very few assumptions and the more assumptions you use[,] the more assumptions that can be wrong." *Id.* at 267. Dr. Hughes's adherence to a forecast that does not reflect real world conditions, and a defense of it that defies his own economic principles, call into question his methodology.

Defendant also argues that Xalatan, a solution, is [**39] an inappropriate analog for Restasis, a complex emulsion. Plaintiffs do not dispute that emulsions are more complex than solutions and, as such, more difficult to reproduce by generic manufacturers. While Restasis' complex composition is not contested, the significance of the drug's composition on Restasis' but-for brand retention rate is.

Allergan asserts that Restasis' composition would have led to significant brand retention in the but-for world, making Xalatan an unrealistic analog. To support its position, it references a January 2019 statement from then-FDA Commissioner Scott Gottlieb that complex drugs, including eye drops, "are harder to 'genericize' under traditional approaches" and thus "often face less competition" and some industry analysts who predicted limited competition for Restasis because of its

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defendant's criticism of his decision not to use as an analog Allergan's ophthalmic drug Alphagan P, which had only one generic entrant and higher brand retention than Xalatan. Dr. Frank explained that, in 2009, the year before Alphagan P lost exclusivity, its retail sales were only $188.8 million.

[19] I have excluded the challenged portions of defendant's other two witnesses, Dr. Hatch and Dr. Mandadakis. As I note in the Daubert Decision, however, even if I had found these experts' opinions admissible, they would not alter my decision on class certification.

[20] Although Dr. Hughes regularly serves as a defense witness in generic delay antitrust litigation, he has not published articles relevant to this topic.

[21] I have excluded the names of these companies as confidential. However, this opinion reveals some facts about Allergan or third parties that Allergan has requested that I seal. *See* Motion to Redact and Seal Certain Documents Related to End-Payor Plaintiffs' Motion for Class Certification, Dkt. No. 456. Where it does so, it is because I have determined that the public's right—under the common law and the First Amendment—to understand the basis of my conclusions on a crucial motion in this litigation substantially outweighs the factors that favor sealing. *See Brown v. Maxwell*, 929 F.3d 41, 47-51 (2d Cir. 2019); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); *Liberty Re (Bermuda) Ltd. v. Transamerica Occidental Life Ins. Co.*, 2005 U.S. Dist. LEXIS 9774, 2005 WL 1216292, at *6 (S.D.N.Y. May 23, 2005).

[22] At oral argument, EPPs' counsel asserted that Company B's representative confirmed that the company forecasted three initial entrants and a fourth six months later.

In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

complexity.[23]

[*21] But, as EPPs note, Allergan [**40] has offered no empirical evidence showing that a drug's complexity influences its brand retention rate, let alone a metric by which to determine how much more complex Restasis is than Xalatan or, even more importantly, how much its complexity affects its generic penetration rate. And it certainly has not shown that the empirical factors Dr. Frank cites that influence generic entry—including the size of the brand drug's market before generic entry—are rendered irrelevant (or even less significant) in the context of a complex drug.

Allergan further criticizes Dr. Frank's reliance on the company's own internal forecasts of the effects of generic entry on Restasis, many of which used Xalatan as an analog, to support his selection of the drug. Defendant asserts that those forecasts accounted for factors that would have led to aggressive generic penetration in the actual world but would not have existed in the but-for world. It argues that Dr. Frank did not consider those differences when he conducted his analysis.

EPPs respond by casting doubt on the accuracy of defendant's claims that its forecasts all predicted aggressive generic entry, as some of the forecasts selected analog drugs with [**41] only one initial generic entrant. In any event, even if all of Allergan's forecasts predicted aggressive generic entry, there is no indication that they led Dr. Frank astray. With three initial generic entrants in 2011, Xalatan is hardly the "very aggressive" choice Dr. Hughes said it was. *See* Class Cert. Hr'g Tr. at 188. Perhaps the most powerful evidence of this comes from Dr. Hughes himself: Company A's forecast—which Dr. Hughes deemed an accurate measure of the but-for world—predicted a nearly identical pattern of generic entry as Xalatan's.[24]

Defendant also asserts that the conclusions of Dr. Jeffrey Leitzinger, DPPs' expert, regarding brand retention show why Dr. Frank's analysis was misguided. By averaging 72 forecasts from five generic manufacturers, Dr. Leitzinger predicted a but-for brand retention rate of 11.5 percent after three years.[25] Dr. Frank responded that the use of averaging is accurate only when the data relied upon is similar and based on equal expertise. Since Dr. Leitzinger did not analyze the accuracy of the underlying forecasts (or even account for the generic manufacturers' own view of their accuracy), Dr. Frank criticized his method for giving "undue weight to [**42] the generic companies' projections, which are often imprecise and unrealistic." Rebuttal Declaration of Richard G. Frank in Support of Class Certification of Restasis End-Payors ¶ 16. Dr. Frank's defense of his methodology, including why he did not find Dr. Leitzinger's methodology more accurate than his own, was persuasive, and I am satisfied that Dr. Frank's decision to use a yardstick approach was sound and workable.

Relying heavily on the evidence from Dr. Hatch and Dr. Mandadakis that I excluded in the Daubert Decision, defendant further contends that Dr. Frank did not account for eye care providers' unique skepticism of generic drugs, which would have made them hesitant to switch patients to generic Restasis in the but-for world. Dr. Frank convincingly responds that any such skepticism would have been accounted for by his choice of Xalatan, which is also an ophthalmic product, as an analog.

Allergan's assertions about eye care providers' skepticism of generic drugs are thus relevant to class certification only if it can show that these providers are especially skeptical of complex generic ophthalmic drugs generally or of Restasis in particular.[26] [*22] Daubert Dec. at 14. Defendant's evidence on these

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[23] Defendant cites *Statement from FDA Commissioner Scott Gottlieb, M.D., on 2019 Efforts to Advance the Development of Complex Generics to Improve Patient Access to Medicines*, Jan. 30, 2019, www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-2019-efforts-advance-development-complex-generics; Jefferies, *Akorn (AKRX) ANDA to Restasis Disclosed; Could Become AKRX's Largest Opportunity—If Approved* (transmitted in an email dated July 16, 2015); and RBC Capital Markets, *Allergan, Inc.: Restasis Guidelines Major Setback; But AGN Still Attractive at Current Valuation*, June 24, 2013.

[24] It is also possible that, in the but-for world, Allergan may have tried to retain more of the market by introducing its own generic version of Restasis—that is, an "authorized generic." According to Dr. Frank, 68 percent of drugs with high sales include an authorized generic at generic entry. One of Xalatan's generic entrants was an authorized one.

[25] It is noteworthy that, on average, these generic manufacturers predicted a brand retention rate that was significantly lower than that predicted by Dr. Hughes, who relied exclusively on single forecasts created by each of two companies.

[26] One piece of evidence cited by Dr. Hughes fails to make this critical distinction. Dr. Hughes wrote that "brand loyalty" is especially high for ophthalmic products in part because "the design of the bottle and eyedropper are very important for ophthalmic drugs, especially with regards to ease of use and precision of the quantity dispensed." Hughes Rep. ¶ 82. He

points [**43] is far from conclusive. It relies heavily on a survey commissioned by Bank of America of just 75 ophthalmologists in which 78 percent stated that they viewed generics as potentially different from the brand (although the majority of that group still prescribe generics); 24 percent said they would not prescribe generic Restasis under the then- existing FDA bioequivalence guidance; and 27 percent said they would prescribe the generic only to new patients. Bank of America Merrill Lynch, *Allergan: Tidbits from ophthalmology survey*, at 5-6 (Aug. 7, 2013).

Most importantly, even if defendant had proffered stronger evidence of physician resistance, it has not bridged the gap between eye care providers' preferences and generic penetration rates. Indeed, the Bank of America survey itself acknowledged that "other factors (such as payor coverage)" often override physician preference, and, therefore, "most of the ophthalmic drugs that have gone generic in recent years have faced significant erosion." *Id.* at 1. Allergan notes that [**44] EPPs' expert Mr. Clark acknowledged that, if a large percentage of doctors wrote "dispense as written" on their prescriptions for a particular brand drug, it could increase the brand penetration rate. But Mr. Clark also described such a situation as extremely uncommon, citing prescriptions for thyroid medication as a rare exception. According to Ms. Craft, Allergan's former CEO David Pyott agreed, testifying at his deposition that "those days of writing dispense [as] written to [] override generics, they are history." Craft Reb. ¶ 56. In short, defendant has not shown that Dr. Frank's analysis is unreliable because of his failure to account for eye care providers' potential resistance to generic drugs.

Defendant further argues that the underperformance of a generic version of Restasis manufactured by Teva Pharmaceutical Industries Ltd. ("Teva") in Canada supports its claim that Restasis would have experienced significant brand retention in the United States. Teva's product entered the Canadian market in May 2018; after 11 months, it captured only a low percentage of sales—less than many other generic ophthalmic products in Canada had achieved. Allergan claims that Teva's experience [**45] shows that physician resistance to prescribing generic Restasis would have led to significant brand retention in the United States.

In response, EPPs retained Mr. Clark to compare the marketplaces for drugs in the United States and Canada and to determine whether the experience of Teva's generic was instructive as to how generic versions of Restasis would have performed in the United States. Mr. Clark, president of a life sciences industry advisory firm, concluded that Teva's [*23] generic sold poorly largely because it cost nearly the same as the brand and was not placed on Canada's provincial formularies. In a surrebuttal report, Dr. Hughes criticized Mr. Clark's findings, claiming that other generic drugs that shared the characteristics cited by Mr. Clark performed better in Canada. At the hearing, Mr. Clark took issue with Dr. Hughes's methodology.

The experience of Teva's generic in the Canadian pharmaceutical market does not render Dr. Frank's choice of Xalatan unreliable. The Canadian market is dramatically different from that of the United States. In 2018, Canadians spent about $30.7 billion on retail prescription drugs, while Americans spent between $360 and $520 billion. The smaller [**46] Canadian market reduces incentives for generic manufacturers to enter. In addition, insurance arrangements in Canada differ

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cited an article in which an ophthalmologist, after asserting that the design of the bottle and eyedropper could make a generic drug less user-friendly, described the packaging of generic Xalatan products as an example. Dr. Yvonne Ou, *Glaucoma Eye Drops: Is There a Difference Between Brand Name and Generic*, Bright Focus Foundation, Mar. 24, 2017 ("Ou Article"), www.brightfocus.org/glaucoma/article/glaucoma-eye-drops-there-difference-between-brand-name-and-generic. This article's reference to Xalatan, of course, undercuts Dr. Hughes' claim that concerns about a generic's inferior packaging could impede the drug's rapid and effective penetration of the market.

Defendant also cites a study of Medicare Part D recipients that found that, in 2013, eye care providers prescribed brand drugs to Medicare patients at the highest rate relative to all other physician specialties. Dr. Paula A. Newman-Casey, et al., *Brand Medications and Medicare Part D: How Eye Care Providers' Prescribing Patterns Influence Costs*, 125 Ophthalmology 332 (2018), www.ncbi.nlm.nih.gov./pmc/articles/PMC5732892. The authors did not determine the precise reasons for the difference, although they did acknowledge, among other possibilities, some doctors' concerns about the efficacy of generic drugs. They also noted, however, that brand medications' "[h]igh costs result in less frequent medication purchases and lead to lower medication adherence," citing a study of 8,427 patients with open-angle glaucoma who were 39 percent more likely to have reduced medication adherence if they were prescribed the brand name drug. *Id.* The authors deemed it "likely critically important to prescribe less expensive [generic] medications as first-line therapies to help decrease the risk of cost-related medication nonadherence." *Id.* The Ou Article similarly acknowledged that the "[d]ecreased cost of glaucoma drops has been shown to increase adherence, or compliance with taking a medication as prescribed."

markedly from those in the United States, and the promotion of prescription drugs is more strictly regulated. Notably, Teva's representative said that the company did not account for the experience of its Canadian generic when it forecasted generic Restasis' performance in the United States.

In sum, Allergan requests that I find unreliable Dr. Frank's conclusion that Restasis would have penetrated the market in the but-for world at a rate consistent with the average market penetration rate of all drugs. I decline to do so. Dr. Frank offered persuasive reasons for choosing Xalatan as a yardstick and equally persuasive reasons why the choice was conservative. Additionally, having observed his testimony, I found Dr. Frank to be a thorough, thoughtful, and credible witness. Defendant may make its case to a jury, but it has not given me a basis to say that Dr. Frank's use of Xalatan as an analog is unsound. Thus, EPPs have met their burden to show that they can present classwide proof of injury-in-fact and that the number of brand retainers is *de minimis*.

Finally, defendant [**47] sometimes argues that I need to determine on this motion not only whether Dr. Frank's methodology is sound enough to go to the jury, but what Restasis' brand retention rate would have been in the but-for world. If that were in fact the standard, I would readily accept Dr. Frank's analysis as establishing that brand retainers would account for no more than 5.7 percent of consumer class members.

(b) Plaintiffs' Methodology to Remove Brand Retainers from the Judgment

I now address Allergan's argument, supported largely by *Asacol*, that it is entitled to individualized inquiries at the liability phase of trial to identify brand retainers in the but-for world and that EPPs' proposed methodology to exclude them from the class is insufficient.[27]

EPPs propose that, using Dr. Frank's damages methodology, which relies exclusively on common proof, the jury will remove purchases that would have remained for the brand in the but- for world from the total damages award. Therefore, the experts' dispute over the brand retention *rate*

> does not undermine the fact that both experts rely on common proof (as opposed to individual proof) to estimate the impact Brand Loyalists have on the aggregate damages [**48] number under both of their models. Estimating the number of Brand Loyalist purchases (using a common proof methodology) is a sufficiently reliable method to remove purchases from the aggregate damages award.

See In re Lidoderm, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *19.[28]

[*24] This model also ensures that Allergan will not be forced to pay a penny more than the damages the jury determines it caused, protecting its due process rights.

> [I]n cases in which aggregate liability can be calculated in such a manner, 'the identity of particular class members *does not implicate the defendant's due process interest at all'* because '[t]he addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class.'

See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (quoting *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 670 (7th Cir. 2015)) (emphasis added); *accord In re EpiPen*, 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *37.

In *Hickory Secs. Ltd. v. Republic of Argentina*, 493 F. App'x 156 (2d Cir. 2012), another iteration of the Argentine bondholders' class actions at issue in *Seijas*, the Second Circuit indicated its approval for a damages model similar to EPPs'. The *Hickory* Court reversed the district court's entry of an aggregate damages award because it did not "sufficiently account[] for non-continuous bondholders," who were excluded from the

[27] I note that defendant's argument appears contingent on a finding that the brand retention rate would be higher than that predicted by Dr. Frank—a finding I have not made. Notably, the district court in *Asacol* concluded that the rate there would have been 10 percent. 907 F.3d at 45. I will nevertheless address defendant's argument, in part because it is not obvious that the *Asacol* Court's holding would have differed if that Court had been faced with a lower percentage of uninjured class members.

[28] EPPs' model distinguishes this case from two cited by defendant, *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 129 (E.D.N.Y. 2019), and *Vaccariello v. XM Satellite Radio, Inc.*, 295 F.R.D. 62, 74 (S.D.N.Y. 2013), in which the district courts denied class certification due, in part, to the need for individualized inquiries to determine whether each class member was injured. The plaintiffs in those cases, unlike EPPs, did not offer a method of classwide proof to separate uninjured class members from those who were injured.

classes. *Id.* at 158-59. On remand, the Court instructed the district court to see if it could calculate [**49] aggregate damages that account, in "a reasonably accurate, non-speculative" way, for the volume of bonds that did not belong in the classes at issue. *Id.* at 160. By removing the percentage of prescriptions that would have remained for brand Restasis in the but-for world from the total damages amount, EPPs' proposal does precisely that.

Plaintiffs' methodology offers additional protection to defendant. To collect damages, consumers will be required to submit sworn affidavits declaring, among other things, that they would have purchased a generic version of Restasis if it had been available.[29] There is nothing novel about this approach. Self-identifying affidavits are an accepted means to establish a class member's entitlement to recovery in class action litigation. *See, e.g., Briseno*, 844 F.3d at 1131-32; *Mullins*, 795 F.3d at 667-72. For instance, in consumer protection cases, many courts in this Circuit have accepted self-identifying affidavits to establish proof of a product's purchase (a prerequisite, of course, to injury) where such evidence does not otherwise exist. *See, e.g., Hasemann v. Gerber Prods. Co.*, 331 F.R.D. 239, 270-72 (E.D.N.Y. 2019); *Ebin v. Kangadis Food, Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014).

Here, by contrast, the data available in the pharmaceutical industry, detailed by Ms. Craft, ensures that only those who actually purchased Restasis will receive damages. [**50] "The detail and specificity of this electronically recorded data is truly exceptional in the realm of consumer goods purchases." Declaration of Laura R. Craft in Support of End-Payor Plaintiffs' Motion for Class Certification ¶ 24. This unique fact provides protections to Allergan that are regularly absent from consumer class actions. The data will show exactly how many purchases a consumer made and exactly how much he or she paid for each one. Where courts have accepted the use of affidavits to establish something as essential as a class member's proof of purchase of a product at issue, I see no reason to reject their use to discern a consumer's hypothetical purchasing activity in the but-for world.

As Allergan stresses, a proposal similar to that of EPPs was rejected by the Court in *Asacol*, which was also an antitrust class action alleging that the defendant pharmaceutical manufacturers worked to prevent generic entry. *See* 907 F.3d at 44-45. Where the district court found that 10 percent of class members had not been injured, *id.* at 45, the First Circuit held that a claims process that relies on affidavits "provides defendants [*25] no meaningful opportunity to contest whether an individual would have, in fact, [**51] purchased a generic drug had one been available," in violation of the defendants' Seventh Amendment and due process rights, *id.* at 53. The *Asacol* Court also rejected the plaintiffs' proposal to instruct the jury to remove the percentage of uninjured consumers from the aggregate damages amount. *Id.* at 55-56. It reasoned that "[a]ccepting plaintiffs' proposed procedure for class litigation would [] put us on a slippery slope, at risk of an escalating disregard of the difference between representative civil litigation and statistical observations of tendencies and distributions." *Id.*; *accord In re Thalomid & Revlimid Antitrust Litig.*, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *12-13 (D.N.J. Oct. 30, 2018) (relying on *Asacol* and Third Circuit precedent to deny, with leave to renew, class certification after the plaintiffs' expert determined that up to 10 percent of consumer class members were brand retainers).[30]

But the Second Circuit has accepted the use of representative evidence and statistical observations to prove classwide injury. In *Cordes*, the Second Circuit recognized that the plaintiffs in that antitrust class action may show that "injury-in-fact is susceptible to common proof" through the use of a "single formula," observing that, if the district court on remand were to agree that the [**52] plaintiffs' formula could show injury-in-fact, the

[29] Allergan insists that it will challenge each plaintiff in the claims process to assure that no uninjured plaintiff receives an award. There are two responses to this. Realistically, the likelihood that Allergan would choose to undertake the time and expense to challenge each plaintiff is remote. This is because any award against it, having already been reduced by the percentage of uninjured plaintiffs found by the jury, will not change. If it nonetheless chooses this path, it may effectively use the affidavit process to cull those plaintiffs it wishes to challenge.

[30] Allergan also relies on the D.C. Circuit's recent decision in *Rail Freight*, 934 F.3d at 620, which affirmed the district court's denial, on remand, of class certification because the class contained too many uninjured members. Although the D.C. Circuit cited *Asacol* with approval, *see id.* at 624, 627, the plaintiffs' model in *Rail Freight* was different from that in *Asacol* as well as from EPPs'. The plaintiffs in *Rail Freight* "insist[ed] that each member of the proposed class *was* injured," even though their own expert's model found that over 2,000 class members were not. *Id.* at 623-24. Thus, unlike here, the plaintiffs had not proposed a method to remove uninjured plaintiffs through common evidence, leaving the D.C. Circuit to conclude that it must be done through "full-blown, individual trials." *Id.* at 625.

predominance requirement would "likely" be met. 502 F.3d at 106-08. In *Petrobras*, where the plaintiffs were required to prove that they had purchased Petrobras Notes in a "domestic transaction," the Second Circuit indicated that they might have satisfied the predominance requirements if they had "suggest[ed] a form of representative proof that would answer the question of domesticity for individual class members." 862 F.3d at 272 (citing *Tyson Foods*, 136 S.Ct. at 1045-46).[31]

Defendant's argument, buoyed by *Asacol*, that the Seventh Amendment, Due Process Clause, and Rules Enabling Act require that it be permitted to challenge each class member's ability to show injury at the liability stage of trial is also inconsistent with *Tyson Foods. Tyson Foods* affirmed certification of a class in which the jury awarded aggregate damages without determining which individual class members' FLSA rights had been violated by the employer Tyson Foods. 136 S.Ct. at 1049-50. Tyson Foods asked the Court to determine whether, "where class plaintiffs cannot offer proof that all class members were injured, they must demonstrate instead that there is some mechanism to identify the uninjured class members prior to judgment and ensure that uninjured members (1) [**53] do not contribute to the size of any damage award and (2) cannot recover such damages." *Id.* at 1049 (internal quotation marks omitted). Deeming "the question whether uninjured class members may recover [] one of great importance," the Court nonetheless found its resolution "premature" since the damages award at issue had not yet been distributed. *Id.* at 1050. In a concurrence, Chief Justice John Roberts agreed [*26] that the issue was not ripe for the Court's resolution, but stated that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," and thus the jury's award could not stand "if there is no way to ensure that [it] goes only to injured class members." *Id.* at 1053.

As described above, uninjured class members here will "not contribute to the size of any damage award," and, by identifying and removing such class members during the claims administration process, plaintiffs' proposal satisfies Chief Justice Roberts's concerns. It also is in line with *Hickory*, in which the Second Circuit expressed no concern that uninjured class members had not been identified during the liability phase. *See* 493 F. App'x at 160. I therefore disagree with the First Circuit's conclusion in *Asacol [**54]* that defendant has a constitutional right to remove these individuals at the liability stage of trial. Notably, in a comprehensive opinion, the court in *EpiPen* predicted that *Asacol*'s analysis would not be followed by the Tenth Circuit, and it explicitly rejected the constitutional underpinnings of *Asacol*, upon which the defendants there, as here, relied. 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *28-32, *36-37.

(c) Defendant's Argument That Individual Inquiries Are "Likely Impossible"

While stressing its absolute right to question every individual class member to determine if he or she would have purchased generic Restasis in the but-for world, Allergan simultaneously argues that determining the hypothetical actions of a consumer is "next to impossible here because there is still no evidence of what patients actually did once a generic version of Restasis hit the market in the U.S." Allergan's Memorandum of Law in Opposition to End-Payor Plaintiffs' Motion for Class Certification ("Opp.") at 27.[32]

This argument only buttresses plaintiffs' case. If defendant were correct that individualized inquiries would be futile, Dr. Frank's reliance on aggregate data is not just a reasonable way to account for brand retention in the but-for [**55] world; it is the only way. A finding otherwise "would enable the wrongdoer to profit by his wrongdoing

[31] Defendant unpersuasively argues that EPPs' proposed methodology to show classwide impact is prohibited by the Supreme Court's decision in *Wal-Mart*. But there is no basis to compare the proposed class here to the class in *Wal-Mart* of 1.5 million female employees alleging employment discrimination in 3,400 stores. 564 U.S. at 357. The Court there found that Rule 23(a)'s lenient commonality requirement was not met as there was not even a single common question. *Id.* at 359. And it rejected the use of "sample cases" to extrapolate the percentage of women who were discriminated against by their local supervisors. *See id.* at 348, 357-58. Dr. Frank's use in this case of a market yardstick to show classwide impact in the but-for world bears no resemblance to the "trial by formula" condemned in *Wal-Mart. See id.* at 367.

[32] It also claims that the lack of a generic Restasis prevents the parties from examining "[o]ne of the factors that will likely drive especially high brand loyalty rates here [-] each patient's idiosyncratic medical issues, such as the likelihood that a patient would experience side effects and/or efficacy problems with the generic and their likely response if they experienced such side effects." *Id.* But a class member who experienced side effects from a generic would still be injured because he or she paid at least one overcharge. *See, e.g., In re Nexium*, 777 F.3d at 27.

at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery[.]" *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S. Ct. 574, 90 L. Ed. 652 (1946); *see In re Namenda Direct Purchaser Antitrust Litig.*, 331 F. Supp. 3d 152, 209 (S.D.N.Y. 2018) ("Defendants are not entitled to the benefit of [the] doubt when the very reason we cannot know the answer to [a] question is because of their alleged wrongdoing.").

Finally, Allergan's argument about the likely impossibility of individualized proof does not appear limited to class actions. If I were to accept this argument, it would lead to the untenable conclusion that in generic delay cases in which there is not yet a generic on the market—potentially because of the efficacy of a defendant's anticompetitive conduct—an individual plaintiff could not establish injury-in-fact. *Tyson Foods* accepted the plaintiffs' method of proving classwide liability in part because they could have relied on the same method to establish individual liability. 136 S.Ct. at 1046-48. By analogy, I view with great skepticism an argument against class certification that would prevent individual lawsuits as well.[33]

[*27] In sum, Allergan may not defeat class certification [**56] by insisting that it has a right to individualized inquiries while also claiming that those inquiries would be fruitless.[34] EPPs have presented a reasonable methodology to eliminate brand retainers' purchases from the damages calculation and to remove them from the class before judgment. I therefore find that the existence of a small percentage of consumers who were unharmed by generic foreclosure does not doom this class action.

Indeed, defendant's assertion that a small percentage of brand retainers should prevent over one million people and 30,000 to 40,000 TPPs from suing collectively runs afoul of Rule 23, as interpreted by the Supreme Court and Second Circuit. Most of these class members have low value claims and no economic incentive to bring individual lawsuits. Rule 23(b)(3) was designed with such plaintiffs "dominantly in mind." *Amchem*, 521 U.S. at 617; *Sykes*, 780 F.3d at 81. A district court bound by *Asacol* recently deemed the First Circuit's decision "likely a death knell for pharmaceutical, antitrust class actions brought by indirect purchasers," leaving "most putative class members' claims . . . unremedied." *In re Intuniv Antitrust Litig.*, 2019 U.S. Dist. LEXIS 141643, 2019 WL 3947262, at *7 n.8 (D. Mass. Aug. 21. 2019). Another such court was "troubled that over ninety percent of consumers in the proposed EPP class may have been injured by [**57] Defendants' alleged unlawful conduct, but now have no practical recourse under antitrust law." *In re Loestrin*, 410 F. Supp. 3d at 404.

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In addition to brand retainers, which plaintiffs acknowledge exist within the class, Allergan argues there are other less significant categories of uninjured plaintiffs that also affect the predominance balance. As will be seen, these alleged categories either do not exist, are purely speculative, or at most create a small number of issues that can be dealt with using common proof or a relatively trivial number of individual inquiries.

(3) Consumers with Flat Copayment Plans

EPPs have excluded from the class consumers with flat copayment plans because they pay the same for both brand and generic drugs. Dr. Frank notes that the existence of this small group of consumers does not affect his classwide damages calculation because, when an insured consumer has a flat co-payment, the entire overcharge is borne by the TPP. These consumers thus affect only the distribution of damages between consumers and TPPs during the claims administration process.

Allergan argues that EPPs have not offered a way to use common proof to identify and exclude consumers with flat copayment plans, but sworn statements [**58] submitted

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[33] At oral argument, Allergan contended that the continued absence of a generic entrant weighs against class certification because it evidences the weakness of plaintiffs' case. But the overall strength of plaintiffs' case is not relevant to class certification. *See, e.g., In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement").

[34] Defendant further argues that, even if a generic enters the market during this litigation, consumers' purchasing decisions would likely still provide insufficient data to show what they would have done in the but-for world. It is true that whether a consumer purchased a generic version of Restasis in the actual world is not open-and-shut proof that he or she would have done the same in the but-for world. But this data nonetheless would provide insight into his or her actions in the but-for world. *See In re Flonase*, 284 F.R.D. at 222; *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 343 (E.D. Mich. 2001).

to the court by PBMs OptumRx, Inc. and Prime Therapeutics LLC indicate otherwise. These PBMs confirmed that they are aware of the terms of the plans for the TPPs they service and that the PBMs can sort their data to exclude purchases by consumers with flat copayment plans.

Dr. Hughes does not contest that PBMs can identify and exclude flat copayors, but instead argues that there are *de facto* flat copayment plans that are not easily identifiable. He lists a coinsurance plan with a payment cap; an insurance plan that would have placed the generic drug on the same tier that the brand drug previously occupied; and individuals who qualify for "Full Extra Help" under Medicare's Low Income Subsidy Program.

Ms. Craft and Dr. Frank persuasively respond that Dr. Hughes's examples are based on either an unrealistic but-for price for generic Restasis, the unlikely and speculative actions of insurance plans in the but-for world, or an incorrect description of Medicare's program. In addition, these consumers [*28] constitute a *de minimis* group—around 0.4 percent of insured consumers.[35]

In short, the need to identify (solely to exclude from a damages award) consumers with official or *de facto* flat [**59] copayment plans does not defeat predominance. *But cf. Vista Healthplan*, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *19 (predominance requirement not satisfied in part because the plaintiffs' expert conceded that individualized inquiries were the only method to identify uninjured class members, including those with flat copayments).

EPPs explain that defendant's assertion that up to four percent of insured consumers fall into this category is incorrect because it includes consumers with coinsurance, whose payments are impacted by a drug's price.

(4) Consumers Who Used Coupon or Copayment Assistance Programs

Defendant offers coupon or copayment assistance programs that reduce the cost of brand Restasis for insured consumers to as low as $5 for a prescription. It asserts that, as a result, some consumers paid less for brand Restasis than they would have paid for a generic and that individualized inquiries are necessary to identify and exclude these individuals from the class.

I conclude that Allergan's issuance of coupons creates a *de minimis* number of unharmed class members, as most consumers who used coupons still paid overcharges. *See In re Thalomid and Revlimid*, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14. According to Dr. Frank, consumers who used coupons made out-of-pocket payments of an average of $48 per prescription, [**60] and the vast majority of those consumers would have paid an average of $11 per prescription for generic Restasis in the but-for world. Furthermore, Dr. Frank asserts, and defendant does not contest, that the coupons limiting consumers' payments to $5 applied to just three percent of prescriptions, making it unlikely that a consumer who used such a coupon on one purchase would not have paid an overcharge on another purchase.

Furthermore, EPPs have indicated that common data probably can be used to determine which consumers used coupons and to what extent. According to Ms. Craft, the data generated by pharmaceutical transactions could be used to link transactions with and without coupons to the same consumer. Additionally, Allergan's own data may allow the parties to identify coupon users through common proof. Ms. Craft explained that the coupon programs were designed to collect consumers' data to aid defendant's marketing efforts. During discovery, Allergan apparently provided only aggregate coupon data to EPPs, claiming that its individualized data had been lost. Having examined the contracts between Allergan and its coupon processors, Ms. Craft opined that it is "highly implausible [**61] given the commercial value of the data and the large expense incurred in its collection" that the data is truly gone. Craft Reb. 1 52.

In sum, defendant has not persuaded me that its use of coupon programs creates predominance concerns.

(5) Consumers Who Would Have Purchased a Different or No Brand Drug in the But-For World

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[35] Ms. Craft and Dr. Frank both initially estimated that the percentage of individuals covered by employer-sponsored prescription drug plans that have flat copayments was 0.32. But, adjusting for numbers cited by Dr. Hughes in his report, Ms. Craft increased the percentage to 0.4 percent in her rebuttal report. This percentage may be a slight underestimate as it does not include individuals covered by Medicaid or by health insurance that is not sponsored by an employer.

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Allergan asserts that it devoted substantial resources to marketing Restasis and that Restasis usage rates were particularly susceptible to these efforts. Defendant claims that, once a generic enters, brand manufacturers generally discontinue these efforts, and, as a result, some customers who purchased Restasis in the real world may have purchased Xiidra (another dry-eye medication) or no drug at all in the but-for world. These uninjured consumers, defendant argues, cannot be identified and excluded from the class through the use of common proof.

Dr. Frank criticized the assumption upon which this argument is based: Dr. Hughes's claim that there would be a "likely reduction in total [Restasis] prescriptions in the but-for world." Hughes Rep. 1 94. According to Dr. [*29] Frank, Dr. Hughes relied on a misrepresentation of the findings of one study to argue that purchases of [**62] the molecule form (*i.e.*, brand and generic forms combined) of a drug decrease after generic entry. Dr. Frank indicated that, often, any decline in demand for the molecule form of a drug caused by a decline in promotion after generic entry is offset by an increase in demand resulting from generics' lower price. While Dr. Frank acknowledged at his deposition that the sales of the molecule form of drugs sometimes do decline after market entry, he said that he considered that possibility while conducting his analysis and found it unlikely here, since Allergan's own models predicted a steady increase in total molecule sales after generic entry.

Defendant's argument about this category of so-called uninjured class members is based on speculation and thus insufficient to defeat class certification. *See Amgen*, 568 U.S. at 469-70; *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 121-22 (2d Cir. 2013).

(6) Potentially Uninjured Third-Party Payors

Defendant argues that individualized inquiries are also required to identify and exclude certain categories of uninjured TPPs.[36] EPPs argue, and I agree, that, even though a percentage of insured consumers would have remained on the brand, there is no sound basis to conclude that any TPP would not have been injured as it would have paid at least one [**63] overcharge for Restasis. *In re EpiPen*, 2020 U.S. Dist. LEXIS 40975, 2020 WL 1180550, at *32-34; *In re Loestrin*, 410 F. Supp. 3d at 404-05; *In re Solodyn.*, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *18.

Defendant's argument that some TPPs were uninjured because they received rebates from Allergan is also meritless. In *Nexium*, the First Circuit observed that "[t]here is some disagreement as to whether [] rebates are passed-through as a discounted price when the PBMs bill the TPPs or whether TPPs are charged the list price and then refunded a portion based on the rebate amount." 777 F.3d at 28 n.23. If they fall into the latter category, as EPPs contend, then "the rebates are only a damages setoff and do not affect the fact of injury." *Id.*; *accord In re Thalomid and Revlimid*, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14. This is because "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset." *In re Nexium*, 777 F.3d at 27.[37]

If, however, rebates fall into the former category (that is, if they serve to discount the initial price a TPP pays for a prescription), they still do not raise predominance concerns. Dr. Frank has challenged Dr. Hughes's assertion that the rebates offered to certain TPPs must have reduced the price of Restasis so dramatically that the TPPs would have paid more for a generic. Dr. Frank explains that Dr. Hughes relied on an unrealistically high price for generic Restasis in the but-for world. At [**64] minimum, "[Dr. Frank's] analysis suffices for purposes of the class certification motion . . . ." *In re Lidoderm*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *21; *see In re Solodyn*, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *18. Notably, even if Dr. Hughes' price calculations were accurate, a TPP would still have been injured if it paid just one overcharge on a purchase of Restasis. *See In re Solodyn*, 2017 U.S. Dist. LEXIS\ 170676, 2017 WL 4621777, at *18.

In addition, Allergan asserts that some TPPs who possessed stop-loss insurance may not have been injured and can only be identified through individualized inquiries. But reimbursements from stop-loss insurance

[36] Dr. Frank's assertion that TPPs bore about 90 percent of the class' overcharges is uncontested.

[37] Defendant's reliance on *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 488-90 (S.D.N.Y. 1987), to argue otherwise is not persuasive, as that case holds only that damages offsets should be accounted for in the ultimate assessment of damages, not that the existence of these offsets renders a party uninjured in the first place. The same can be said about *Abrahamson v. Fleschner*, 568 F.2d 862, 878-79 (2d Cir. 1977), another case cited by Allergan, which addressed the measure of damages under the Investment Advisors Act of 1940. Consistent with these cases, Dr. Frank subtracted rebates from his calculation of TPPs' damages.

are post-injury offsets that are "irrelevant to the question of impact." *In re Thalomid and Revlimid*, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *14.

[*30] Defendant also argues that a TPP would not suffer injury if, in the but-for world, a patient experienced side effects from generic Restasis, leading to additional medical visits and participation in a costly appeals process to demand coverage for the brand drug. Allergan's argument again is not grounded in the law, as a TPP's payment of a single overcharge renders it injured. *See, e.g., In re Lidoderm*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *21. And speculative claims about class members' medical reaction to a non-existent drug cannot defeat class certification. *See, e.g., Amgen*, 568 U.S. at 469-70.

Defendant further claims that individualized inquiries are necessary to determine which TPP, among the many potential payors, [**65] paid any overcharge. It claims that PBMs (which are excluded from the class) often share in a prescription's cost through their role obtaining rebates from drug manufacturers and sharing these rebates with their TPP customers. Allergan also claims that PBMs offer discount guarantees and price protection to their TPP customers and, in doing so, share with these TPPs the risk of negotiating reimbursement terms and drug price increases.

In response, EPPs have submitted declarations from the PBMs Express Scripts, Inc., OptumRx, Inc., and Prime Therapeutics LLC. The PBMs explain that they are hired to provide various services to assist in the administration of their clients' health plans. Nothing in those declarations suggests that a PBM directly or indirectly pays for its customers' prescription drug purchases. Ms. Craft also credibly and persuasively testified that PBMs serve only as agents for TPPs and do not pay for prescription drugs themselves. Allergan has provided no evidence to refute these representations.

I find that PBMs are not end-payors and, accordingly, their exclusion from the class does not create predominance concerns. *See, e.g., In re Loestrin*, 410 F. Supp. 3d at 405; *In re Thalomid and Revlimid*, 2018 U.S. Dist. LEXIS 186457, 2018 WL 6573118, at *23; *In re Lidoderm*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *6-7, *25; *but cf. Vista Healthplan*, 2015 U.S. Dist. LEXIS 74846, 2015 WL 3623005, at *9-13 (finding class unascertainable, [**66] in part, because PBMs may share the cost of a prescription); *In re Skelaxin (Metaxalone) Antitrust Litig.*, 299 F.R.D. 555, 569-77 (E.D. Tenn. 2014) (denying class certification on ascertainability (and several alternative) grounds where plaintiffs' expert suggested that, while PBMs were excluded from the class, they might pay for the cost of some prescriptions); *In re Wellbutrin XL Antitrust Litig.*, 308 F.R.D. 134, 148-51 (E.D. Pa. 2015) (decertifying an end-payor class in part because the plaintiffs did not show that they could "ascertain which PBMs, if any, are members of the class").[38]

To summarize, the existence of a relatively small number of uninjured class members does not preclude a finding of predominance under Rule 23(b)(3).

c) Plaintiffs' Aggregate Damages Proposal

The third and final element of an antitrust claim is damages. *Cordes*, 502 F.3d at 105. EPPs propose that the jury issue an award of aggregate damages that accounts for classwide harm. Their "model is relatively straightforward as aggregate class-wide damages equal the difference between the costs paid by class members for [brand Restasis] in the actual world versus the costs class members would have paid for [generic Restasis] in the 'but-for' world." *In re Flonase*, 284 F.R.D. at 232 (approving similar damages methodology). These damages would then be distributed to injured class [*31] members during the claims administration process.

Defendant argues [**67] that the need for individualized damages determinations weighs against a finding of predominance. Although a court must consider the fact that damages calculations will be individualized in the predominance analysis, class certification under Rule 23(b)(3) does not require a court to conclude "that

[38] Dr. Hughes also criticized EPPs' failure to exclude from the class insurers who function in an Administrative Services Only (ASO) capacity. As their name indicates, ASOs solely administer health plans on behalf of a health insurer; they do not pay for the drugs themselves. While Dr. Hughes does not assert otherwise, he claims the contractual relationships between TPPs and ASOs would cause various administrative difficulties, requiring individualized inquiries to determine exactly who is entitled to recoup an overcharge. But Dr. Hughes admitted during his hearing testimony that he had offered no specific case in which a conflict between a TPP and ASO may arise. I trust that, pursuant to the terms of their agreements, ASOs and TPPs will submit proper claims. To the extent they do not, these issues can be addressed during the claims administration process, with the aid of the robust data attached to each pharmaceutical transaction.

damages are capable of measurement on a classwide basis." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 402, 405 (2d Cir. 2015). Further, where, as here, the legal and factual questions raised by the second element of an antitrust claim are common to the class, "the predominance requirement of Rule 23(b)(3) is likely met." *Cordes*, 502 F.3d at 108.

Here, while the claims administration process will include individualized damages calculations, many of the questions relevant to the damages distribution will be answered through common proof. The entire process depends on the extensive and particularized data created in the pharmaceutical industry that reveals the number of prescriptions purchased by each consumer and how much each end-payor paid for each prescription. These common components will significantly narrow the scope of individualized damages calculations, which will likely involve simple arithmetic. *See In re U.S. Foodservice Inc.*, 729 F.3d at 123 (the measure of overcharge damages in a RICO class action "is straightforward"). Thus, individualized [**68] damages calculations "will not qualitatively outweigh the plaintiffs' reliance on common proof." *See In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *63.

Defendant also argues that Dr. Frank's damages calculations do not satisfy the Second Circuit's standard for aggregate damages. "'The use of aggregate damages calculations is well established in federal court and implied by the very existence of the class action mechanism itself.'" *Hickory Secs.*, 493 F. App'x at 159 (quoting *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 197 (1st Cir. 2009)). The Second Circuit has accepted the use of aggregate classwide damages so long as they "roughly reflect" the harm caused to plaintiffs. *Id.* at 158 (internal quotation marks omitted).

Upon careful scrutiny of Dr. Frank's methodology to calculate classwide damages, I find that it arrives at amounts that, at minimum, "roughly reflect" the harm caused by defendant. *Hickory Secs.*, 493 F. App'x at 158. The result of this methodology would "accurately reflect the number of plaintiffs actually injured by defendant[]" and bear a direct "relationship to the amount of economic harm actually caused by defendant[]." *Cf. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

To determine overcharges for each of the three categories of class members (TPPs, insured consumers, and cash payors), Dr. Frank determined the monthly average price each category paid for a prescription of Restasis in the actual world [**69] and subtracted his predicted but-for price. He then reduced those numbers for TPPs and uninsured consumers according to Xalatan's data. In the case of insured consumers, he used weighted averages from the Kaiser Family Foundation's annual survey regarding generic copay and coinsurance amounts. Dr. Hughes challenges Dr. Frank's use of Xalatan's prices as a yardstick as well as his use of averages to calculate damages. I find Dr. Frank's use of the data he relied upon and his use of averages in this context a reasonable way to measure overcharges. *See In re Air Cargo*, 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100, at *61-62 (collecting cases in which "courts have permitted the use of averages to calculate overcharges").

Critically, Dr. Frank used Xalatan's monthly generic penetration rate to omit from his damages calculations the prescriptions that would have remained for the brand even after generic entry in the but-for world. He factored these figures in by determining the quantity of prescriptions that were subject to overcharges each month, based on the actual number of Restasis prescriptions, and reducing it by Xalatan's corresponding generic penetration rate. Dr. Frank then multiplied the per-month overcharge by the quantity of generic Restasis that [**70] would have been purchased each month and added the monthly [*32] totals together.[39]

Dr. Frank adjusted his overcharge totals based on the assumption that Allergan would not have provided rebates to TPPs and coupons to insured consumers in the but-for world. And he eliminated from his damages calculations uninjured entities not in the class—including insured consumers with flat copays, federal and state governmental entities, and fully insured health plans.

These actions ensure that Dr. Frank's aggregate damages formulation does not create substantial danger that defendant would be overpaying. *Cf. McLaughlin*, 522 F.3d at 231 (rejecting aggregate damages calculation that was "likely to result in an astronomical damages figure"); *In re Rail Freight*, 292 F. Supp. 3d at 143-44 (finding plaintiffs' classwide damages model unreliable because it, in part, assessed damages to uninjured class members).

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[39] Dr. Frank calculated damages for two different scenarios in the but-for world—one in which generic products replaced prescriptions for Restasis MultiDose (a product Allergan launched in March 2017) and one in which they did not.

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Dr. Frank's methodology is especially appropriate here, where it is impossible to measure the true harm caused by Allergan's alleged conduct. Courts recognize that, "[g]iven the inherent difficulty of identifying a 'but-for world,'" antitrust damages need not "be measured with certainty." *Behrend v. Comcast Corp.*, 655 F.3d 182, 203 (3d Cir. 2011), *rev'd on other grounds*, 569 U.S. 27, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013). Rather, they must be demonstrated as "a matter of just and [**71] reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931). If plaintiffs cannot prove their damages with precision, "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265; *accord Story Parchment Co.*, 282 U.S. at 563; *In re Elec. Books*, 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *16. For these reasons, the "burden of proving antitrust damages is not as rigorous as in other types of cases." *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88 (2d Cir. 2000).

Allergan contends that Dr. Frank's damages calculations do not satisfy the demands of *Hickory* because, "[a]s in *Asacol*, the damages here are incremental rather than fixed." Opp. at 35. That Court concluded that "the aggregate damage amount is the sum of damages suffered by a number of individuals, such that proving that the defendant is not liable to a particular individual . . . reduces the amount of the possible total damage." *In re Asacol*, 907 F.3d at 55. That is not the case here. By removing a percentage of prescriptions from the total damages calculation, EPPs' model is not dependent on any individual class member's actions in the but-for world. If, in the claims administration process, defendant successfully challenges a class member's representation in his or her affidavit that he or she would have purchased generic [**72] Restasis, defendant would have identified someone who falls within the percentage of uninjured plaintiffs whose prescriptions were removed from the damages award. While that class member would not recover, the aggregate damages amount would not be affected.

I conclude that EPPs' method to determine and allocate classwide damages is reasonable and will not cause individual issues to predominate.

d) Predominance Concerns Raised by Multiple State Laws

EPPs' claims, under the laws of 31 states and the District of Columbia, arise under 31 antitrust laws, five consumer protection laws, and the unjust enrichment statute of California.[40] The statutes in play, while similar, are not identical. "In a motion for class certification, plaintiff bears the burden of providing an extensive analysis of state law variations to determine whether there are insuperable obstacles to class certification." *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000) (internal quotations [*33] marks omitted). Therefore, I must determine whether the variations in state case law "swamp" common legal issues and defeat the predominance requirement. *In re Pharm. Indus. Aver. Whol. Price List*, 252 F.R.D. 83, 98 (D. Mass. 2008); *see also In re Polyurethane Foam Antitrust Litig.*, 2015 U.S. Dist. LEXIS 94785, 2015 WL 4459636, at *4 (N.D. Ohio July 21, 2015) ("In the end, the question is not whether the 15 state consumer protection and unfair competition laws are different—they [**73] are—but whether those differences overwhelm common issues."). As the Second Circuit has held, "[v]ariations in state laws do not necessarily prevent a class from satisfying the predominance requirement," so long as "district courts . . . do more than take the plaintiff's word that no material differences exist. . . . Rather district courts themselves must undertake a considered analysis of the differences in state laws." *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 97 (2d Cir. 2018) (citations omitted).

Here, I found insufficient the charts initially offered by EPPs to meet their burden. Therefore, at my direction at oral argument, they submitted additional support for their trial plan. They have now grouped the states' laws according to the various statutes' requirements and drafted proposed questions for the jury that address the differences between these laws.

Plaintiffs contend that a multistate class action is appropriate because the elements of most statutes are substantially similar, any differences fall into predictable patterns that can be separated into tranches, and the court, in charging the jury and providing the jury with an appropriate verdict sheet, will resolve any remaining variations. As to the antitrust statutes, EPPs argue [**74] that each state's antitrust statute mirrors the federal antitrust laws, contains a federal harmonization

[40] Defendant categorizes these slightly differently, classifying Missouri's antitrust statute as a consumer protection law, but that does not affect the analysis here.

provision, and/or has been interpreted in harmony with federal laws. Except in one regard discussed below and certain issues reserved for summary judgment, *see infra* footnote 41, Allergan does not dispute that this is the case. As a result, plaintiffs argue, a single set of questions on the verdict sheet can be used to resolve questions of Allergan's liability.

With regard to the consumer protection statutes, plaintiffs maintain that they can prove violations of the statutes at issue here—those of Arkansas, California, Colorado, Montana, and Vermont—based on Allergan's allegedly unfair, unconscionable, and/or deceptive conduct through the presentation of common proof. Even so, several of the consumer protection statutes require additional proof. Specifically, California requires proof that Allergan violated another law, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937, 943 (Cal. 2003); Colorado requires a showing that defendant knowingly made a false representation, Colo. Rev. Stat. § 6-1-105(1)(e); and Vermont requires proof that Allergan's misconduct was likely to affect a consumer's conduct, *Carter v. Gugliuzzi*, 168 Vt. 48, 716 A.2d 17, 23 (Vt. 1998). Additionally, as discussed below, multiple states' antitrust and consumer protection [**75] statutes have different standards for the imposition of enhanced damages. EPPs argue that the statutes' differences are resolvable through proposed additional jury questions.

Defendant, on the other hand, argues that these differences will predominate over common issues and render adjudication of the class unmanageable. In addition to the issues related to additional proofs identified above, Allergan argues that the antitrust statutes of Florida, Michigan, and Minnesota require a greater showing of individual impact than the other states' antitrust statutes and that the antitrust and consumer protection statutes of Colorado, Illinois, and Montana prohibit class actions entirely. Allergan does not argue that any single issue is determinative, but rather that the cumulative effect of the state law variations defeats predominance.[41]

(1) Choice-of-Law Analysis

Neither side addressed choice-of-law concerns in the initial briefing. I raised the [*34] issue at oral argument because "[c]ourts must exercise care in conducting a choice-of-law analysis in a putative Rule 23(b)(3) class action . . . in order to determine whether any conflicts in governing law will overwhelm the ability of the trier of fact meaningfully [**76] to advance the litigation through classwide proof." *Johnson*, 780 F.3d at 141.

At oral argument, EPPs initially stated that their class definition included both purchases of Restasis made by residents of the class states and purchases of Restasis made in the class states by non-residents. In an attempt to avoid possible conflicts of law, EPPs have since limited the class to consumers who purchased Restasis in the class states, regardless of the consumer's state of residence. Defendant responds that plaintiffs have not adequately analyzed the issues and that choice-of-law considerations compound the problems of this multi-state class action.

When deciding matters of state law, a federal court generally must apply the choice-of-law principles of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Adding a layer of complexity, this action is a consolidation of cases filed in this court and cases transferred from California and Texas. In a multidistrict litigation, "the transferee court applies the choice of law rules of the state in which the action first was filed." *In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 329 (S.D.N.Y. 2005) (citations omitted). Thus, I must apply the choice-of-law rules of California, New York, and Texas to the cases arising therefrom.

Defendant acknowledges that California [**77] and New York courts employ variations on the same choice-of-law analysis—the "government interest test"—and it does not genuinely dispute that, under that analysis, the state of purchase provides the appropriate substantive law for consumer class members' claims. *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (applying California's choice-of-law rule in determining that "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place"); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 147, 150 (S.D.N.Y. 2008) (applying law of state of purchase under New York and California choice-of-law rules). I agree with this uncontroversial analysis.

[41] In its initial briefing, defendant cited more perceived differences between the states' antitrust and consumer protection laws than it raises now. At oral argument and in subsequent briefing, defendant has acknowledged that many of the issues it had raised to defeat class certification are more appropriate for summary judgment. Therefore, I do not address them now.

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I therefore focus on three issues on which the parties disagree: (1) whether the law of a state other than the state of purchase would apply to consumers' purchases under Texas's choice of-law analysis, (2) whether the law of the state in which a TPP has its principal place of business should apply to its claims, and (3) whether the law of the state to which a consumer's mail-order prescription was delivered should apply to the claims of both consumers and TPPs.

Unlike New York and California, Texas applies the "most significant relationship" test of the Restatement (Second) [**78] Conflict of Laws (1971) ("the Restatement"). *Johnson*, 780 F.3d at 145 (citing *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 311-12 (5th Cir. 2000)). The Restatement lists numerous factors to consider when determining which state has the most significant relationship to a case.[42] Restatement § 6(2). The factors vary somewhat in importance from one field of law to another, and additional factors apply when considering tort claims such as those at issue here.[43] *See In re Wellbutrin XL Antitrust [*35] Litig.*, 282 F.R.D. 126, 135 (E.D. Pa. 2011) ("'antitrust violations are essentially tortious acts. . . .'") (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 547, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (Marshall, J., dissenting)); *In re Flonase Antitrust Litig.*, 815 F. Supp. 2d 867, 882 (E.D. Pa. 2011) (same). Under this analysis, "[t]he applicable law will usually be the local law of the state where the injury occurred." Restatement §§ 156(2) (addressing the tortious character of the conduct); 158(2) (addressing the interest entitled to legal protection).

Defendant argues that, under the most significant relationship test, the state where the anticompetitive activities occurred, or the states where plaintiffs and defendant are residents, may have the most significant contacts to the case. I disagree. As the court in *Wellbutrin* reasoned in a thorough analysis of the relevant state policies and contacts,

> The place of purchase is where the relationship between the parties is centered; it is where the transaction with the alleged overcharge actually [**79] occurs. A place-of purchase rule protects justified expectations because an in-state transaction will be governed by the antitrust laws and/or consumer protection laws of that state and not by the chance location of the TPP's principal place of business, the location of the TPP's PBM, or an individual purchaser's residence. This approach will also provide consistent results because all purchases within a state will be treated uniformly.

282 F.R.D. at 135. While some of the Restatement's factors favor other states, consideration of the factors as a whole and in the context of this case indicates that a consumer's place of purchase—that is, where he or she was injured by overpaying—has the most significant contacts or relationships with the particular issue. *See id.*; *In re Flonase*, 815 F. Supp. 2d at 882; *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 277 (D. Ma. 2004).

Johnson v. Nextel Communs., 780 F.3d 128, is relied upon by defendant because it found class members' home states to have the most significant contacts. But *Johnson*'s analysis fully supports plaintiffs' position, not Allergan's. The Second Circuit in *Johnson* found the place of injury of critical importance for tort claims, but, under the wholly different facts in that case, the place of economic injury was the class members' home states. *Id.* at 142-44. Here, the place of injury is the place [**80] of purchase. Accordingly, I conclude that, under the choice-of-law analysis of New York, California, and Texas, the law of the place of purchase applies to each consumer class member's claims.

As to TPP class members, Allergan argues that, under a government interest analysis, the law of the state of a TPP's principal place of business should apply. On the contrary, the law of the TPPs' insured consumer's place of purchase governs the TPPs' claims under the most significant relationship test and the government interest test. Under the government interest analysis, "[i]f conflicting conduct-regulating laws are at issue, the law of the jurisdiction where the tort occurred will generally

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[42] These general factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, [*36] predictability, and uniformity of result, and (g) ease in the determination and application of the law to be applied." Restatement § 6(2).

[43] The additional factors applicable to tort cases include: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." Restatement § 145. The Restatement further provides that "[t]hese contacts are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72, 612 N.E.2d 277, 595 N.Y.S.2d 919 (N.Y. 1993). Here, the consumer's antitrust injury or consumer protection injury takes place in the state where the drug is purchased, and, without a consumer's purchase in that state, the TPP would not be injured. As a result, under either the government interest test or the most significant interest test, the state that would be most impaired if its laws were not applied, the state with the greatest contacts, and [**81] the state with the most significant interest in preventing antitrust and consumer protection violations is the state in which a TPP's insured consumer purchased Restasis.[44] Moreover, this result will provide "certainty, predictability, and uniformity of result," Restatement § 6(2)(f), and promote "ease in the determination and application of the law to be applied." Restatement § 6(2)(g).

Finally, the parties disagree as to which state's law governs mail-order prescriptions. Defendant asserts that the law of the state of the consumer's residence should govern, while EPPs argue that, under both the government interest test and the most significant interest test, the law of the state where the drug was delivered (presumably, this generally would be the state of residence) should apply to both consumers and TPPs. I conclude that it is reasonable to treat the place of receipt of mailed drugs as the place of purchase and, therefore, the place of injury. In other words, it is reasonable to treat drugs received by mail-order the same as drugs received at a retail location.

In sum, choice-of-law considerations do not raise issues that defeat predominance.

(2) Proof of Antitrust Impact

Allergan argues that the antitrust laws of [**82] Florida, Michigan, and Minnesota require "a somewhat stronger and more precise showing of individual impact" than the laws of the other states at issue, quoting *In re Relafen*, 221 F.R.D. at 282, and *In re Digital Music Antitrust Litig.*, 321 F.R.D. 64, 99 (S.D.N.Y. 2017), which adopts this phrase from *Relafen* without discussion. As a result, defendant argues that the existence of uninjured plaintiffs precludes class certification under Florida, Michigan, and Minnesota antitrust laws.

A careful review of the law in these three states, and of the analysis made by the court in *Relafen*, leads me to a different conclusion—namely, that the requirements for showing individual impact, and also damages, are essentially the same in all of the states under which plaintiffs sue. I discern no heightened standard, explicit or implicit, in the cases upon which *Relafen* relies, and therefore there are no individualized issues regarding these three states.

In *Gordon v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *4 (D. Minn. March 30, 2001), cited by *Relafen*, 221 F.R.D. at 281, the United States District Court for the District of Minnesota noted the "consistency" with which Minnesota courts had denied certification of indirect purchaser classes, but, after a close and comprehensive analysis of those cases, certified a class of indirect purchasers of Microsoft products. *Gordon* concluded that denial in the prior [**83] cases had been on "narrow grounds rather than pursuant to any general rule." *Id.* In addressing the earlier denials, the *Gordon* court highlighted the individual complexities of determining injury in *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132 (Minn. App. 1987), where cigarette purchasers unsuccessfully sought class certification. 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *5. In *Keating*, the complicated chain of distribution, and the likely unavailability of purchase records—two issues entirely absent here— made individualized issues predominant and made the proposed class unmanageable.[45] 417 N.W.2D at 137. The court in *Gordon* also expressly found that plaintiffs need not "*prove* class-wide fact of injury or individual damages at the class certification stage," but only a viable method for doing so. 2001 U.S. Dist. LEXIS 26360, 2001 WL 366432, at *7 (emphasis in original).

Turning to Michigan, although its statute requires proof of "actual damages," Mich. Comp. Laws Ann. § 445.778(2), that language, as interpreted by Michigan courts, does

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[44] *Cf. In re Flonase*, 815 F. Supp. 2d at 882-83 (applying state law of consumers' place of purchase using Pennsylvania's choice of law principles which "require[] an inquiry both into the number and nature of contacts at issue, as set forth in the Restatement (Second) of Conflict of Laws, as well as the policies and governmental interests underlying the issue"); *In re Wellbutrin XL*, 282 F.R.D. at 135 (same); *but see In re K-Dur Antitrust Litig.*, 2008 U.S. Dist. LEXIS 113310, 2008 WL 2660783, at *5 (D.N.J. Mar. 19, 2008) (applying state law of TPPs' principal place of business using government interest analysis); *In re Rezulin*, 392 F. Supp. 2d at 611 n.85 (same).

[45] The facts in *Ludke v. Philip Morris Cos.*, 2001 Minn. Dist. LEXIS 2, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001), relied upon by *Relafen*, were similar to those in *Keating*.

not require a showing of damages inconsistent with that proposed by EPPs here. *Ren v. Philip Morris Inc.*, 2002 Mich. Cir. LEXIS 1, 2002 WL 1839983 (Mich. Cir. Ct. June 11, 2002), which was not cited by *Relafen*, but is relied upon by Allergan, is particularly instructive. The *Ren* court found that "common issues of law or fact would likely predominate relative to the issue of the existence of injury in fact" despite the plaintiffs' expert's [**84] inability to "show that each and every member of the class was necessarily subjected to paying an illegal overcharge and hence was impacted." 2002 Mich. Cir. LEXIS 1, [WL] at *11. This, the court held, was because the "inability to show injury as to a few does not defeat class certification where the plaintiffs can show widespread injury to the class." *Id.* [*37] (quoting *In re Cardizem CD Antitrust Litig.*, 200 FRD 297, 321 (E.D. Mich. 2001)). While the court in *Ren* rejected a class that sought to aggregate damages and then "simply award[ ] each member of the class the average of the class wide damages," it observed that an end-payor class "might not founder on the issue of computation of individual damages . . . where the number of purchasers of the product are readily identifiable and reliable records for individual purchases exist." 2002 Mich. Cir. LEXIS 1, [WL] at *15-16. That, of course, is the situation here.

Finally, the law in Florida also does not support a heightened standard. For example, in *Execu-Tech Business v. Appleton Papers*, 743 So. 2d 19 (Fla. App. 4 Dist. 1999), cited by *Relafen*, the appellate court upheld the trial court's denial of certification of an end-payor class where the trial court had rejected the plaintiffs' expert evidence and had concluded that there was no reasonable methodology for generalized proof of classwide impact and damages. Thus, while the court acknowledged its skepticism [**85] of end-payor classes, its holding was based upon the lack of sufficient evidence needed to avoid individual inquiries.

As *Relafen* also noted, a different Florida court had certified an end-payor class where, in contrast to *Execu-Tech*, the plaintiffs' expert economists had "identified methodologies for demonstrating the individual impact of" the defendants' behavior. *In re Relafen*, 221 F.R.D. at 281 (citing *In re Fla. Microsoft Antitrust Litig.*, 2002 WL 31423620, at *11 (Fla. Cir. Ct. Aug. 26, 2002)). The *Florida Microsoft* court held that Microsoft's claim that some class members were not harmed and may even have benefitted from its conduct presented, at most, matters of fact for the jury, and did not impact class certification. Perhaps most significantly, in a case decided since *Relafen*, a Florida appellate court has expressly accepted that uninjured class members do not automatically preclude class certification in end-payor class actions. *Miami-Dade Expressway v. Tropical*, 250 So.3d 751 (Fla. App. 3 Dist. 2018).

Rollins, Inc. v. Butland, 951 So. 2d 860, 866 (Fla. Dist. Ct. App. 2006), upon which Allergan relies, is not to the contrary. The court there refused to allow the plaintiffs to demonstrate classwide impact merely through a "pattern and practice" of deception. *Id.* at 873. It found that such a method would insufficiently show that class members were impacted by the same misconduct and therefore, in violation of due process, the defendants would be denied [**86] their ability to defend against the claims. No such issue exists here.

In sum, the laws in these three states, like the laws of the other states at issue, permit the use of EPPs' methodologies to determine classwide impact and damages and to cull before judgment any uninjured class members.[46]

(3) Vermont

EPPs bring a claim of deception against Allergan under Vermont's Consumer Protection Act, Vt. Stat. Ann. Tit. 9 §§ 2453 *et seq.*, which requires, in addition to elements common to the other consumer protection claims, that the claimed deception "must be material, that is, likely to affect the consumer's conduct or decision regarding the product." *Carter*, 716 A.2d at 23. To address this, plaintiffs' proposed verdict form includes a question asking if "Allergan's deceptive misconduct was likely to affect the consumer's conduct or decision regarding Restasis." Allergan argues that the inclusion of Vermont's deception claim greatly increases the difficulty of managing a certified class.

To the extent defendant argues, as it did in a withdrawn motion to dismiss, that Vermont's statute requires

[46] It is also worth noting that many courts have certified end-payor classes containing claims under the laws of Minnesota, Michigan, and/or Florida without any discussion of a higher standard of individual impact. *See, e.g., Hosp. Auth. of Metro. Gov't of Nashville and Davidson County, Tenn. v. Momenta Pharmaceuticals, Inc.*, 333 F.R.D. 390, 2019 WL 4573433 (M.D. Tenn. Sept. 20, 2019); *In re Lidoderm*, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367; *In re Terazosin Hydrochloride*, 220 F.R.D. 672 (S.D. Fla. 2004). Indeed, in *In re Nexium*, 297 F.R.D. at 175, the very judge who wrote the decision in *Relafen*, did precisely that.

consumer-facing conduct and that EPPs are unable to meet that burden, this argument must be saved for summary judgment. If, however, [**87] Allergan is asserting that the inclusion of the additional [*38] jury question makes the case unmanageable, I am unpersuaded. Adding this question, and an appropriate jury charge, would not be onerous, and obtaining a common answer would not defeat the predominance of the common issues. Indeed, I accept plaintiffs' representation that they would use the same proof to answer this question as they would all others. I therefore find that the inclusion of EPPs' claims under Vermont law does not defeat predominance.

(4) Scienter - Arkansas & Colorado

Defendant argues that the consumer protection statutes of Arkansas and Colorado require a showing of scienter, rendering the class unmanageable because "there would have to be a separate phase of trial or a unique set of jury instructions in order for the jury to determine what scienter was required." Opp. at 38-39. Though Allergan acknowledged at oral argument that the court would determine the level of scienter that is required and instruct the jury to apply it to the facts, it still argues that including states with a scienter requirement would cause individual issues in those states to predominate.

The parties agree that EPPs' claim, pursuant to the catch-all [**88] provision of the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-107(a)(10), does not contain a scienter requirement. Allergan argues, however, that plaintiffs' patent-related allegations fall more appropriately under a different subsection of the same statute, which prohibits "[k]nowingly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, source, sponsorship, approval, or certification of goods or services or as to whether goods are original or new or of a particular standard, quality, grade, style, or model." Ark. Code Ann. § 4-88-107(a)(1). Defendant argues that EPPs' Arkansas claim therefore requires a different standard for scienter than the other class claims, contributing to the overall complexity of jury instructions.

As an initial matter, because EPPs bring their claim under only the catch-all provision, defendant's argument is, in essence, a motion to dismiss that claim and is inappropriately raised in opposition to class certification. *See Amgen*, 568 U.S. at 466. And, even if defendant ultimately manages to transform EPPs' current Arkansas claim into one under subsection (a)(1), the inclusion of a single jury question as to whether defendant possessed the requisite scienter would not defeat predominance. [**89] *See In re Pharm. Indus. Aver. Whol. Price List*, 252 F.R.D. at 100 ("In the context of plaintiffs' theory in this case, the varying standards governing a defendant's scienter do not pose insuperable management issues because the Court can ask the jury specific questions. . . .").

The same analysis applies to the Colorado statute under which plaintiffs sue, which requires a showing that defendant "knowingly" made a false representation. Colo. Rev. Stat. § 6-1-105(1)(e).

In sum, the need for a jury to determine scienter under one or two statutes does not defeat predominance or render the class unmanageable.

(5) Enhanced Damages

Defendant raises concerns regarding the availability of enhanced damages, whether treble or punitive, under some states' antitrust and consumer protection statutes. At oral argument, it conceded that this issue "is not important by itself" and that it has pressed the issue only because it "adds to the manageability." Oral Arg. Tr. at 165.

EPPs propose three questions to account for states that require an additional finding for an award of enhanced damages. The inclusion of these questions, even when added to the other questions regarding liability and damages, does not cause individual issues to predominate or render the class unmanageable.

(6) [**90] **State Law Bans on Class Actions**

Allergan also argues that Colorado, Illinois, and Montana ban class actions, precluding certification of a class that includes those states' claims. *See* 740 Ill. Comp. Stat. § 10/7(2); Mont. Code Ann. § 30-14-133(1); Colo. Rev. Stat. § 6-1-113(2). Having carefully reviewed the parties' supplemental papers, I find that this issue is a legal question common to all class members within each state. Whether the statutes of Colorado, Illinois, [*39] and Montana bar recovery through a class action is more appropriately resolved on summary judgment; my decision on these questions is unnecessary for the purposes of class certification. *See Amgen*, 568 U.S. at 466. For efficiency's sake, I will rely on the parties' current briefing on these questions when I consider defendant's forthcoming summary judgment motion.

In conclusion, EPPs have met their burden of demonstrating, through an extensive analysis of state law variations, that class certification does not present insuperable obstacles. None of the issues raised by Allergan is alone so material as to prevent certification. Even when taken together, the differences cited by Allergan address factual and legal questions common to the entire class, or discrete subsections thereof; are remediable by additional questions to the jury; [**91] and/or are more appropriately raised on summary judgment.

2. Superiority

Rule 23(b)(3) permits class certification only where "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Rule provides a list of factors to be considered in this assessment:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D).

EPPs have shown that litigating this case as a class is superior to other methods of adjudication. None of the factors listed in Rule 23(b)(3) counsels against certification. First, since the class contains thousands of TPPs, some with relatively small claims, and at least one million consumers, "proceeding individually would be prohibitive," not advantageous, for the majority of class members. *See Seijas*, 606 F.3d at 58. Thus, "substituting a single class action for numerous trials in a matter involving substantial common legal issues and factual [**92] issues susceptible to generalized proof will achieve significant economies of 'time, effort and expense, and promote uniformity of decision.'" *In re U.S. Foodservice Inc.*, 729 F.3d at 130-31 (quoting Fed. R. Civ. P. 23 advisory committee's notes).

Second, the only cases brought by or against class members regarding this controversy are pending before me. Third, I do not see any reason why this litigation cannot remain concentrated in this court. Plaintiffs have effectively litigated these actions before me, and defendant has not argued that they cannot continue to do so. Finally, no one has a greater interest than I do in ensuring that this class action is manageable before certifying it. Based on my familiarity with the case, I am confident that this litigation can be managed as a class action.

Defendant makes two arguments against a finding of superiority. It first relies on its assertions, raised in the context of predominance, regarding the need for individualized inquiries. As set forth above, the individualized determinations required by this class action are relatively minimal. They do not make this class action unmanageable or inappropriate.

Nor am I persuaded by defendant's second argument, that the mere possibility of a *parens patriae* action [**93] in an antitrust case renders a class action an inferior mechanism to resolve EPPs' claim. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972). This is especially true where the Federal Trade Commission ("FTC") and New York Attorney General chose not to bring such an action against Allergan regarding Restasis. *See Bryan v. Amrep Corp.*, 429 F. Supp. 313, 318-19 (S.D.N.Y. 1977) ("The possibility that the FTC may at some future time secure refunds for the class is not an adequate reason to deny a class determination in this case, which seeks present and independent relief.").

[*40] **C. Ascertainability**

In the Second Circuit, the ascertainability doctrine "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras*, 862 F.3d at 264. As defendant does not contest, that "modest threshold" is easily met here. *See id.* at 269. The class is objectively defined as consisting of any person or entity who purchased Restasis not for resale in specific states during a discrete period. *See In re Solodyn*, 2017 U.S. Dist. LEXIS 170676, 2017 WL 4621777, at *13-14.

V. APPOINTING CLASS COUNSEL AND CLASS REPRESENTATIVES

Rule 23(g) requires me to appoint class counsel at the time of certification. In doing so, I must consider

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other [**94] complex litigation, and the types of

> claims asserted in the action;
> (iii) counsel's knowledge of the applicable law; and
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

EPPs' current interim counsel seek appointment as class counsel. As discussed above in the context of Rule 23(a)(4)'s adequacy requirement, it is undisputed that these lawyers satisfy the requirements of Rule 23(g)(1)(A). I carefully reviewed the qualifications, experience, and resources of these attorneys when I appointed them to their interim roles, and the attorneys' work since then, including on this motion, serves as further assurance that they are extremely qualified and able to represent the certified class. I have no hesitation that these lawyers will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). Therefore, Girard Sharp LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Joseph Saveri Law Firm, Inc. are appointed as co-lead counsel for class plaintiffs, and Zwerling, Schachter & Zwerling, LLP is appointed as liaison counsel for the class.

Additionally, 1199SEIU National Benefit Fund; 1199SEIU Greater New York Benefit Fund; 1199SEIU National Benefit Fund for Home Care Workers; 1199SEIU Licensed Practical [**95] Nurses Welfare Fund; American Federation of State, County, and Municipal Employees District Council 37 Health and Security Plan; Fraternal Order of Police, Miami Lodge 20, Insurance Trust Fund; Ironworkers Local 383 Health Care Plan; Self-Insured Schools of California; Sergeants Benevolent Association Health & Welfare Fund; St. Paul Electrical Workers' Health Plan; and United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund are appointed as class representatives.

VI. CONCLUSION

Plaintiffs' motion for class certification is granted. The class is defined as:

> All persons or entities who indirectly purchased, paid and/or provided reimbursement for some or all of the purchase price for Restasis, other than for resale, who made their purchases in Arizona, Arkansas, California, Colorado, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine*, Massachusetts*, Michigan, Minnesota, Mississippi, Missouri*, Montana*, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Vermont*, West Virginia, and Wisconsin from May 1, 2015, through the present (in the case of Arkansas [**96] only, July 31, 2017), for consumption by themselves, their families, or their members, employees, insureds, participants, or beneficiaries.

In the states marked with an asterisk, class members are only consumers, not TPPs. Excluded from the class are:

> Allergan, its officers, directors, employees, subsidiaries, and affiliates; all federal and state government entities except for cities, towns, municipalities, or counties with self-funded prescription drug plans; all persons or entities who purchased Restasis for purposes of resale or directly from Allergan of [*41] its affiliates; fully insured health plans, *i.e.*, plans that purchased insurance covering 100 percent of their reimbursement obligations to members; any "flat copay" consumers who purchased Restasis only via a fixed dollar copayment that does not vary on the basis of the drug's status as brand or generic; PBMs; and all judges assigned to this case and their chambers staff and any members of the judges' or chambers staff's immediate families.

When a court certifies a Rule 23(b)(3) class, Rule 23(c)(2)(B) provides that "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can [**97] be identified through reasonable effort." Plaintiffs are directed to submit to the court a proposed plan for notice to class members, which should include a proposed form of notice.

Dated: May 5, 2020

Brooklyn, New York

SO ORDERED.

/s/ Nina Gershon

NINA GERSHON

United States District Judge

In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

Table1 (Return to related document text**)**

In re Restasis (Cyclosporine Opthalmic Emulsion) Antitrust Litig.

Table1 (Return to related document text)

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **ZOOM VIDEO COMMUNICATIONS, INC., a corporation, d/b/a ZOOM.**	**FILE No. 192 3167** **AGREEMENT CONTAINING CONSENT ORDER**

The Federal Trade Commission ("Commission") has conducted an investigation of certain acts and practices of Zoom Video Communications, Inc. ("Proposed Respondent"). The Commission's Bureau of Consumer Protection ("BCP") has prepared a draft of an administrative Complaint ("draft Complaint"). BCP and Proposed Respondent, through its duly authorized officer, enter into this Agreement Containing Consent Order ("Consent Agreement") to resolve the allegations in the attached draft Complaint through a proposed Decision and Order to present to the Commission, which is also attached and made a part of this Consent Agreement.

IT IS HEREBY AGREED by and between Proposed Respondent and BCP, that:

1. The Proposed Respondent is Zoom Video Communications, Inc., also doing business as Zoom, a Delaware Corporation with its principal office or place of business at 55 Almaden Boulevard, 6th Floor, San Jose, California, 95113.

2. Proposed Respondent neither admits nor denies any of the allegations in the Complaint, except as specifically stated in the Decision and Order. Only for purposes of this action, Proposed Respondent admits the facts necessary to establish jurisdiction.

3. Proposed Respondent waives:

   a. Any further procedural steps;

   b. The requirement that the Commission's Decision contain a statement of findings of fact and conclusions of law; and

   c. All rights to seek judicial review or otherwise to challenge or contest the validity of the Decision and Order issued pursuant to this Consent Agreement.

4. This Consent Agreement will not become part of the public record of the proceeding unless and until it is accepted by the Commission. If the Commission accepts this Consent Agreement, it, together with the draft Complaint, will be placed on the public record for 30 days and information about them publicly released. Acceptance does not constitute final approval, but it serves as the basis for further actions leading to final disposition of the matter. Thereafter, the Commission may either withdraw its acceptance of this Consent Agreement and so notify Proposed Respondent, in which event the Commission will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require) and decision in disposition of the proceeding, which may include an Order. *See* Section 2.34 of the Commission's Rules, 16 C.F.R. § 2.34 ("Rule 2.34").

5. If this agreement is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to Rule 2.34, the Commission may, without further notice to Proposed Respondent: (1) issue its Complaint corresponding in form and substance with the attached draft Complaint and its Decision and Order; and (2) make information about them public. Proposed Respondent agrees that service of the Order may be effected by its publication on the Commission's website (ftc.gov), at which time the Order will become final. *See* Rule 2.32(d). Proposed Respondent waives any rights it may have to any other manner of service. *See* Rule 4.4.

6. When final, the Decision and Order will have the same force and effect and may be altered, modified, or set aside in the same manner and within the same time provided by statute for other Commission orders.

7. The Complaint may be used in construing the terms of the Decision and Order. No agreement, understanding, representation, or interpretation not contained in the Decision and Order or in this Consent Agreement may be used to vary or contradict the terms of the Decision and Order.

8. Proposed Respondent agrees to comply with the terms of the proposed Decision and Order from the date that Proposed Respondent signs this Consent Agreement. Proposed Respondent understands that it may be liable for civil penalties and other relief for each violation of the Decision and Order after it becomes final.

ZOOM VIDEO COMMUNICATIONS, INC.

By:_____
Eric Yuan
Chief Executive Officer

Date:_____

By:_____
Travis LeBlanc, Esq.
Cooley LLP
Attorney for Proposed Respondent

Date:_____

FEDERAL TRADE COMMISSION

By:_____
Linda Holleran Kopp
Attorney, Bureau of Consumer Protection

By:_____
Ryan Mehm
Attorney, Bureau of Consumer Protection

By:_____
Caroline Schmitz
Attorney, Bureau of Consumer Protection

APPROVED:

By: _____
Maneesha Mithal
Associate Director, Division of Privacy & Identity Protection

By: _____
Andrew Smith
Director, Bureau of Consumer Protection

Date:_____

192 3167

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of **ZOOM VIDEO COMMUNICATIONS, INC.,** **a corporation, d/b/a ZOOM.**	**DECISION AND ORDER** **DOCKET NO. C-**

DECISION

The Federal Trade Commission ("Commission") initiated an investigation of certain acts and practices of the Respondent named in the caption. The Commission's Bureau of Consumer Protection ("BCP") prepared and furnished to Respondent a draft Complaint. BCP proposed to present the draft Complaint to the Commission for its consideration. If issued by the Commission, the draft Complaint would charge the Respondent with violations of the Federal Trade Commission Act.

Respondent and BCP thereafter executed an Agreement Containing Consent Order ("Consent Agreement"). The Consent Agreement includes: (1) statements by Respondent that it neither admits nor denies any of the allegations in the Complaint, except as specifically stated in this Decision and Order, and that only for purposes of this action, it admits the facts necessary to establish jurisdiction; and (2) waivers and other provisions as required by the Commission's Rules.

The Commission considered the matter and determined that it had reason to believe that Respondent has violated the Federal Trade Commission Act, and that a Complaint should issue stating its charges in that respect. The Commission accepted the executed Consent Agreement and placed it on the public record for a period of 30 days for the receipt and consideration of public comments. The Commission duly considered any comments received from interested persons pursuant to Section 2.34 of its Rules, 16 C.F.R. § 2.34. Now, in further conformity with the procedure prescribed in Rule 2.34, the Commission issues its Complaint, makes the following Findings, and issues the following Order:

Findings

1. The Respondent is Zoom Video Communications, Inc., a Delaware corporation, with its principal office or place of business at 55 Almaden Boulevard, 6th Floor, San Jose, California 95113.

2. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions apply:

A. "**Covered Incident**" means any instance in which any United States federal, state, or local law or regulation ("Breach Notification Law") requires, or would require if recorded or livestream video or audio content from a Meeting were included as a type of personal information covered by such Breach Notification Law, Respondent to notify any U.S. federal, state, or local government entity that information collected or received, directly or indirectly, by Respondent from or about an individual consumer was, or is reasonably believed to have been, accessed or acquired without authorization. For purposes of this definition, "Covered Incident" does not include any instance of unauthorized access or acquisition of video or audio content if Respondent determines that such instance: (a) affected fewer than 500 Users; (b) resulted from a User accessing the video or audio content by using a link, password, or other access information, obtained directly or indirectly, as a result of its distribution by a Meeting host or organizer; or (c) resulted from a Meeting that is offered or made publicly accessible by the Meeting host or organizer; or (d) the video or audio content was encrypted and the encryption key was not also accessed or acquired from Respondent by an unauthorized person.

B. "**Covered Information**" means information from or about an individual, including: (a) a first and last name; (b) a physical address; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license or other government-issued identification number; (g) a financial institution account number; (h) credit or debit card information; (i) recorded or livestream video or audio content, chat transcripts, documents, or any other multimedia content shared by Users during a Meeting; (j) a persistent identifier, such as a customer number held in a "cookie," a static Internet Protocol ("IP") address, a mobile device ID, or processor serial number; or (k) any information combined with any of (a) through (j) above.

C. "**Credential**" or "**Credentials**" means the user name and password that a User utilizes for logging in or otherwise accessing Respondent's products or services.

D. "**Meeting**" means a one-on-one or group videoconference on Respondent's platform, including but not limited to, webinars and conference room videoconference connectors.

E. "**Meeting Service**" **or** "**Meeting Services**" means all features and ancillary services developed by or on behalf of Respondent and used in the context of a Meeting (*e.g.*, video, audio, chat, content-sharing, recording, and storage of recordings). "Meeting Service" or "Meeting Services" does not include any plugin, cookie, or application that is offered or provided by a third party, including but not limited to, applications offered by third parties through the Zoom app store.

F. "**Respondent**" or "**Zoom**" means Zoom Video Communications, Inc., and its successors and assigns.

G. "**Third-Party Security Feature**" means any feature or tool built into an internet browser or operating system that: (a) has been specified as a security feature in the developer's official release notes; or that (b) has been identified by Zoom Security Personnel designated by Respondent for this purpose, based on their experience and expertise in secure software development principles, as a feature that protects the security of a User against the risk of unauthorized access, collection, disclosure, use, misuse, loss, theft, alteration, destruction, or other compromise of the User's Covered Information. "Third-Party Security Feature" does not include any software, system, feature, or tool, including without limitation, any plugin, cookie, or application, that is not developed by or for the browser or operating system developer.

H. "**User**" means any entity or individual that uses Zoom's Meeting Services.

I. "**Zoom Security Personnel**" means any person(s) working by or on behalf of Respondent who has been trained in secure software development principles, including secure engineering and defensive programming concepts, such as Respondent's Chief Information Security Officer.

Provisions

I. Prohibited Misrepresentations

IT IS ORDERED that Respondent, and Respondent's officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with any product or service, must not misrepresent in any manner, expressly or by implication:

A. Respondent's collection, maintenance, use, deletion, or disclosure of any Covered Information;

B. The security features, or any feature that impacts a Third-Party Security Feature, included in any Meeting Service, or the material changes included in any updates thereof;

C. The extent to which Respondent protects any Covered Information from unauthorized access;

D. The extent to which a User can control the privacy or security of any Covered Information collected and maintained by Respondent, and the steps the User must take to implement such controls;

E. The categories of third parties to which Respondent makes Covered Information accessible; or

F. The extent to which Respondent otherwise maintains the privacy, security, confidentiality, or integrity of Covered Information.

II. Mandated Information Security Program

IT IS FURTHER ORDERED that Respondent, and any business that Respondent controls directly or indirectly, in connection with the collection, maintenance, use, or disclosure of, or provision of access to, Covered Information, must, within sixty (60) days of issuance of this order, establish and implement, and thereafter maintain, a comprehensive information security program ("Program" or "Information Security Program") that protects the security, confidentiality, and integrity of such Covered Information. To satisfy this requirement, Respondent must, at a minimum:

A. Document in writing the content, implementation, and maintenance of the Program, including all processes and procedures that will be used to implement all Program policies and safeguards;

B. Provide the written Program and any material evaluations thereof or material updates thereto to Respondent's board of directors or governing body or, if no such board or equivalent governing body exists, to a senior officer of Respondent responsible for Respondent's Program at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

C. Designate a qualified employee or employees to coordinate and be responsible for the Program;

D. Assess and document, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, internal and external risks to the security, confidentiality, or integrity of Covered Information that could result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Covered Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information;

E. Design, implement, maintain, and document safeguards that control for the internal and external risks Respondent identifies to the security, confidentiality, and integrity of Covered Information identified in response to sub-Provision II.D. Each safeguard must

be based on the volume and sensitivity of Covered Information that is at risk, and the likelihood that the risk could be realized and result in the (1) unauthorized collection, maintenance, use, or disclosure of, or provision of access to, Covered Information; or the (2) misuse, loss, theft, alteration, destruction, or other compromise of such information. Such safeguards must also include:

1. Implementing a security review by Zoom Security Personnel designated by Respondent of all new Meeting Services software or software updates, prior to release that, at a minimum, includes:

    a. Policies, procedures, and any applicable technical measures for reviewing all new Meeting Service software or software updates for commonly known vulnerabilities, including those identified by the Open Web Application Security Project (OWASP) and critical or high severity vulnerabilities in the National Vulnerability Database (NVD), and remediating or otherwise mitigating any such vulnerabilities;

    b. Policies, procedures, and any applicable technical measures to: (i) determine whether any new Meeting Services software or software update is designed to circumvent or bypass, in whole or in part, any Third-Party Security Feature such that the Third-Party Security Feature no longer provides the same protection(s) for Users against the risk of unauthorized access, collection, disclosure, use, misuse, loss, theft, alteration, destruction, or other compromise of Users' Covered Information; and (ii) assess the risk of unauthorized access, collection, disclosure, use, misuse, loss, theft, alteration, destruction, or other compromise of the User's Covered Information that will result from such circumvention or bypass, based on the volume and sensitivity of Covered Information that is at risk, and the likelihood that the risk could be realized; and

    c. Policies, procedures, and any applicable technical measures so that Respondent will not implement any new Meeting Services software or software update that has been identified under Part II.E.1.b(i) of this Order as designed to circumvent or bypass a Third-Party Security Feature, unless: (i) Zoom Security Personnel determine that the bypass or circumvention does not create a material risk of unauthorized access, collection, disclosure, use, misuse, loss, theft, alteration, destruction, or other compromise of Users' Covered Information; or (ii) Respondent implements security measure(s) that offset or otherwise mitigate the risk(s) of unauthorized access, collection, disclosure, use, misuse, loss, theft, alteration, destruction, or other compromise of Users' Covered Information that were identified under Part II.E.1.b(ii) of this Order;

2. Implementing a vulnerability management program that includes:

    a. Conducting vulnerability scans of Respondent's networks and systems on at least a quarterly basis; and

b. Policies, procedures, and any applicable technical measures for remediating or otherwise mitigating any critical or high severity vulnerabilities promptly (but in no event later than thirty (30) days after the vulnerability is detected), unless Respondent documents its rationale for not doing so;

3. Implementing a default, randomized naming convention for recorded Meetings that are to be stored on Users' local devices, and instructing Users to employ a unique file name when saving such recorded Meetings;

4. Policies, procedures, and any applicable technical measures to: (a) systematically classify and inventory Covered Information in Respondent's control; (b) log and monitor access to repositories of Covered Information in Respondent's control; and (c) limit access to Covered Information by, at a minimum, limiting employee and service provider access to Covered Information to what is needed to perform that employee or service provider's job function;

5. Data deletion policies, procedures, and any applicable technical measures, including validating that all copies of Covered Information identified for deletion are deleted within thirty-one (31) days;

6. Policies, procedures, and any applicable technical measures designed to reduce the risk of online attacks resulting from the misuse of valid Credentials by unauthorized third parties, including: (a) requiring Users to secure their accounts with strong, unique passwords; (b) using automated tools to identify non-human login attempts; (c) rate-limiting login attempts to minimize the risk of a brute force attack; and (d) implementing password resets for known compromised Credentials;

7. Regular security training programs, on at least an annual basis, that are updated, as applicable, to address internal or external risks identified by Respondent under sub-Provision II.D of this Order, and that include, at a minimum:

   a. Security awareness training for all employees on Respondent's security policies and procedures, including the requirements of this Order and the process for submitting complaints and concerns; and

   b. Training in secure software development principles, including secure engineering and defensive programming concepts, for developers, engineers, and other employees that design Respondent's products or services or that are otherwise responsible for the security of Covered Information;

8. Technical measures to monitor all of Respondent's networks, systems, and assets within those networks to identify anomalous activity and/or data security events on Respondent's network, including unauthorized attempts to exfiltrate Covered Information from Respondent's networks;

9. Incident response policies, procedures, and any applicable technical measures, including centralized log management and documenting remedial security actions;

10. Technical measures designed to safeguard against unauthorized access to any network or system that stores, collects, maintains, or processes Covered Information, such as properly configured firewalls; properly configured physical or logical segmentation of networks, systems, and databases; and securing of remote access to Respondent's networks through multi-factor authentication or similar technology except for when accessing such networks is for the purpose of using Meeting Services; and

11. Protections, such as encryption, tokenization, or other same or greater protections, for Covered Information collected, maintained, processed, or stored by Respondent, including in transit and at rest;

F. Assess, at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, the sufficiency of any safeguards in place to address the internal and external risks to the security, confidentiality, and integrity of Covered Information, and modify the Program based on the results;

G. Test and monitor the effectiveness of the safeguards at least once every twelve (12) months and promptly (not to exceed thirty (30) days) following a Covered Incident, and modify the Program based on the results. Such testing and monitoring must include penetration testing of Respondent's network at least once every twelve (12) months and promptly (not to exceed thirty (30) days) after a Covered Incident;

H. Select and retain service providers capable of safeguarding Covered Information they access through or receive from Respondent, and contractually require service providers to implement and maintain safeguards for Covered Information sufficient to address the internal and external risks to the security, confidentiality, or integrity of Covered Information;

I. Consult with, and seek appropriate guidance from, independent, third-party experts on data protection in the course of establishing, implementing, maintaining, and updating the Program; and

J. Evaluate and adjust the Program in light of any changes to Respondent's operations or business arrangements, a Covered Incident, new or more efficient technological or operational methods to control for the risks identified in sub-Provision II.D of this Order, or any other circumstances that Respondent knows or has reason to know may have a material impact on the effectiveness of the Program or any of its individual safeguards. At a minimum, Respondent must evaluate the Program at least once every twelve (12) months and modify the Program as necessary based on the results.

III. Independent Program Assessments by a Third Party

IT IS FURTHER ORDERED that, in connection with compliance with Provision II of this Order, titled Mandated Information Security Program, Respondent must obtain initial and biennial assessments ("Assessments"):

A. The Assessments must be obtained from one or more qualified, objective, independent third-party professionals ("Assessor"), who: (1) uses procedures and standards generally accepted in the profession; (2) conducts an independent review of the Program; and (3) retains all documents relevant to each Assessment for five (5) years after completion of such Assessment and (4) will provide such documents to the Commission within ten (10) days of receipt of a written request from a representative of the Commission. No documents may be withheld by the Assessor on the basis of a claim of confidentiality, proprietary or trade secrets, work product protection, attorney-client privilege, statutory exemption, or any similar claim;

B. For each Assessment, Respondent must provide the Associate Director for Enforcement for the Bureau of Consumer Protection at the Federal Trade Commission with the name(s), affiliation, and qualifications of the proposed Assessor, whom the Associate Director shall have the authority to approve in her or his sole discretion;

C. The reporting period for the Assessments must cover: (1) the first one hundred eighty (180) days after the Information Security Program has been put in place for the initial Assessment; and (2) each two-year period thereafter for twenty (20) years after issuance of the Order for the biennial Assessments;

D. Each Assessment must, for the entire assessment period:

1. Determine whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program;

2. Assess the effectiveness of Respondent's implementation and maintenance of sub-Provisions II.A-J;

3. Identify any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program;

4. Address the status of gaps or weaknesses in, or instances of material non-compliance with, the Information Security Program that were identified in any prior Assessment required by this Order; and

5. Identify specific evidence (including documents reviewed, sampling and testing performed, and interviews conducted) examined to make such determinations, assessments, and identifications, and explain why the evidence that the Assessor examined is (a) appropriate for assessing an enterprise of Respondent's size, complexity, and risk profile; and (b) sufficient to justify the Assessor's findings. No finding of any Assessment shall rely primarily on assertions or attestations by Respondent's management. The Assessment must be signed by the Assessor, state that the Assessor conducted an independent review of the Information Security Program and did not rely primarily on assertions or attestations by Respondent's

management, and state the number of hours that each member of the assessment team worked on the Assessment. To the extent that Respondent revises, updates, or adds one or more safeguards required under Provision II of this Order during an Assessment period, the Assessment must assess the effectiveness of the revised, updated, or added safeguard(s) for the time period in which it was in effect, and provide a separate statement detailing the basis for each revised, updated, or additional safeguard; and

E. Each Assessment must be completed within sixty (60) days after the end of the reporting period to which the Assessment applies. Unless otherwise directed by a Commission representative in writing, Respondent must submit the initial Assessment to the Commission within ten (10) days after the Assessment has been completed via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin, "In re Zoom Video Communications, Inc., FTC File No. 192 3167." All subsequent biennial Assessments must be retained by Respondent until the order is terminated and provided to the Associate Director for Enforcement within ten (10) days of request.

IV. Cooperation with Third Party Assessor(s)

IT IS FURTHER ORDERED that Respondent, whether acting directly or indirectly, in connection with any Assessment required by Provision III of this Order, titled Independent Program Assessments by a Third Party, must:

A. Provide or otherwise make available to the Assessor all information and material in its possession, custody, or control that is relevant to the Assessment for which there is no reasonable claim of privilege;

B. Provide or otherwise make available to the Assessor information about Respondent's networks and all of Respondent's IT assets so that the Assessor can determine the scope of the Assessment, and visibility to those portions of the networks and IT assets deemed in scope; and

C. Disclose all material facts to the Assessor, and not misrepresent in any manner, expressly or by implication, any fact material to the Assessor's: (1) determination of whether Respondent has implemented and maintained the Information Security Program required by Provision II of this Order, titled Mandated Information Security Program; (2) assessment of the effectiveness of the implementation and maintenance of sub-Provisions II.A-J; or (3) identification of any gaps or weaknesses in, or instances of material noncompliance with, the Information Security Program.

V. Annual Certification

IT IS FURTHER ORDERED that Respondent must:

A. One (1) year after the issuance date of this Order, and each year thereafter, provide the Commission with a certification from a senior corporate manager, or, if no such senior corporate manager exists, a senior officer of Respondent responsible for Respondent's Information Security Program that: (1) Respondent has established, implemented, and maintained the requirements of this Order; and (2) Respondent is not aware of any material noncompliance that has not been (a) corrected or (b) disclosed to the Commission. The certification must be based on the personal knowledge of the senior corporate manager, senior officer, or subject matter experts upon whom the senior corporate manager or senior officer reasonably relies in making the certification.

B. Unless otherwise directed by a Commission representative in writing, submit all annual certifications to the Commission pursuant to this Order via email to DEbrief@ftc.gov or by overnight courier (not the U.S. Postal Service) to Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "In re Zoom Video Communications, Inc., FTC File No. 192 3167."

VI. Covered Incident Reports

IT IS FURTHER ORDERED that Respondent, within thirty (30) days after the date of Respondent's discovery of a Covered Incident, but in any event no later than ten (10) days after the date Respondent first notifies any U.S. federal, state, or local government entity of the Covered Incident, must submit a report to the Commission. The report must include, to the extent possible:

A. The date, estimated date, or estimated date range when the Covered Incident occurred;

B. A description of the facts relating to the Covered Incident, including the causes of the Covered Incident, if known;

C. A description of each type of Covered Information that was affected or triggered any notification obligation to the U.S. federal, state, or local government entity;

D. The number of consumers whose information was affected or that triggered the notification obligation to the U.S. federal, state, or local government entity;

E. The acts that Respondent has taken to date to remediate the Covered Incident and protect Covered Information from further exposure or access, and protect affected individuals from identity theft or other harm that may result from the Covered Incident; and

F. A representative copy of any materially different notice sent by Respondent to consumers or to any U.S. federal, state, or local government entity.

Unless otherwise directed by a Commission representative in writing, all Covered Incident reports to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW,

Washington, DC 20580. The subject line must begin: "In re Zoom Video Communications, Inc., FTC File No. 192 3167."

VII. Acknowledgments of the Order

IT IS FURTHER ORDERED that Respondent obtain acknowledgments of receipt of this Order:

A. Respondent, within ten (10) days after the effective date of this Order, must submit to the Commission an acknowledgment of receipt of this Order, sworn under penalty of perjury;

B. For five (5) years after the issuance date of this Order, Respondent must deliver a copy of this Order to: (a) all principals, officers, directors, and LLC managers and members; (b) all employees, agents, and representatives with managerial responsibilities related to the subject matter of the Order; and (c) any business entity resulting from any change in structure as set forth in the Provision titled Compliance Reports and Notices. Delivery must occur within ten (10) days after the effective date of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities; and

C. From each individual or entity to which Respondent delivered a copy of this Order, Respondent must obtain, within thirty (30) days, a signed and dated acknowledgment of receipt of this Order.

VIII. Compliance Reports and Notices

IT IS FURTHER ORDERED that Respondent make timely submissions to the Commission:

A. One (1) year after the issuance date of this Order, Respondent must submit a compliance report, sworn under penalty of perjury, in which Respondent must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission, may use to communicate with Respondent; (b) identify all of Respondent's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, and the means of collection, maintenance, use, deletion, or disclosure of information; (d) describe in detail whether and how Respondent is in compliance with each Provision of this Order; and (e) provide a copy of each Acknowledgment of the Order obtained pursuant to this Order, unless previously submitted to the Commission;

B. Respondent must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in the following: (a) any designated point of contact; or (b) the structure of the Respondent or any entity that Respondent has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising

under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order;

C. Respondent must submit notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Respondent within fourteen (14) days of its filing;

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature; and

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "In re Zoom Video Communications, Inc., FTC File No. 192 3167."

IX. Recordkeeping

IT IS FURTHER ORDERED that Respondent must create certain records for five (5) years after the issuance date of the Order, and retain each such record for five (5) years. Specifically, Respondent must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Copies of all U.S. consumer complaints that were submitted to Respondent and relate to the subject matter of the Order, and any response(s) to such complaints;

D. All records necessary to demonstrate full compliance with each Provision of this Order, including all submissions to the Commission;

E. A copy of each widely disseminated and materially different representation by Respondent that describes (a) Respondent's collection, maintenance, use, deletion, or disclosure of any Covered Information; (b) the security features, or any features that impact a Third-Party Security Feature, included in any Meeting Service, or the changes included in any updates thereof; (c) the extent to which Respondent protects Covered Information from unauthorized access, including any representation on any website or other service controlled by Respondent that relates to the privacy, security,

confidentiality, and integrity of Covered Information; (d) the extent to which a User can control the privacy or security of Covered Information and the steps the User must take to implement such controls; and (e) the categories of third parties to which Respondent makes Covered Information accessible; and

F. For five (5) years after the date of preparation of each Assessment required by this Order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of Respondent, including all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials concerning Respondent's compliance with related Provisions of this Order, for the compliance period covered by such Assessment.

X. Compliance Monitoring

IT IS FURTHER ORDERED that, for the purpose of monitoring Respondent's compliance with this Order:

A. Within fourteen (14) days of receipt of a written request from a representative of the Commission, Respondent must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury, appear for depositions, and produce records for inspection and copying;

B. For matters concerning this Order, representatives of the Commission are authorized to communicate directly with Respondent. Respondent must permit representatives of the Commission to interview anyone affiliated with Respondent who has agreed to such an interview. The interviewee may have counsel present; and

C. The Commission may use all other lawful means, including posing through its representatives as consumers, suppliers, or other individuals or entities, to Respondent or any individual or entity affiliated with Respondent, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

XI. Order Effective Dates

IT IS FURTHER ORDERED that this Order is final and effective upon the date of its publication on the Commission's website (ftc.gov) as a final order. This Order will terminate twenty (20) years from the date of its issuance (which date may be stated at the end of this Order, near the Commission's seal), or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying settlement) in federal court alleging any violation of this Order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

A. Any Provision in this Order that terminates in less than twenty (20) years;

B. This Order's application to any Respondent that is not named as a defendant in such complaint; and

C. This Order if such complaint is filed after the Order has terminated pursuant to this Provision.

Provided, further, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Provision as though the complaint had never been filed, except that the Order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

April J. Tabor
Acting Secretary

SEAL:
ISSUED:

Caution
As of: December 8, 2020 3:07 PM Z

Salzberg v. Sciabacucchi

Supreme Court of Delaware

January 8, 2020, Submitted; March 18, 2020, Decided

No. 346, 2019

Reporter
227 A.3d 102 *; 2020 Del. LEXIS 100 **

MATTHEW B. SALZBERG, JULIE M.B. BRADLEY, TRACY BRITT COOL, KENNETH A. FOX, ROBERT P. GOODMAN, GARY R. HIRSHBERG, BRIAN P. KELLEY, KATRINA LAKE, STEVEN ANDERSON, J. WILLIAM GURLEY, MARKA HANSEN, SHARON MCCOLLAM, ANTHONY WOOD, RAVI AHUJA, SHAWN CAROLAN, JEFFREY HASTINGS, ALAN HENDRICKS, NEIL HUNT, DANIEL LEFF, and RAY ROTHROCK, Defendants Below, Appellants, and BLUE APRON HOLDINGS, INC., STITCH FIX, INC., and ROKU, INC., Nominal Defendants Below, Appellants, v. MATTHEW SCIABACUCCHI, on behalf of himself and all others similarly situated, Plaintiff Below, Appellee.

Subsequent History: Case Closed April 14, 2020.

Prior History: [**1] Court Below: Court of Chancery of the State of Delaware. C.A. No. 2017-0931.

Disposition: Upon appeal from the Court of Chancery. REVERSED.

Case Summary

Overview

HOLDINGS: [1]-Federal-forum provisions (FFPs) do not violate federal law or policy, and the Court referred to United States Supreme Court case law, which has held that federal law has no objection to provisions that preclude state litigation of Securities Act claims; [2]-The Court further held that FFPs, as charter provisions, must be subjected to, and approved by a vote of the stockholders; [3]-The court noted that as Section 11, 15 U.S.C.S. § 77k(a), claims were not internal corporate claims, Del. Code Ann. tit. 8, § 115 (Section 115) did not apply as FFPs, which direct Section 11 claims to federal courts (which are most experienced in adjudicating them), do not violate Section 115 and are facially valid.

Outcome
Judgment reversed.

Counsel: William B. Chandler, III, Esquire (argued), Bradley D. Sorrels, Esquire, Lindsay Kwoka Faccenda, Esquire, Andrew D. Berni, Esquire, WILSON SONSINI GOODRICH & ROSATI, P.C., Wilmington, Delaware; Boris Feldman, Esquire, David J. Berger, Esquire, WILSON SONSINI GOODRICH & ROSATI, P.C., Palo Alto, California; Attorneys for Defendants-Appellants Katrina Lake, Steven Anderson, J. William Gurley, Marka Hansen, Sharon McCollam, Anthony Wood, Ravi Ahuja, Shawn Carolan, Jeffrey Hastings, Alan Hendricks, Neil Hunt, Daniel Leff, Ray Rothrock, Stitch Fix, Inc., and Roku, Inc.

Catherine G. Dearlove, Esquire, Anthony M. Calvano, Esquire, Tyre Tindall, Esquire, RICHARDS LAYTON &

Salzberg v. Sciabacucchi

FINGER, P.A., Wilmington, Delaware; Michael G. Bongiorno, Esquire, WILMER CUTLER PICKERING HALE & DORR, LLP, New York, New York; Timothy J. Perla, Esquire, WILMER CUTLER PICKERING HALE & DORR, LLP, Boston, Massachusetts; Attorneys for Defendants-Appellants Matthew B. Salzberg, Julie M.B. Bradley, Tracy Britt Cool, Kenneth A. Fox, Robert P. Goodman, Gary R. Hirshberg, Brian P. Kelley, and Blue Apron Holdings, Inc.

Kurt M. Heyman, Esquire, Melissa [**2] N. Donimirski, Esquire, Aaron M. Nelson, Esquire, HEYMAN ENERIO GATTUSO & HIRZEL LLP, Wilmington, Delaware; Jason M. Leviton, Esquire, Joel A. Fleming, Esquire (argued), Lauren Godles Milgroom, Esquire, Amanda R. Crawford, Esquire, BLOCK & LEVITON LLP, Boston, Massachusetts; Attorneys for Plaintiff-Appellee Matthew Sciabacucchi.

Judges: Before SEITZ, Chief Justice; VALIHURA, VAUGHN, and TRAYNOR, Justices; and KARSNITZ, Judge,[*] constituting the Court en Banc.

Opinion by: VALIHURA

Opinion

[*109] **VALIHURA**, Justice:

We are asked to determine the validity of a provision in several Delaware corporations' charters requiring actions arising under the federal Securities Act of 1933 (the "Securities Act" or "1933 Act") to be filed in a federal court. Blue Apron Holdings, Inc., Roku, Inc., and Stitch Fix, Inc. are all Delaware corporations that launched initial public offerings in 2017. Before filing their registration statements with the United States Securities and Exchange Commission (the "SEC"), each company adopted a federal-forum provision. An example of such a federal-forum provision (or "FFP") provides:

> Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United [**3] States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision].[1]

Appellee Matthew Sciabacucchi ("Appellee") bought shares of each company in its initial public offering or a short time later. He then sought a declaratory judgment in the Court of Chancery that the FFPs are invalid under Delaware law. The Court of Chancery held that the FFPs are invalid because the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."[2] Because such a provision can survive a facial challenge under our law, we **REVERSE**.

I. Overview

The Securities Act of 1933 requires persons offering securities for sale [*110] to the public to file a registration statement[3] that makes "full and fair disclosure of relevant information."[4] The 1933 Act creates private rights of action so that purchasers of securities [**4] can enforce the registration and disclosure requirements of the 1933 Act.[5] Unlike some other securities laws for which there

[*] Sitting by designation under Del. Const. Art. IV § 12.

[1] *Sciabacucchi v. Salzberg*, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *6 (Del. Ch. Dec. 19, 2018) [hereinafter *Opinion*]. Defendants Stitch Fix, Inc. and Roku, Inc. adopted substantively identical provisions, while Blue Apron, Inc. qualified its FFP to have effect "to the fullest extent permitted by law." *Id.; see* App. to Opening Br. at A69, A84, A100.

[2] *Opinion*, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *3.

[3] 15 U.S.C. § 77e.

[4] *Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066, 200 L. Ed. 2d 332 (2018) (internal quotation marks omitted).

[5] *Id; see also Omnicare, Inc. v. Laborers Dist. Counsel Constr. Indus. Pension Fund*, 575 U.S. 175, 179, 135 S. Ct. 1318, 191 L. Ed. 2d 253 (2015) ("The Securities Act of 1933 . . . protects investors by ensuring that companies issuing securities (known as 'issuers') make a 'full and fair disclosure of information' relevant to a public offering.").

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are no private rights of action, the statute provides that private plaintiffs may bring their claims under the 1933 Act in either federal or state courts.[6] The statute also bars the removal of such actions from state court to federal court.[7] Thus, if a plaintiff chooses to bring an action under the 1933 Act in state court, a defendant cannot change the forum.[8]

Section 12(a)(1)[9] of the 1933 Act "imposes strict liability for violating" the securities registration requirements, which "are the heart of the Act."[10] Section 11[11] "allows purchasers of a registered security to sue certain enumerated parties in a registered offering when false or misleading information is included in a registration statement."[12] A plaintiff who purchased a security issued under a registration statement "need only show a material misstatement or omission to establish his *prima facie* case."[13] In addition [*111] to the issuer, other defendants, including the corporation's directors,[14] are also potentially liable, although they may avoid liability by proving a due diligence defense.[15]

Section 12(a)(2)[16] "provides similar [**5] redress where the securities at issue were sold using prospectuses or oral communications that contain material misstatements or omissions."[17] Liability under Section 12(a)(2) extends to "statutory sellers," including a person who "passed title, or other interest in the security, to the buyer for value" or "successfully solicited the purchase of a security, motivated at least in part by a desire to serve his own financial interests or those of the securities' owner."[18] Section 15 imposes liability on an individual or entity that "controls any person liable" under Sections 11 or 12.[19]

Concerns over "perceived abuses of the class-action vehicle in litigation involving nationally traded securities" prompted Congress to adopt the Private Securities Litigation Reform Act in 1995 ("PSLRA").[20] The provisions of the PSLRA, aimed at the "Reduction of Abusive Litigation," "limit recoverable damages and attorney's fees, provide a 'safe harbor' for forward-looking statements, impose new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate

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[6] *Cyan*, 138 S. Ct. at 1079; *see* 15 U.S.C. § 77v(a) ("The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter . . . and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.").

[7] *See* 15 U.S.C. § 77v(a) ("Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."); *see also Cyan*, 138 S. Ct. at 1078 ("[The Securities Litigation Uniform Standards Act of 1998 ('SLUSA')] did nothing to strip state courts of their longstanding jurisdiction to adjudicate class actions alleging only 1933 Act violations. Neither did SLUSA authorize removing such suits from state to federal court.").

[8] *Cyan*, 138 S. Ct. at 1066.

[9] 15 U.S.C. § 77*l*(a)(1).

[10] *Pinter v. Dahl*, 486 U.S. 622, 638, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988).

[11] 15 U.S.C. § 77k(a).

[12] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983).

[13] *Id.* at 382 (citations omitted); *see also Omnicare*, 575 U.S. at 179 ("Section 11 thus creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out. Either way, the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud." (citation omitted)); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010) (stating that, to state a claim under Section 11, a plaintiff must allege that "(1) she purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under section 11; and (3) the registration statement 'contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading'" (quoting 15 U.S.C. § 77k(a))).

[14] *See* 15 U.S.C. § 77k(a)(1)-(5) (listing potential defendants).

[15] *Huddleston*, 459 U.S. at 382.

[16] 15 U.S.C. § 77*l*(a)(2).

[17] *Morgan Stanley*, 592 F.3d at 359; *see* 15 U.S.C. §§ 77z-1, 78u-4.

[18] *Morgan Stanley*, 592 F.3d at 359 (internal quotations and alterations omitted).

[19] 15 U.S.C. § 77*o*(a).

[20] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006).

imposition of sanctions for frivolous litigation, and authorize a stay of discovery pending resolution of any motion to dismiss."[21] But the PSLRA "had an unintended consequence: [**6] It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path by the [PSLRA], plaintiffs and their representatives began bringing class actions under state law, often in state court."[22]

Some corporations preferred to litigate 1933 Act claims in federal court and began adopting forum-selection provisions that designated the federal courts as the exclusive forum for such claims.[23] Each of the companies in this appeal is a Delaware corporation that launched a 2017 initial public offering. Before filing their registration statements with the SEC, each company adopted a federal-forum provision in its certificate of incorporation, designating the federal courts as the exclusive forum for the resolution of claims under the 1933 Act.

Roku's and Stitch Fix's federal-forum provisions provided:

> Unless the Company consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising [*112] under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring [**7] any interest in any security of [the Company] shall be deemed to have notice of and consented to [this provision].[24]

Blue Apron's provision differed slightly:

> Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall, *to the fullest extent permitted by law*, be the sole and exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933. Any person or entity purchasing or otherwise acquiring *or holding* any interest in *shares of capital stock* of the Corporation shall be deemed to have notice of and consented to [this provision].[25]

Appellee bought shares of common stock of each company, either in the initial public offering or a short time later. On December 29, 2017, he filed a putative class-action complaint in the Court of Chancery against the individuals who had served as the companies' directors since they went public, and named the companies as nominal defendants. The complaint sought a declaratory judgment that the federal-forum provisions are invalid under Delaware law.

The Court of Chancery granted the motion for summary judgment. In [**8] reaching that result, the court examined its 2013 decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*,[26] this Court's 2014 decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[27] federal case law, and what the Court of Chancery described as "first principles" of Delaware corporate law. The court decided that the "constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."[28] Because "the Federal Forum Provisions attempt to accomplish that feat," the court held that the federal-forum provisions are "ineffective and invalid."[29]

II. Standard of Review

This Court reviews the Court of Chancery's decision to grant summary judgment *de novo*.[30] A court may grant summary judgment only if, based on the undisputed material facts, the moving party is entitled to judgment as a matter of law.[31] There are no material facts in dispute in this appeal, and the issues on which we decide this appeal concern the interpretation of the statutes governing the permissible contents of a Delaware

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[21] *Id.* (summarizing 15 U.S.C. § 78u-4).

[22] *Id.* at 82.

[23] *Opinion*, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *6.

[24] App. to Opening Br. at A84, A100.

[25] *Id.* at A69 (emphasis added). The language difference between the two provisions is immaterial to our decision.

[26] 73 A.3d 934 (Del. Ch. 2013).

[27] 91 A.3d 554 (Del. 2014).

[28] *Opinion*, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *3.

[29] *Id.*

[30] *In re Krafft-Murphy Co., Inc.*, 82 A.3d 696, 702 (Del. 2013).

[31] *Id.*

corporation's certificate of incorporation. Statutory interpretation [**9] is a question of law, which we review *de novo*.[32] The plaintiff must show that the federal-forum provisions do not address a proper subject matter of charter provisions under 8 *Del. C.* § 102(b)(1).

[*113] *III. Analysis*

A. FFPs are Valid as They Fall Within the Plain Text of Section 102(b)(1)

1. This is a Facial Challenge

In asserting its facial challenge, the plaintiff must show that the charter provisions "cannot operate lawfully or equitably *under any circumstances*."[33] Plaintiffs must demonstrate that the charter provisions "do not address proper subject matters" as defined by statute, "and can never operate consistently with law."[34]

2. The FFPs Fall Within the Broad, Enabling Text of Section 102(b)(1)

The analysis must begin with the text of Section 102, the provision of the Delaware General Corporation Law ("DGCL") governing the matters contained in a corporation's certificate of incorporation.[35] The "most important consideration for a court in interpreting a statute is the words the General Assembly used in writing it."[36] The court must "give the statutory words their commonly understood meanings."[37]

Section 102(b)(1) provides:

> (b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also [**10] contain any or all of the following matters: (1) Any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State. Any provision which is required or permitted by any section of this chapter to be stated in the bylaws may instead be stated in the certificate of incorporation . . . .[38]

Thus, Section 102(b)(1) authorizes two broad types of provisions:

> *any* provision for the management of the business and for the conduct of the affairs of the corporation,

and

> *any* provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, . . . if such provisions are not contrary to the laws of this State.

[*114] An FFP could easily fall within either of these broad categories, and thus, is facially valid. FFPs involve a type of securities claim related to the management of litigation arising [**11] out of the Board's disclosures to current and prospective stockholders in connection with an IPO or secondary offering. The drafting, reviewing,

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[32] *Corvel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 868 (Del. 2015).

[33] *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc.*, 2018 Del. Ch. LEXIS 292, 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018) (quoting *Boilermakers*, 73 A.3d at 948) (internal quotation marks omitted).

[34] *Boilermakers*, 73 A.3d at 949 (citing *Stroud v. Grace*, 606 A.2d 75, 79 (Del. 1992) and *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985)).

[35] 8 *Del. C.* § 102. *See State v. Barnes*, 116 A.3d 883, 888 (Del. 2015) ("The starting point for the interpretation of a statute begins with the statute's language."); *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442 (1917)) (internal quotation marks omitted)).

[36] *Boilermakers*, 73 A.3d at 950 (citing *New Cingular Wireless PCS v. Sussex Cty. Bd. Of Adjustment*, 65 A.3d 607, 611 (Del. 2013)).

[37] *Kofron v. Amoco Chems. Corp.*, 441 A.2d 226, 230 (Del. 1982).

[38] 8 *Del. C.* § 102(b)(1).

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and filing of registration statements by a corporation and its directors is an important aspect of a corporation's management of its business and affairs and of its relationship with its stockholders. This Court has viewed the overlap of federal and state law in the disclosure area as "historic," "compatible," and "complimentary."[39] Accordingly, a bylaw that seeks to regulate the forum in which such "intra-corporate" litigation can occur is a provision that addresses the "management of the business" and the "conduct of the affairs of the corporation," and is, thus, facially valid under Section 102(b)(1).

*i. FFPs and Post-*Cyan *Efficiencies*

To elaborate, FFPs can provide a corporation with certain efficiencies in managing the procedural aspects of securities litigation following the United States Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*.[40] There, the United States Supreme Court unanimously held that federal and state courts have concurrent jurisdiction over class actions based on claims brought under the 1933 Act, and that [**12] such claims are not removable to federal court. Following *Cyan*, in 2018, the filing of 1933 Act cases in state courts escalated. The 2018 Year in Review Report by Cornerstone Research found that, "[t]here were 55 percent more state-only filings than federal-only filings in 2018."[41] Claims brought under Section 11 of the 1933 Act "decreased in federal courts as a portion of filing activity moved to state courts."[42] The 2018 report observed that, "[t]he uptick in state actions following the *Cyan* decision indicates a change in approach by plaintiffs."[43]

The recently released Cornerstone 2019 Year in Review Report states that, "[t]he number of state 1933 Act filings in 2019 increased by 40 percent from 2018," and that "[a]bout 45 percent of all state 1933 Act filings in 2019 had a parallel action in federal court."[44] In 2019, the combined number of federal Section 11 filings and state 1933 Act filings was 65, approximately a 59 percent overall increase from 2018.[45] Of the 65 filings, 22 were parallel filings, 27 were state-only filings (a 69 percent increase from 2018), and 16 were federal-only filings.[46] State-only and parallel filings made up over 75 percent of [**13] all federal Section 11 and state 1933 Act filings in 2019.[47] Since *Cyan*, 43 parallel class actions have been filed in multiple jurisdictions.[48] The 2019 report observes that, "[t]he 65 filings in 2019 was historically unprecedented," and that, "[p]rior to 2015, there were only a handful of state court filings, and the highest number of federal Section 11 filings previously was 57 in 1998."[49]

When parallel state and federal actions are filed, no procedural mechanism is available to consolidate or

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[39] *Malone v. Brincat*, 722 A.2d 5, 13 (Del. 1998); *see id.* at 12 ("When corporate directors impart information they must comport with the obligations imposed by both the Delaware law and the federal statutes and regulations of the [SEC]."); *id.* at 13 (observing that, "[t]he historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complimentary" (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474-80, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977))).

[40] 138 S. Ct. 1061, 200 L. Ed. 2d 332

[41] Stanford Law Sch. Secs. Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings 2018 Year in Review* 22 (2019). The report notes that in 2018, the combined [*115] number of federal Section 11 filings and state 1933 Act filings was 41. This consisted of 13 parallel filings, 17 state-only filings, and 11 federal-only filings. Further, "these filings in federal and state courts increased by 52 percent compared to 2017 due to the rise in state filing activity." *Id.* at 21. In 2018, 16 class actions alleging 1933 Act violations were filed in California state courts, 13 were filed in New York state courts, and four were filed in other state courts. The 2018 Report concludes that, "[f]ilings in New York state courts appear to have markedly increased in 2018 as a result of the *Cyan* decision," and that, "[a]ll 13 1933 Act filings in New York were filed after the U.S. Supreme Court's ruling in March." *Id.* at 19.

[42] *Id.* at 10.

[43] *Id.* at 21.

[44] Stanford Law Sch. Secs. Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings 2019 Year in Review* 4 (2020). The report notes that 1933 Act filings in California state courts decreased from 2018 to 2019, but filings in New York and other states rose substantially, with New York state courts becoming the preferred state venue for 1933 Act plaintiffs. *Id.*

[45] *Id.* at 22.

[46] *Id.* at 25.

[47] *Id.*

[48] *Id.* at 24.

[49] *Id.* at 25.

coordinate multiple suits in state and federal court. The costs and inefficiencies of multiple cases being litigated simultaneously in both state and federal courts are obvious.[50] The possibility of inconsistent judgments and rulings on other matters, such as stays of discovery, also exists. By directing 1933 Act claims to federal courts when coordination and consolidation are possible, FFPs classically fit the definition of a provision "for the management of the business and for the conduct of the affairs of the corporation." An FFP would also be a provision "defining, limiting and regulating the powers of the corporation, the directors and the stockholders," since [**14] FFPs prescribe where current and former stockholders can bring Section 11 claims against the corporation and its directors and officers.[51]

ii. FFPs are Not Contrary to Policies or Laws of Delaware

a. FFPs Do Not Violate Section 102

Section 102(b)'s broad authorization is constrained by the phrase, "if such provisions are not contrary to the laws of this State."[52] FFPs do not violate the policies or laws of this State.

First, Section 102(b)(1)'s scope is broadly enabling. For example, in *Sterling v. Mayflower Hotel Corp.*,[53] this Court held that Section 102(b)(1) bars only charter provisions that would "achieve a result forbidden by settled rules of public policy."[54] Accordingly, "the stockholders of a Delaware corporation may by contract embody [*116] in the [certificate of incorporation] a provision departing from the rules of the common law, provided that it does not transgress a statutory enactment or a public policy settled by the common law or implicit in the General Corporation Law itself."[55]

Further, recognizing that corporate charters are contracts among a corporation's stockholders, stockholder-approved charter amendments are given great respect under our law. In *Williams v. [**15] Geier*,[56] in commenting on the "broad policies underlying the Delaware General Corporation Law," this Court observed that, "all amendments to certificates of incorporation and mergers require stockholder action," and that, "Delaware's legislative policy is to look to the will of the stockholders in these areas."[57] *Williams* supports the view that FFPs in stockholder-approved charter amendments should be respected as a matter of policy.[58] At a minimum, they should not be deemed violative of Delaware's public policy.

Finally, the DGCL allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise.[59] "At its core, the [DGCL] is a broad enabling act which leaves latitude for substantial private ordering, provided the statutory parameters and judicially imposed principles of fiduciary duty are honored."[60] In fact, "Delaware's corporate statute is widely regarded as the most flexible in the nation because it leaves the parties to

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[50] The 2019 report notes "as an example of post-*Cyan* jurisdictional complexities," that in 2019, SmileDirectClub was the subject of securities class action filings in New York federal court, Tennessee federal and state courts, and Michigan federal and state courts. *Id.* at 24.

[51] In *Boilermakers*, the Court of Chancery held that as "a matter of easy linguistics," the forum bylaws were valid under Section 109(b) "because they regulate *where* stockholders may file suit." 73 A.3d at 950-52. They also "plainly relate to the 'business of the corporation[s],' the 'conduct of [their] affairs,' and regulate the 'rights and powers of [their] stockholders.'" *Id.* at 939.

[52] 8 *Del. C.* § 102(b)(1).

[53] 33 Del. Ch. 293, 93 A.2d 107 (Del. 1952).

[54] *Id.* at 118.

[55] *Id.* There are a few statutory provisions that cannot be limited in a certification of incorporation. *See* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 Del. J. Corp. L. 845, 856-60 (2008) (discussing cases concerning the rights of stockholders to periodically elect directors, to inspect books and records, and directors' duty of loyalty).

[56] 671 A.2d 1368 (Del. 1996).

[57] *Id.* at 1381.

[58] *See Nat'l Indus. Grp. (Hldg.) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 387 (Del. 2013) ("The enforcement of an international forum selection clause is not an issue of comity. It is a matter of contract enforcement and giving effect to substantive rights that the parties have agreed upon.").

[59] Welch & Saunders, *supra* note 55, at 847.

[60] *Williams*, 671 A.2d at 1381.

the corporate contract (managers and stockholders) with great leeway to structure their relations, subject to relatively loose statutory constraints and to the policing of director misconduct through [**16] equitable review."[61]

In sum, FFPs are facially valid under both the enabling text of Section 102(b)(1) and as a matter of Delaware public policy.

b. The 2015 Amendments Did Not Alter Section 102(b)(1)'s Broad Scope

Section 115, added in the 2015 amendments to the DGCL, supports the view that FFPs are valid under Delaware law, and in particular, Section 102(b)(1). Section 115 provides:

> The certificate of incorporation or the bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State. "Internal corporate claims" means claims, including claims in the right of the corporation, (i) that are based upon a violation of a duty by a current or [*117] former director or officer or stockholder in such capacity, or (ii) as to which this title confers jurisdiction upon the Court of Chancery.[62]

The 2015 amendments were intended, in part, to codify *Boilermakers*,[63] and to preclude a charter or bylaw provision from excluding Delaware as a forum for internal corporate claims. Notably, Section 102(b)(1) was not amended. The synopsis to the bill introducing the legislation states [**17] that, "Section 115 is also not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction, nor is Section 115 intended to limit or expand the jurisdiction of the Court of Chancery or the Superior Court."[64] FFPs do not foreclose suits in federal court. Rather, they direct 1933 Act claims (federal claims) to federal court.

The 2015 amendment adding Section 102(f) further supports the view that Section 102(b)(1) remains expansive enough to include FFPs. Section 102(f) prohibits fee-shifting as against stockholders (of stock corporations) in connection with an "internal corporate claim," as defined in Section 115. Specifically, Section 102(f) provides:

> (f) The certificate of incorporation may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title.[65]

The language in Section 102(f) implies that Section 102(b)(1) can address claims other than "internal corporate claims." Otherwise, the reference to "internal corporate claims" in new Section 102(f) would not have been necessary. We must give meaning to every word in the statute.[66] Each part or section of a statute should be construed in connection with every other [**18] part or section to produce a harmonious whole.[67] "Statutory

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[61] *Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 845 (Del. Ch. 2004).

[62] 8 *Del. C.* § 115. A similar provision was adopted in 2000 in the alternative entity context in response to this Court's decision in *Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286 (Del. 1999). In that case, this Court upheld a forum-selection clause in the company's operating agreement which designated a foreign jurisdiction as the exclusive jurisdiction for internal disputes. In response, our General Assembly adopted Section 18-109(d) of the Delaware LLC Act prohibiting a Delaware LLC from designating a foreign jurisdiction as its exclusive jurisdiction for internal disputes. The Delaware Limited Partnership Act was similarly amended.

[63] 73 A.3d 934.

[64] Del. S.B. 75 syn., 148th Gen. Assem. (2015).

[65] 8 *Del. C.* § 102(f). The 2015 amendments do not disturb the ruling in *ATP Tour Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), in relation to nonstock corporations. Del. S.B. 75 syn. The synopsis also states that, "[n]ew subsection (f) is not intended, however, to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced." *Id.*

[66] *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc.*, 36 A.3d 336, 344 (Del. 2012) (affirming the "canon of statutory construction that every word chosen by the legislature (and often bargained for by interested constituent groups) must have meaning").

[67] *Grimes v. Alteon Inc.*, 804 A.2d 256, 265 n.35 (Del. 2002) (*en banc*) (citing 2A Norman J. Singer, *Sutherland on Statutory Construction* § 46:05 (2000)).

construction . . . is a holistic endeavor."[68] It is presumed that "the General Assembly purposefully chose particular language and [we] therefore [*118] construe statutes to avoid surplusage if reasonably possible."[69] This reading is also consistent with our holding in *ATP*.

The Appellee contends the 2015 amendments adding Section 115 *implicitly* amended Section 102(b)(1). More specifically, the Appellee contends that Section 115 "reflects either prohibition [of FFPs] or implicit recognition that [FFPs] were never authorized by Section 102(b)(1) in the first place."[70] The Appellants disagree, arguing that because Section 115 does not explicitly state that a charter may not contain a forumselection provision that addresses claims other than "internal corporate claims," Section 115 does not limit the scope of provisions that are permissible under Section 102(b)(1).[71]

The Appellee's argument runs afoul of a number of well-established principles of statutory construction. First, "[c]ourts do not resort to other statutes if the statute being construed is clear and unambiguous."[72] Section 102(b)(1) is clear and unambiguous. By its terms, it does not incorporate Section 115.

Second, [**19] principles of statutory construction instruct that statutes should not be superseded or altered by implication unless there is an irreconcilable conflict.[73] The Appellee attempts to create a conflict between Section 102(b)(1) and Section 115 by reading Section 115 as modifying Section 102(b)(1). But the two statutes do not conflict—at least not irreconcilably. Indeed, an interpretation that harmonizes the two—as opposed to one that puts them in conflict with each other—is readily available here. Section 115 simply clarifies that *for certain claims*, Delaware courts may be the only forum, but they cannot be excluded as a forum. Section 102(b)(1)'s general and broad provisions govern all [*119] other claims. Thus, Section 115 is not properly viewed as modifying Section 102(b)(1).

Instead, Section 115 merely confirms affirmatively, as held in *Boilermakers*, that a charter may specify that internal corporate claims must be brought in "the courts in this State" (presumably, including the federal court),[74] while prohibiting provisions that would preclude bringing internal corporate claims "in the courts of this State." Section 115, read fairly, does not address the propriety of forum-selection provisions applicable to other types of

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[68] *Terex Corp. v. S. Track & Pump, Inc.*, 117 A.3d 537, 543 (Del. 2015); *see also Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989) (stating that, statutes "must be viewed as a whole").

[69] *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 422 (Del. 2013) (citing *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011)); *see Clark v. State*, 65 A.3d 571, 578 (Del. 2013); *Zhurbin v. State*, 104 A.3d 108, 110 (Del. 2014); *Chase Alexa, LLC v. Kent Cty. Levy Ct.*, 991 A.2d 1148, 1152 (Del. 2010) ("[W]ords in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning, and courts must ascribe a purpose to the use of statutory language, if reasonably possible." (quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)) (internal quotation marks omitted)). "The legislative body is presumed to have inserted every provision for some useful purpose and construction, and when different terms are used in various parts of a statute it is reasonable to assume that a distinction between the terms was intended." *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (citation omitted). *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) (stating that, "[i]t is well established that a court may not engraft upon a statute language which has clearly been excluded therefrom," and that, "when provisions are expressly included in one statute but omitted from another, we must conclude that the General Assembly intended to make those omissions").

[70] Answering Br. at 18.

[71] Opening Br. at 24; Reply Br. at 8-11.

[72] 2A Norman J. Singer, *Sutherland Statutory Construction* § 51:1 (7th ed.).

[73] "It is assumed that when the General Assembly enacts a later statute in an area covered by a prior statute, it has in mind the prior statute and therefore statutes on the same subject must be construed together so that effect is given to every provision unless there is an irreconcilable conflict between the statutes, in which case the later supersedes the earlier." *State v. Fletcher*, 974 A.2d 188, 193 (Del. 2009) (quoting *State, Dept. of Labor v. Minner*, 448 A.2d 227, 229 (Del. 1982)); *State v. Cook*, 600 A.2d 352, 355 (Del. 1991); *State ex. rel. Green v. Foote*, 35 Del. 514, 5 W.W. Harr. 514, 168 A. 245, 247 (Del. 1933) ("When there are two Acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the later Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first.").

[74] "New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State." Del. S.B. 75 syn.

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claims. If a forum-selection provision purports to govern intra-corporate litigation of claims that do [**20] not fall within the definition of "internal corporate claims," we must look elsewhere (back to Section 102(b)(1)) to determine whether the provision is permissible. This is because intra-corporate litigation relates to the business of the corporation (*see ATP*), and such provision is authorized under Delaware law and is facially valid.

The Appellee's "implicit prohibition" also fails to account for the fact that, when the General Assembly enacted the 2015 amendments, it included explicit prohibitions against fee-shifting (*see* Section 102(f)) and forum-selection provisions that precluded litigation of internal corporate claims in Delaware state courts. The Appellee does not explain why the General Assembly, having explicitly prohibited certain provisions, did not do so as to others—*i.e.*, forum-selection provisions governing claims that are not internal corporate claims—if that is what it intended to do. Had the General Assembly intended for Section 115 to circumscribe the scope of Section 102(b)(1), it would have amended that subsection in the 2015 amendments as well. Prohibiting fee-shifting provisions for internal corporate claims in the new subsection (f) of Section 102, while leaving Section 102(b)(1) untouched, does not indicate that the General Assembly intended to impliedly amend [**21] Section 102(b)(1) to restrict its scope. Rather, it signals that the General Assembly intended to leave the scope of Section 102(b)(1) intact. Courts do not impliedly amend or supersede other statutes unless that intention is "manifestly clear."[75]

Moreover, the synopsis of Section 115 suggests that Section 115 did not impliedly amend Section 102(b)(1). The synopsis states, among other things, that "Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought."[76] Although this caveat is tethered to internal corporate claims, the Appellee's reasoning (that a forum-selection provision not expressly permitted by Section 115, is implicitly prohibited) runs [*120] head-first into it. After all, if, Section 115's permissive provision defines the whole universe of permitted forum-selection provisions, the synopsis's clarification that provisions allowing "Delaware plus another" jurisdiction should be written directly in the statute's text. Without that direct permission, the *expressio unius* doctrine should cause Section 115 to prohibit such "Delaware plus another" provisions.[77]

Finally, the Appellee's analogy between Section 115 and 102(b)(7) is a faulty one.[78] These amendments differ in that, before the amendment of Section 102(b)(7), the default under our common law was that such provisions were impermissible. The opposite is true with respect to forum-selection provisions, which, prior to Section 115, were valid under Section 102(b) and Section 109(b). It is logical for the express language of a permissive statute like Section 102(b)(7) to designate the outer bounds of its scope if it were impermissible initially. That is not the case with Section 115. Forum provisions were valid prior to Section 115's enactment.

Read holistically, Section 115 indicates a concern for

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[75] *Foote*, 168 A. at 247 ("Whether such statutes repeal the previously existing law, in the absence of a repeal in express terms, depends upon the presence or absence of an irreconcilable inconsistency between them, unless it is manifestly clear that the later enactment is intended to supersede the earlier law and embrace the whole subject-matter.").

[76] Del. S.B. 75 syn.; *see* R. Franklin Balotti & Jesse A. Finkelstein, *Delaware Law of Corporation & Business Organizations, Statutory Deskbook* 114-M (2017 ed.).

[77] The *expressio [**22] unius est exclusio alterius* doctrine ("*expressio unius*" for short) is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Expressio unius est exclusion alterius*, Black's Law Dictionary (11th ed. 2019). However, it "properly applies only when the *unius* (or technically *unum*, the thing specified) can reasonably be thought to be the expression of *all* that shares in the grant or prohibition involved. Common sense often suggests when this is or is not so." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *see also* William N. Eskridge, Jr. *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 408 (2016) (stating that, the *expressio unius* canon is "[i]napplicable if statutory purpose or context suggests listing is not comprehensive"). Section 115 merely confirms, as held in *Boilermakers*, that charters and bylaws may effectively specify that internal corporate claims must be brought in "the courts in this State." 2A Norman J. Singer, *Sutherland Statutory Construction* § 47:23 (7th ed.) ("[*E]xpressio unius* is a rule of statutory construction and . . . is subordinate to the primary rule that legislative intent governs the interpretation of a statute . . . .").

[78] *See* Answering Br. at 18-19 (arguing that, "Section 102(b)(7)'s express prohibition of some exculpatory provisions . . . could be read to implicitly authorize any exculpatory provision not expressly forbidden.").

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centering particular claims—"internal corporate claims"—in Delaware. This makes sense given Delaware's interest and expertise in corporate law. As Section 11 claims are not "internal corporate claims," Section 115 does not apply.[79] In sum, FFPs, which direct Section 11 claims to federal courts (which are most experienced in adjudicating them), do not violate Section 115 [**23] and are facially valid.

B. Section 102(b)(1) is Not Limited to "Internal Affairs" Matters

We disagree with the trial court's analysis in a number of respects. Among them, the Court of Chancery appears to have narrowed the broad enabling scope of Section 102(b)(1) in a way that is inconsistent with decisions by this Court and with the overall statutory scheme in Title 8.

[*121] *1. ATP Suggests FFPs are Permissible Under Section 102(b)(1)*

FFPs involve intra-corporate claims. *ATP* concerned intra-corporate claims.[80] *ATP* supports the view that FFPs can fall within Section 102(b)(1) and be deemed facially valid.

In *ATP*, this Court considered certified questions regarding fee-shifting provisions in the bylaws of a non-stock corporation. The plaintiffs were members of the defendant ATP, a Delaware membership corporation that operated a global professional tennis tour. ATP amended its bylaws in 2006 to include a fee-shifting provision. The provision applied to any claim asserted by a member against the corporation whereby the member was required to reimburse the corporation for legal fees and costs incurred in connection with litigating the claim if the member did not obtain a judgment on the merits that substantially achieved, in substance and amount, the full remedy sought. [**24] Thus, the ATP bylaw "applie[d] in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member."[81] We referred to this scenario as "intra-corporate litigation."[82]

In 2007, ATP changed the tour schedule in a manner adverse to the plaintiff members. The members sued ATP based on federal antitrust, Delaware fiduciary duty, and other grounds. Specifically, the plaintiffs asserted that ATP and its Board violated sections 1 and 2 of the Sherman Act (Counts I-IV of the complaint), breached their fiduciary duties (Counts V-VII), tortiously interfered with the plaintiffs' contractual and business interests (Count VIII), and converted membership rights (Count IX). After trial, ATP prevailed on all claims.[83] Citing the fee-shifting bylaw, it then sought to recover its litigation fees and costs. The District Court denied ATP's motion, concluding that Article 23.3(a), the fee-shifting bylaw, was contrary to the policy underlying the federal antitrust laws.[84] It reasoned that federal law preempts the enforcement of fee-shifting agreements where antitrust claims are involved.

ATP appealed to the United States Court of Appeals for [**25] the Third Circuit. The Third Circuit vacated the District Court's order, and held that the District Court should have decided whether Article 23.3(a) was enforceable as a matter of Delaware law before addressing the federal preemption question.

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[79] Neither side in this case argues that Section 115's definition of "internal corporate claims" encompasses Section 11 claims. We think Section 115 likely was intended to address claims requiring the application of Delaware corporate law as opposed to federal law. Stated differently, we do not think the General Assembly intended to encompass federal claims within the definition of internal corporate claims. Thus, Section 115 is not implicated. And the fact that Section 102(b)(1) was not amended indicates that it remains broad enough to address other than internal corporate claims.

[80] 91 A.3d 554.

[81] *Id.* at 557; *see id.* at 559.

[82] *See id.* at 557, 558.

[83] The District Court granted judgment as a matter of law to ATP and the individual defendants on all of the state law counts, and to the individual defendants on the antitrust claims. A jury found ATP not liable for any antitrust violations. The Third Circuit affirmed the judgment. *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010), *cert. denied*, 562 U.S. 1064, 131 S. Ct. 658, 178 L. Ed. 2d 482 (2010).

[84] *Deutscher Tennis Bund v. ATP Tour, Inc.*, 2009 U.S. Dist. LEXIS 97851, 2009 WL 3367041, at *4 (D. Del. Oct. 19, 2009), *vacated*, 480 Fed. Appx. 124 (3d Cir. 2012). The District Court relied primarily on the Third Circuit's decision in *Byram Concretanks, Inc. v. Warren Concrete Prods. Co. of N.J.*, 374 F.2d 649, 651 (3d Cir. 1967), which held that, "in the absence of specific legislative authorization[,] attorneys' fees may not be awarded to defendants in private anti-trust litigation." Accordingly, the District Court refused to give effect to Article 23.3.

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After finding that the enforceability of the fee-shifting bylaw presented a novel question of Delaware law, the District Court certified four questions of law to the Delaware Supreme Court. The first question, relevant here, asked:

> [*122] May the Board of a Delaware non-stock corporation lawfully adopt a bylaw (i) that applies in the event that a member brings a claim against another member, a member sues the corporation, or the corporation sues a member (ii) pursuant to which the claimant is obligated to pay for "all fees, costs, and expenses of every kind and description (including, but not limited to, all reasonable attorneys' fees and other litigation expenses)" of the party against which the claim is made in the event that the claimant "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"?[85]

Responding to this question, this Court held as follows:

> A fee-shifting bylaw, like the one described [**26] in the first certified question, is facially valid. Neither the DGCL nor any other Delaware statute forbids the enactment of fee-shifting bylaws. A bylaw that allocates risk among parties in *intra-corporate litigation* would also appear to satisfy the DGCL's requirement that bylaws must "relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." The corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence. Moreover, no principle of common law prohibits directors from enacting feeshifting bylaws.[86]

This Court held that the fee-shifting bylaw fell within both broad prongs of Section 102(b)(1)—namely, that it relates (i) to the "business of the corporation" and the "conduct of its affairs," and (ii) to the powers of the corporation or "the rights or powers of its stockholders, directors, officers or employees."[87]

The Court of Chancery suggests that since this Court was dealing with a facial challenge in *ATP*, so long as the claims involved a state law breach of fiduciary duty claim, that was enough for the bylaw in *ATP* to survive a facial challenge. [**27] It then states that our Court in *ATP* "did not suggest that the corporate contract can be used to regulate other types of claims."[88] We disagree with these points for at least three reasons. First, *ATP* held that the fee-shifting bylaw fell within the scope of Section 109(b) and 102(b)(1). It did not purport to define the outer limits of either Section 109(b) or 102(b)(1). Similarly, *Boilermakers* only held that the forum-selection bylaw (which addressed only internal affairs)[89] easily fell within Section 109(b). [*123] Contrary to what the Court of Chancery suggests, *Boilermakers* did not establish the outer limit of what is permissible under either Section 109(b) or Section 102(b)(1). Second, not even Appellants are contending that Section 11 claims are "internal affairs" claims,[90] because Section 11 claims are not

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[85] *ATP*, 91 A.3d at 557.

[86] *Id.* at 558 (emphasis added).

[87] *Id.*

[88] *Opinion*, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *13.

[89] The bylaw provision in *Boilermakers* provided:

> Unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum for (i) any derivative action or proceeding brought on behalf of the Corporation, (ii) any action asserting a claim of breach of a fiduciary duty owed by any director, officer or other employee of the Corporation to the Corporation or the Corporation's stockholders, (iii) any action asserting a claim arising pursuant to any provision of the Delaware General Corporation Law, or (iv) any action asserting a claim governed by the internal affairs doctrine. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation [**29] shall be deemed to have notice of and consented to the provisions of this [bylaw].

Boilermakers, 73 A.3d at 942. Although prong (iv) of this bylaw refers explicitly to "internal affairs," the Court of Chancery appropriately observed that all four prongs concern internal affairs. *Id.*

[90] During the oral argument before this Court, the following exchange occurred:

> Justice Valihura: Are you arguing then, that these provisions are not within the internal affairs doctrine as say articulated by *Edgar v. MITE*? And I think there the U.S. Supreme Court said "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders" and I think this Court used a similar description in the *VantagePoint* case.
>
> Mr. Chandler: You did. You did, a very similar description. My argument Your Honor, our argument, is that these provisions are intra-corporate claims. They touch upon the

governed by substantive Delaware law. Rather, they are governed by federal law. But Section 11 claims are often asserted along with parallel state fiduciary duty and disclosure claims and very often involve the same or similar predicate facts and defenses.[91] As such, Section 11 claims are "internal" in the sense that they arise from internal corporate conduct on the part of the Board and, therefore, fall within Section 102(b)(1). *ATP* supports, rather than undermines, this conclusion. Third, the argument that *ATP*'s holding encompasses [**28] only state law fiduciary duty claims ignores the significance in that case of the federal antitrust claims as evidenced by this Court's repeated mention of those claims, and this Court's repeated use of the phrase "intra-corporate litigation," as opposed to the phrase, "internal affairs" claims.[92] At a minimum, this Court did not distinguish between the validity of the bylaw's application to the state law fiduciary claims and the federal antitrust claims.

2. The Trial Court Improperly Restricted the Scope of Section 102(b)(1)

The Court of Chancery narrowly interpreted *ATP* by concluding that "intracorporate litigation" was synonymous with only the state law fiduciary duty claims.[93] [*124] The court then relied primarily on *Boilermakers* to suggest that *Boilermakers* defined the permissible limits of Section 109(b) and confined it to only the "internal affairs" claims that were the subject of the bylaw at issue there. In eliminating the potentially broader reach of "internal" or "intra-corporate" claims (as evidenced by our holding in *ATP*), it basically stated that everything other than an "internal affairs" claim was "external" and, therefore, not the proper subject of a bylaw or charter provision.

To elaborate, the court below reasoned that, "[t]he *Boilermakers* distinction between internal and external claims answers whether a forum-selection provision can govern claims under the 1933 Act."[94] The court stated that, "a 1933 Act claim is external to the corporation,"[95] and then explained what it meant by an "external" claim:

> Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or defendant. The 1933 Act establishes a statutory regime that applies when a particular type of property—securities—is offered for sale in particular scenarios that the federal government has chosen to regulate. The cause of action belongs to a purchaser of [**32] a security, and it arises out of an offer or sale. The defined term "security" encompasses a wide range of financial products. Shares of stock are just one of many types of securities, and shares in a

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> very same kind of internal relationships and conduct that the internal affairs doctrine, the difference is, there's only one difference. Even though the claim is internal in the same sense as an internal affairs claim, it doesn't arise under the same law. It arises under federal law. That's the only difference. Otherwise, it's the same relationships involved, boardroom conduct, stockholder status as a stockholder. That's the same thing as it is in an internal affairs claim, but it's not the same because it arises under a different law. And our point [**30] is a simple one, just because it arises under federal law, doesn't mean that it is now an external claim. That suddenly translates into an external claim, no it doesn't. Because it involves the same intra-corporate conduct as an internal affairs claim does. So they're the same. And that's why they can be treated under our law the same and the forum selection-provision can be applied to them. Just as this one, these three do.

Oral Argument Video at 21:55-23:22, https://livestream.com/DelawareSupremeCourt/events/8952021/videos/200564724.

[91] *See Malone*, 722 A.2d at 12.

[92] Moreover, we think it is more likely that the "novelty" of the issue perceived by the federal court seeking certification (and by this Court in accepting certification) involved the question of whether a Delaware charter or bylaw provision could properly address an intra-corporate claim (*e.g.*, a federal antitrust claim) that was not an "internal affairs" claim.

[93] This is evident from the following passage in the Opinion below, explaining this Court's holding in *ATP*:

> Although the plaintiffs in the underlying action [**31] also asserted claims for antitrust violations, tortious interference, and conversion, the Delaware Supreme Court interpreted the certified question as only asking about the validity of the bylaw for purposes of "intra-corporate litigation." The Delaware Supreme Court then held that the bylaw was facially valid because it "allocate[d] risk among parties in intra corporate litigation . . . ." The Delaware Supreme Court did not suggest that the corporate contract can be used to regulate other types of claims.

Opinion, 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *13. But, there is nothing that suggests this Court narrowed its focus so as to mean that "intra-corporate" litigation referred only to the state law fiduciary duty claims.

[94] 2018 Del. Ch. LEXIS 578, [WL] at *1.

[95] *Id.*

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> Delaware corporation are just one subtype. A claim under the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation. Under *Boilermakers*, a 1933 Act claim is distinct from "internal affairs claims brought by stockholders *qua* stockholders."[96]

This result, it said, "derives from first principles."[97]

But *Boilermakers*' holding does not address external claims. Further, the dicta in *Boilermakers* regarding "external" claims suggests that its definition of "external" claims would exclude "intra-corporate" claims which, as explained above, do fall within Section 102(b)(1)'s broad scope. The two examples of external claims given in *Boilermakers* do not relate to the "affairs" of the corporation or the "powers" of its constituents (a tort claim for personal injury suffered by the plaintiff on the premises of the company or a contract [**33] claim involving a commercial contract).[98] As for these types of claims, no Board action is present as it necessarily is in Section 11 claims, and those claims are unrelated to the corporation-stockholder relationship. And in any event, the FFPs are limited to 1933 Act claims. Thus, FFPs are not "external," and *Boilermakers* does not suggest that they are. [*125] But by creating a binary world of only "internal affairs" claims and "external" claims, the Court of Chancery superimposed the "internal affairs" doctrine onto and narrowed the scope of Section 102(b)(1)contrary to its plain language. It then concluded that Delaware corporations cannot regulate "external" claims that arise under the laws of other jurisdictions.[99] If our General Assembly wishes to narrow the scope of Section 102(b)(1) to be aligned perfectly with the boundaries of the internal affairs doctrine, it could do so. But until then, it is the obligation of our courts to construe the plain language of the statute.[100]

There is a category of matters that is situated on a continuum between the *Boilermakers* definition of "internal affairs" and its description of purely "external" claims. *ATP* suggests that certificate [**34] of incorporation provisions governing certain types of "intra-corporate" claims that are not strictly within *Boilermakers*' "internal affairs," can be within the boundaries of the DGCL, and specifically Section 102(b)(1). And because we are dealing here with a facial challenge, it is possible to have a scenario where an FFP could apply to an intra-corporate claim. For example, existing stockholders could assert that a prospectus relating to shares of stock the directors were selling in a registered offering, signed by the directors of a Delaware corporation, contained material misstatements and omissions. That is enough to survive a facial challenge.

3. The Trial Court Also Narrowed the Definition of "Internal Affairs"

The Court of Chancery not only narrowed the scope of Section 102(b)(1), but it also narrowed the definition of "internal affairs" from both the established definition in the United States Supreme Court's decision in *Edgar v. MITE Corp.*[101] (which *Boilermakers* follows) and this Court's parallel definition in *McDermott v. Lewis*.[102] The following illustrates the point:

Table 1—Internal Affairs Definitions:

Go to table1

Focusing on the exact words used by the United States Supreme Court, the Delaware Supreme Court, and our General Assembly, the Court of Chancery's definition, on its face, is narrower than the traditional definition of "internal affairs" as used in *Edgar* and *McDermott*.

In *Edgar*, the United States Supreme Court reviewed a

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[96] *Id.*

[97] 2018 Del. Ch. LEXIS 578, [WL] at *2.

[98] *See* 73 A.3d at 952.

[99] Commentators also have viewed the choice as a binary one. *See, e.g.*, Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 Tenn. L. Rev. (forthcoming 2020) (manuscript at 48) (available at https://dx.doi.org/10.2139/ssrn.3435165) ("Delaware has much staked on the basic distinction that the [internal affairs] doctrine makes—the distinction between internal corporate affairs versus external matters."); *see also Id.* at 54 ("So again, which is it? Are the rights of shareholders arising under federal securities law—rights that arise upon the purchase or sale of a corporation's shares—an internal corporate affair or an external matter?").

[100] *See In re Adoption of Swanson*, 623 A.2d 1095, 1099 (Del. 1993) ("We have long held that our courts do not sit as a superlegislature to eviscerate proper legislative enactments." (citation omitted)).

[101] 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982).

[102] 531 A.2d 206 (Del. 1987).

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challenge to the Illinois Business Take-Over Act, which imposed certain requirements for takeover actions that were more onerous than the federal Williams Act regime. The United States Supreme Court struck down the Illinois law on Supremacy Clause and Commerce Clause grounds. It found that the Illinois law was a "direct restraint on interstate commerce and that it has a sweeping extraterritorial effect. Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled."[106] It also held that the local interests that Illinois sought to protect did not outweigh the burden the law imposed on interstate commerce. The United States Supreme Court then described the internal affairs doctrine as follows:

> The internal affairs doctrine is a conflict of laws principle which recognizes that [**37] only one State should have the authority to regulate a corporation's internal affairs—*matters peculiar to the relationships [*127] among or between the corporation and its current officers, directors, and shareholders*—because otherwise a corporation could be faced with conflicting demands.[107]

As applied to the Illinois law, the Court found that the internal affairs doctrine was "of little use to the State in this context" because "[t]ender offers contemplate transfers of stock by stockholders to a third party and do not themselves implicate the internal affairs of the target company."[108] Finally, the Court noted that the Illinois law extended to non-Illinois corporations with principal places of business outside of Illinois, and "Illinois has no interest in regulating the internal affairs of foreign corporations."[109]

Five years later, in *CTS Corp. v. Dynamics Corp. of America*,[110] the United States Supreme Court stated:

> It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in [**38] the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.[111]

In *CTS*, the United States Supreme Court again reviewed a state takeover statute, this time belonging to the State of Indiana. The Court ruled that this law did not violate the Commerce Clause because the limited effect the tender offer rules had on interstate commerce were outweighed by the State's interest in defining attributes of its corporations' shares and in protecting shareholders. The Court also noted that the "free market system depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of the State of its incorporation."[112]

In *McDermott v. Lewis*,[113] this Court agreed with the scope of internal affairs established by the United States Supreme Court:

> Internal corporate affairs involve those matters which are *peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders*. It is essential to distinguish between acts which can be performed by both corporations and individuals, and those activities [**39] which are peculiar to the corporate entity.[114]

As explained by this Court in *McDermott*, "[c]orporations and individuals alike enter into contracts, commit torts, and deal in personal and real property."[115] [*128] As to these types of matters, "[c]hoice of law decisions relating to such corporate activities are usually determined after

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[106] *Edgar*, 457 U.S. at 642.

[107] *Id.* at 645.

[108] *Id.*

[109] *Id.* at 645-46.

[110] 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987).

[111] *Id.* at 91.

[112] *Id.* at 90.

[113] 531 A.2d 206.

[114] *Id.* at 214 (citing *Edgar*, 457 U.S. at 645 and Restatement (Second) of Conflict of Laws § 313, Comment *a* (1971)); *see also VantagePoint Venture P'rs 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) ("The internal affairs doctrine applies to those matters that pertain to the relationships among or between the corporation and its officers, directors, and shareholders."); *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1082 (Del. 2011).

[115] *McDermott*, 531 A.2d at 214. These types of matters are clearly "external."

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consideration of the facts of each transaction."[116] The choice of law determination often turns on whether the corporation had sufficient contacts with the forum state in order to satisfy the constitutional requirements of due process. But, "[t]he internal affairs doctrine has no applicability in these situations."[117] "Rather, this doctrine governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders."[118]

The Court in *McDermott* observed that, under Delaware conflict of law principles and the United States Constitution, there are appropriate circumstances which mandate application of the internal affairs doctrine. It held that [**40] Delaware's well-established conflict of laws principles required that the laws of the jurisdiction of incorporation (the Republic of Panama) govern the dispute involving the Panamanian corporation's voting rights. It then explained that, "[t]he traditional conflicts rule developed by courts has been that internal corporate relationships are governed by the laws of the forum of incorporation."[119] We stated that, "[t]he internal affairs doctrine requires that the law of the state of incorporation should determine issues relating to internal corporate affairs."[120]

The *McDermott* decision rejected the notion that the more flexible Restatement approach of "weighing" various interests should apply to internal affairs matters. It observed that, following a California state court case in 1961 where a California court upheld an order of the California Commissioner of Corporations directing a Delaware corporation having major contacts with California to follow the cumulative voting requirements imposed by California law, commentators had suggested a "conflicts revolution" had started. The Court, citing the Restatement (Second) of Conflicts of Laws, §§ 302-06, 09 (1971), observed that the "new" conflicts theory "weighs the interests and policies of the [**41] forum state in determining whether the law of the forum—lex fori—should be applied."[121] But in rejecting the idea that this "new theory" should apply to internal affairs matters, this Court noted that, in reviewing cases over the prior twenty-six years, in all but a few, the law of the state of incorporation had been applied. Citing a 1968 article, this Court stated that the following statement had remained "apt:"

> The umbilical tie of the foreign corporation to the state of its charter is usually still religiously regarded as conclusive in determining the law to be applied in *intracorporate disputes*. The fundamental reexamination of the nature of conflict of laws over the past few years has virtually left foreign corporation matters remaining as a pocket of the past in a subject area which has otherwise been characterized by free inquiry, change and flux.[122]

[*129] It then stated that the policy underlying the internal affairs doctrine "is an important one," and it declined to "erode the principle" by applying the Restatement's policy of weighing the interests and policies of the forum state. Instead, "[g]iven the significance of these considerations, application of the internal affairs doctrine [**42] is not merely a principle of conflicts law."[123] Rather, "[i]t is also one of serious constitutional proportions—under due process, the commerce clause and the full faith and credit clause—so that the law of one state governs the relationships of a corporation to its stockholders, directors and officers in matters of internal corporate governance."[124] Thus, we concluded that "the application of the internal affairs doctrine is mandated by constitutional principles, except in 'the rarest situations,'"[125] and that the alternatives present "almost intolerable consequences to the corporate enterprise and its managers."[126]

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[116] *Id.* at 214-15 (citing Reese and Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1121 (1958)).

[117] *Id.* at 215.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.* at 216 (citing Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 Vand. L. Rev. 433, 464 (1968)) (emphasis added).

[123] *Id.*

[124] *Id.* "If the doctrine is only a choice-of-law rule, then any state is free to adopt or reject it." Hon. Jack Jacobs, *The Reach of State Corporate Law Beyond State Borders*, 84 N.Y.U. L. Rev. 1149, 1164 (2009).

[125] *McDermott*, 531 A.2d at 217.

[126] *Id.* at 216. *See also VantagePoint*, 871 A.2d at 1112 ("The

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8 *Del. C*. § 202 *Section 102(b)(1) is More Expansive than Section 115's Definition of Internal Corporate Claims*

As explained above, trial court erred in narrowing Section 102(b)(1) in a manner that prohibits FFPs. In addition to the statutory construction points above, other aspects of our statutory scheme show that Section 102(b)(1) is unquestionably broader than, and is not circumscribed by, Section 115's definition of "internal corporate claims." This is supported by the fact that other sections of the DGCL have an impact on conduct with [**43] persons who are not yet stockholders, such as Section 202 ("Restrictions on Transfer and Ownership of Securities").[127] Section 202(a) provides that transfer restrictions in a stock certificate "may be enforced against the holder of the restricted security or securities or any successor or transferee of the holder."[128] Section 202(b) authorizes charter provisions that place "[a] restriction on the transfer or registration of transfer securities of a corporation, or on the amount of a corporation's securities that may be owned by any person or group of persons."[129]

Moreover, although it is clear that various provisions of our DGCL regulate certain transactions by which one can become a stockholder, it is arguable, from a plain reading of Section 115, that, in certain instances, [**44] claims arising from the purchase of stock could be an "internal corporate claim." For example, we observe that Section 111 was amended in 2003 to empower the Court of Chancery to interpret, apply, enforce or determine the validity of agreements pertaining to sales of stock by the corporation.[130] The Court of Chancery's jurisdiction was expanded again in 2016 to [*130] include stock purchase agreements whereby one or more stockholders of the corporation sells or offers to sell their stock, and to which the stockholder or holders and the corporation are parties.[131] Section 115 includes within its definition of "internal corporate claims," claims "as to which this title confers jurisdiction upon the Court of Chancery."[132]

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internal affairs doctrine is a long-standing choice of law principle which recognizes that only one state should have the authority to regulate a corporation's internal affairs—the state of incorporation.").

[127] 8 *Del. C*. § 202(a). *See* 8 *Del. C*. § 152 (regulating the form of payment of stock subscriptions); 8 *Del. C.* § 157 (authorizing provisions governing the rights and options to acquire stock). Further, DGCL Section 166, addressing stock subscriptions, provides that a "subscription for stock of a corporation . . . shall not be enforceable against a subscriber, unless in writing and signed by the subscriber or by such subscriber's agent." 8 *Del. C*. § 166

[128] 8 *Del. C.* § 202(a).

[129] 8 *Del. C.* § 202(b).

[130] Section 111 was amended and restated in 2003. The 2003 version stated:

> (a) Any civil action to interpret, apply, enforce, or determine the validity of the provisions of . . . (2) any instrument, document or agreement by which a corporation creates or sells, or offers to create or sell, any of its stock, or any rights or options respecting its stock . . . [m]ay be brought in the Court of Chancery, except to the extent that a statute confers exclusive jurisdiction on a court, agency, or tribunal other than the Court of Chancery.

8 *Del. C.* § 111 (2003); Del. S.B. 127 syn., 142nd Gen. Assem. (2003). This revision covers instruments, documents, or agreements pertaining to sales of stock by the issuing corporation, including offering materials and purchase agreements, and thus could include persons who are not yet stockholders. *See* Lewis S. Black, Jr. & Frederick H. Alexander, *Analysis of the 2003 Amendments to the Delaware General Corporation Law* 4 (2003) (noting that, "[a]s revised, Section 111 goes well beyond covering actions involving charters and bylaws, and provides that actions involving documents concerning the sale of stock, restrictions on transfer, proxy relationships, voting trusts, mergers, conversions, domestications, and instruments required by any provision of the General Corporation Law, as well as any action to interpret, apply or enforce any provision of the statute, may be brought in [the] Court of Chancery"). The 2003 jurisdictional expansion predates *Boilermakers*, issued by the Court of Chancery in 2013, and Section 115, which was added to the DGCL in 2015. The General Assembly is presumed to be aware of the statutory scheme. *Hudson Farms, Inc. v. McGrellis*, 620 A.2d 215, 218 (Del. 1993) (stating that, "it is presumed that the General Assembly is aware of existing law when it acts").

[131] Del. H.B. 371, 148th Gen. Assem. (2016). "The 2016 amendments expanded the Delaware Court of Chancery's jurisdiction under Section 111 to empower the Court to interpret, apply, enforce or determine the validity of (i) stock purchase agreements whereby one or more stockholders of the corporation sell or offer to sell their stock, and to which the stockholder or holders and the corporation are parties (i.e., stock transactions), and (ii) agreements to sell, lease or exchange the corporation's property or assets, which, by the terms of the agreement, requires that one or more of the corporation's stockholders approve of or consent to the sale, lease or exchange (i.e., asset transactions)." Jeffrey R. Wolters and James D. Honaker, *Analysis of the 2016 Amendments to the Delaware General Corporation Law* 1 (2016).

[132] 8 *Del. C.* § 115.

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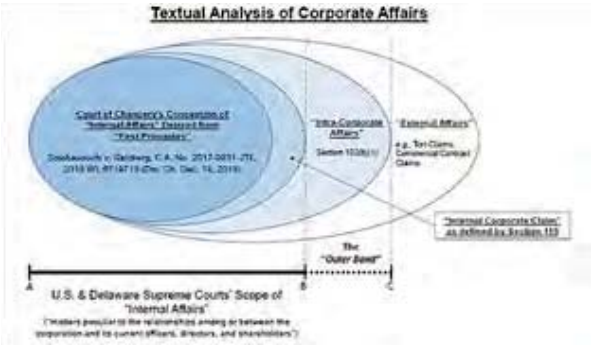
Accordingly, that language, on its face, could include claims arising under Title 8 involving transactions with persons who are not yet stockholders, but who are parties to a stock purchase agreement where jurisdiction is based upon Section 111.

The trial court's main argument for deeming Section 11 claims to be "external" is that they arise from the purchase of shares, as opposed to share ownership. First, that is not necessarily the case.[133] Second, it does not matter as an FFP can survive a facial challenge based upon [**45] claims asserted by existing stockholders. Third, as shown above, our DGCL addresses a number of situations involving the purchase or transfer of shares. FFPs regulating the fora for Section 11 claims involving at least existing stockholders are neither "external" nor "internal affairs" claims. Rather, they are in-between in what might be called Section 102(b)(1)'s "Outer Band," as explained below.

D. FFPs as "Outer Band" Matters—Outside "Internal Affairs," but Within Section 102(b)(1)

The previous discussion lends to the inevitable conclusion that there is a category [*131] of matters that is situated on a continuum between the *Boilermakers* definition of "internal affairs" and its description of purely "external" claims. This conclusion logically follows from the points established thus far: (i) Section 102(b)(1)'s plain language encompasses "intra-corporate" matters that are not necessarily limited to "internal affairs;" (ii) our Delaware definition of "internal affairs" is consistent with the United States Supreme Court precedent; (iii) the Court of Chancery has narrowed our traditional definition of "internal affairs;" and (iv) there are purely "external" [**46] claims, *e.g.*, tort and commercial contract, which are clearly outside the bounds of Section 102(b)(1). These points are illustrated in Figure 1 below:

Figure 1:



Based upon our reasoning above, the universe of matters encompassed by Section 102(b)(1) is greater than the universe of internal affairs matters. This means that there is an area outside of the "internal affairs" boundary but within the Section 102(b)(1) boundary (between points B and C on Figure 1), which, for convenience, we refer to as Section 102(b)(1)'s "Outer Band." It is well-established that matters more traditionally defined as "internal affairs" or "internal corporate [*132] claims" are clearly within the protective boundaries (from points A to B) of *Edgar, McDermott*, and their progeny, where only one State has the authority to regulate a corporation's internal affairs—the state of incorporation. There are matters that are not "internal affairs," but are, nevertheless, "internal" or "intra-corporate" and still within the scope of Section 102(b)(1) and the "Outer Band," represented in Figure 1 between points B to C. FFPs are in this Outer Band, and are facially valid under Delaware law because they are within the statutory scope of Section 102(b)(1), as explained above.

The Court of Chancery unduly constricted the scope of [**47] "internal affairs" by using "first principles." Perhaps this was out of a concern that upholding FFPs might be viewed unfavorably by our sister states and result in jeopardizing even the *Edgar/McDermott*-protected "solid ground" represented from points A to B—the traditional "internal affairs" or "internal corporate claims" territory. But Section 102(b)(1) makes room for FFPs in the Outer Band, even if FFPs are outside the more traditional realm of "internal affairs."

It is potentially problematic for our State to have a definition of "internal affairs" that diverges from, and is narrower than, the long-established definition set forth in *Edgar/McDermott* and their progeny. Further, its narrower focus, based upon self-limiting "first principles," could create confusion and erode the established borders

[133] For a thorough discussion of this point, *see* Joseph A. Grundfest, *The Limits of Delaware Corporate Law: Internal Affairs, Federal Forum Provisions, and Sciabacucchi*, 75 Bus. L. 1319 (2020).

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of the internal affairs doctrine, inviting encroachment from other jurisdictions into matters traditionally governed by that doctrine.

E. FFPs Survive a Facial Challenge as a Policy Matter

The FFPs survive a facial challenge as a policy matter as well. FFPs do not offend federal law and policy, nor do they offend principles of horizontal sovereignty.

1. FFPs Do Not Violate Federal Law or Policy

FFPs do not [**48] violate federal law or policy. We refer to *Rodriquez de Quijas v. Shearson/American Express, Inc.*,[134] where the United States Supreme Court held that federal law has no objection to provisions that preclude state litigation of Securities Act claims. Specifically, the Supreme Court upheld an arbitration provision in a brokerage firm's standard customer agreement that precluded state court litigation of Securities Act claims. In enforcing the provision, the Court described it as "in effect, a specialized kind of forum selection clause" that "should not be prohibited under the Securities Act, since they, like the provision for concurrent jurisdiction [of federal and state courts], serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."[135] The holding in *Rodriguez* provides forceful support for the notion that FFPs do not violate federal policy by narrowing the forum alternatives available under the Securities Act.

The Court of Chancery did not cite *Rodriguez*. It did address *Cyan*, but nothing in *Cyan* prohibits a forum-selection provision from designating federal court as the venue for litigating [**49] Securities Act claims.

Forum-selection provisions traditionally have been evaluated under the *Bremen/Ingres* line of cases. In *Ingres Corp. v. CA, Inc.*, this Court held that forum-selection clauses are presumptively valid and enforceable under Delaware law.[136] *Ingres* follows United States Supreme Court precedent in *M/S Bremen v. Zapata Off-Shore Co*. which requires courts to give as much effect as possible to forum-selection clauses,[137] and to "only deny enforcement of them to the limited extent necessary to avoid some fundamentally inequitable result or a result contrary to positive law."[138] It is unlikely that the [*133] Supreme Court in *Cyan* intended to limit *Rodriguez* or *Bremen* without explicitly discussing those cases.[139] Thus, we think the better view is that *Bremen* and *Rodriguez* still govern the enforcement of such provisions.

Appellee acknowledges that, "[t]here is no tension with the generic federal policy in favor of traditional, contractual, forum-selection clauses," and that, "[i]f sophisticated investors want to bind themselves to a federal forum by contract, they can."[140] He further acknowledges that, "Delaware generally enforces forum-selection provisions contained in a contract." [**50] [141] FFPs, as charter provisions, must be subjected to, and approved by a vote of the stockholders.[142] The logic underlying the validity of traditional contractual forum-selection clauses has some force in this stockholder-

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[134] 490 U.S. 477, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989).

[135] *Id.* at 482-83.

[136] 8 A.3d 1143, 1146 (Del. 2010).

[137] 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). Generally, "charter provisions are presumed to be valid," and the courts will construe them "in a manner consistent with the law rather than strike down" the provisions. *Cedarview*, 2018 Del. Ch. LEXIS 292, 218 WL 4057012, at *20. In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991), the Supreme Court applied *Bremen's* presumption of validity to forum provisions continued in the fine print of cruise line tickets (which provisions were obviously not the subject of bargaining).

[138] *Boilermakers*, 73 A.3d at 949 (citing *Bremen*, 407 U.S. at 15). *See also Bremen*, 407 U.S. at 12 (holding that, "absent some compelling and countervailing reason [a forum-selection clause] should be honored by the parties and enforced by the courts").

[139] "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468, 121 S. Ct. 903, 149 L. Ed. 2d 1 (2001).

[140] Answering Br. at 30 n.116.

[141] *Id.* at n.117; *see also Boilermakers*, 73 A.3d at 953 ("The bylaws cannot fairly be argued to regulate a novel subject matter: the plaintiffs ignore that, in the analogous contexts of LLC agreements and stockholder agreements, the Supreme Court and this court have held that forum-selection clauses are valid.").

[142] 8 *Del. C.* § 242(b).

approved charter context.[143]

Other United States Supreme Court and Delaware Supreme Court cases in other contexts support the position that FFPs are not violative of federal policy. For example, in *Matsushita Electric Industrial Co. v. Epstein*,[144] the United States Supreme Court held that Delaware courts can settle claims subject to exclusive federal jurisdiction without violating federal law or policy. Similarly, in *Nottingham Partners v. Dana*,[145] this Court held that a settlement approved by the Court of Chancery that provided for the *extinguishment* of federal claims was valid and not violative of federal jurisdiction. If it is permissible for a Delaware state court to settle federal claims as part of a state court settlement (resulting in the *extinguishment* of the federal claims), then it follows that a provision in a Delaware corporation's charter requiring stockholders of the corporation to litigate federal claims in federal court is not violative of [**51] federal policy.

2. FFPs and Inter-State Policy

Perhaps the most difficult aspect of this dispute is not with the facial validity of FFPs, but rather, with the "down the road" question of whether they will be respected and enforced by our sister states. If FFPs are not "internal affairs" matters within the traditional *Edgar*/*McDermott* sense, and are not "internal corporate claims" within the meaning of Section 115,[146] then does that suggest [*134] that *Edgar's* protective boundaries may not fully encompass FFPs? Assuming that may be the case, can and should FFPs, nevertheless, be enforced by corporations when plaintiffs challenge them in state court?[147] We believe the answer is "yes."

The question of enforceability is a separate, subsequent analysis that should not drive the initial facial validity inquiry. But we recognize that it is a powerful concern that has infused much of the briefing here. The fear expressed in some of the briefing is that our sister states might react negatively to what could be viewed as an out-of-our-lane power grab. Some say that this perception, in turn, could invite greater scrutiny of even the well-established and respected "internal affairs" territory. Or it could invite a move [**52] towards federalization of our corporate law. These are legitimate concerns. Delaware historically has, and should continue to be, vigilant about not stepping on the toes of our sister states or the federal government.

But there are persuasive arguments that could be made to our sister states that a provision in a Delaware corporation's certificate of incorporation requiring Section 11 claims to be brought in a federal court does not offend principles of horizontal sovereignty—just as it does not offend federal policy.

Given that FFPs are valid under Section 102(b)(1) even though they are not internal affairs matters, what is the proper framework for analyzing matters in this Outer Band? The analytical framework on each end of the continuum is fairly well-established. One commentator has described the framework for internal affairs matters, and for external matters, as follows:

> Typical choice-of-law analysis weighs various factors to determine which state has the most significant relationship to, therefore the greatest interest in regulating, the parties and matters at issue. This is the analysis most courts would apply to determine the law governing the corporation's *external* business activities, such as the corporation's [**53] relationships with its employees, contractors, suppliers, customers, and more broadly the general public.
>
> But with respect to *internal corporate matters*—matters involving the relationship between the corporation, its officers, directors, and shareholders—the internal affairs doctrine provides a different rule. Rather than trying to determine which state has the most significant relationship and interest in regulating these parties, the doctrine focuses instead on a single, decisive factor: the

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[143] *See also Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998) (applying *Bremen* analysis and holding that the anti-waiver provision of the 1933 Act did not void forum clause in international agreements).

[144] 516 U.S. 367, 377, 382, 116 S. Ct. 873, 134 L. Ed. 2d 6 (1996).

[145] 564 A.2d 1089 (Del. 1989).

[146] As stated above, we do not believe Section 11 claims come under Section 115's definition of "internal corporate claims." If they were "internal corporate claims" within the meaning of Section 115, then arguably, they would run afoul of Section 115's requirement that "no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." For a different view on this point, *see* Grundfest, *supra* note 133, at 1378-79.

[147] This question was not a central focus of the briefing before us (which understandably centered on the initial question now before this Court of facial validity).

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corporation's state of incorporation.[148]

Although FFPs are somewhere in-between, the rules for determining the validity of forum-selection provisions in the contractual context lend themselves well to [*135] the corporate charter context in Section 102(b)(1)'s Outer Band area. This is because corporate charters are viewed as contracts among the corporation's stockholders, as we recently reiterated in *BlackRock Credit Allocation Income Trust v. Saba Capital Master Fund, Ltd*.[149]

Typically, in a contractual setting, the party seeking to avoid enforcement of a forum-selection clause bears the burden of establishing that its enforcement would be unreasonable.[150] The subsequent court faced with an enforcement [**54] decision has a number of safety valves, as our own courts have recognized. Relying on the *Bremen/Ingres* principles, this Court recently observed that forum-selection clauses are "presumptively valid."[151] Given that we are addressing a facial challenge, we are not considering hypothetical, contextual situations regarding the adoption or application of FFPs. Such "as applied" challenges are an important safety valve in the enforcement context. As emphasized in *ATP*, whether the specific charter provision is enforceable "depends on the manner in which it was adopted and the circumstances under which it [is] invoked."[152] Charter and bylaw provisions that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.[153]*Bremen* identifies three bases on which forum-selection provisions might be invalidated on an "as applied" basis: (i) they will not be enforced if doing so would be "unreasonable and unjust;" (ii) they would be invalid for reasons such as fraud or overreaching; or (iii) they could be not enforced if they "contravene[d] a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."[154] In this facial [**55] challenge, none of these potential "as applied" challenges are implicated.

Given that many Section 11 claims closely parallel state law breach of fiduciary duty claims, many of the same reasons requiring application of the internal affairs doctrine would support the enforcement of FFPs.[155] As

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[148] Manesh, *supra* note 99, at 8-9 (emphasis added). *See also First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621, 103 S. Ct. 2591, 77 L. Ed. 2d 46 (1983) ("[T]he law of the state of incorporation normally determines issues relating to the *internal affairs* of the corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation . . . . Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue." (first emphasis added)).

[149] 224 A.3d 964, 2020 Del. LEXIS 14, 2020 WL 131370 (Del. Jan. 13, 2020) ("Because corporate charters and bylaws are contracts, our rules of contract interpretation apply.").

[150] *Ingres Corp.*, 8 A.3d at 1146 ("Forum selection [ ] clauses are presumptively valid and should be specifically enforced unless the resisting party [ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching." (citing *Bremen*, 407 U.S. at 15)); *see also Bonnano v. VTB Hldgs., Inc.*, 2016 Del. Ch. LEXIS 24, 2016 WL 614412, at *9 (Del. Ch. Feb. 8, 2016) (finding that under New York law, though forum-selection clauses are presumed valid, the court may refuse to enforce it if the challenging party can show cause); *Drulias v. 1st Century Bancshares, Inc.*, 30 Cal. App. 5th 696, 703, 241 Cal. Rptr. 3d 843 (Cal. Ct. App. 2018) ("Ordinarily, the party seeking to avoid enforcement of a forum selection clause bears the 'burden of establishing that [its] enforcement . . . would be unreasonable.'" (citation omitted)).

[151] *Germaninvestments AG v. Allomet Corp.* 225 A.3d 316, 2020 Del. LEXIS 34, 2020 WL 414426, at * 11 n.63 (Del. Jan. 27, 2020) (citing *Ingres Corp.*, 8 A.3d at 1146); *see also Prestancia Mgmt. Grp., Inc. v. Va. Heritage Found. II LLC*, 2005 Del. Ch. LEXIS 80, 2005 WL 1364616, at *6 n.54 (Del. Ch. May 27, 2005); *Mitek Sys., Inc. v. United Servs. Auto Ass'n*, 2012 U.S. Dist. LEXIS 123716, 2012 WL 3777423 (D. Del. Aug. 30, 2012).

[152] *ATP*, 91 A.3d at 558.

[153] *Id.* (citing *Schnell v. Chris-Craft, Indus., Inc.*, 285 A.2d 437 (Del. 1971)).

[154] *Bremen*, 407 U.S. at 15.

[155] Even if conflicts of law principles of the type typically applied to external claims were applied, these principles support the validity of FFPs. The Restatement (Second) of Conflicts of Laws explains that the needs of predictability and uniformity of result support application of the local law of the state of incorporation. Restatement (Second) of Conflicts of Laws § 302, cmt. e (1971). FFPs are designed to achieve such predictability and uniformity of result. Comment (g) to Section 302 of the Restatement explains that the law of the state of incorporation is applied "almost invariably to determine issues involving matters that are peculiar to corporations." *Id.* at cmt. g. Comment (g) further explains that many factors and the force of precedent support this result "except in the extremely rare situation where a contrary result is required by the overriding interest of another state having its rule applied." *Id.*

this Court noted [*136] in *McDermott*[156] and *VantagePoint*,[157] the internal affairs doctrine raises important Constitutional concerns—namely, under the Fourteenth Amendment Due Process Clause, the Full Faith and Credit Clause, and the Commerce Clause. Due Process concerns address the officers' and directors' rights "to know what law will be applied to their actions," as well as stockholders' "right to know by what standards of accountability they may hold those managing the corporation's business and affairs."[158] As this Court stated in *McDermott*, "full faith and credit commands application of the internal affairs doctrine except in the *rare* circumstance where national policy is outweighed by a significant interest of the forum state in the corporation and its shareholders."[159] The need for uniformity and predictability that FFPs address suggest that they fall closer to the "internal affairs" side of the spectrum, which would argue in favor of deference being given to them.

Further, a well-developed [**56] body of law, including Commerce Clause precedent, already exists to prevent a valid state law from having extraterritorial application.[160] "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts. In either case, any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister states and exceed the inherent limits of the State's power."[161] But as the Court of Chancery recognized in *Boilermakers*, forum-selection provisions "are process-oriented," and are not substantive.[162] They "regulate *where* stockholders may file suit, not *whether* the stockholder may file suit or the kind of remedy that the stockholder may obtain on behalf of herself or the corporation."[163] Thus, FFPs, as procedural [*137] mechanisms, do not offend these constitutional principles.

Finally, Delaware forum provisions sanctioned by *Boilermakers*, and respected by other states in recent years, are arguably more restrictive than FFPs. That is so because they may require non-resident stockholders to litigate their internal affairs claims exclusively in Delaware—potentially far [**57] from their geographic home-base. By contrast, FFPs require that non-residents bring Section 11 claims in federal court (which could be in their home state).

In sum, FFPs, as a facial matter, do not violate principles of horizontal sovereignty.

F. The Fee Award

In view of our decision above, we reverse the fee award.

IV. Conclusion

FFPs are a relatively recent phenomenon designed to address the post-*Cyan* difficulties presented by multi-forum litigation of Securities Act claims. The policies underlying the DGCL include certainty and predictability,[164] uniformity,[165] and prompt judicial resolution to corporate disputes.[166] Our law strives to enhance flexibility in order to engage in private ordering,

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[156] 531 A.2d 206.

[157] 871 A.2d 1108.

[158] *McDermott*, 531 A.2d at 216-17.

[159] *Id.* at 218.

[160] *See Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *see also FdG Logistics LLC v. A&R Logistics Hldgs., Inc.*, 131 A.3d 842, 846 (Del. Ch. 2016) (concluding that A&R's claim under the Delaware Securities Act failed to state a claim for relief because it had not established the requisite factual nexus between the challenged merger and Delaware to trigger application of the act, and observing that A&R's argument that the act automatically applied because of a Delaware choice-of-law provision in the merger agreement "would lead to the bizarre result of converting a blue-sky statute that the Legislature intended to regulate *intrastate* securities transactions into one that would regulate *interstate* securities transactions"). Our Court affirmed that result. *A&R Logistics Hldgs., Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Del. 2016) (Table).

[161] *Edgar*, 457 U.S. at 643 (citation and internal quotation marks omitted).

[162] 73 A.3d at 951.

[163] *Id.* at 951-52; *see also Rodriguez*, 490 U.S. at 482 (finding that the arbitration clause is a procedural provision, and that there is "no sound basis" for construing a prohibition on waiving compliance with any provision of the 1933 Act to apply to the arbitration clause).

[164] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 159 (Del. 1996).

[165] *Carvel v. Andreas Hldgs. Corp.*, 698 A.2d 375, 379 (Del. Ch. 1995).

[166] *Id.*

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and to defer to case-by-case law development. Delaware courts attempt "to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes."[167] FFPs advance these goals.

Our General Assembly has also recognized the need to maintain balance, efficiency, fairness, and predictability in protecting the legitimate interests of all stakeholders, and to ensure that the laws do not impose unnecessary costs on Delaware entities.[168] FFPs do not violate that sense of balance as they allow for litigation [**58] of federal Securities Act claims in a federal court of plaintiff's choosing, but also allow for consolidation and coordination of such claims to avoid inefficiencies and unnecessary costs.[169]

Finally, our DGCL was intended to provide directors and stockholders with flexibility and wide discretion for private ordering and adaptation to new situations.[170] "[T]hat a board's action might involve a new use of plain statutory authority does not make it invalid under our law, and the boards of Delaware corporations have the [*138] flexibility to respond to changing dynamics in ways that are authorized by our statutory law."[171]

For the reasons set forth above, we **REVERSE** the decision of the Court of Chancery.

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[167] *Cantor Fitzgerald v. Chandler*, 1999 Del. Ch. LEXIS 209, 1999 WL 1022065, at *4 (Del. Ch. Oct. 14, 1999).

[168] *See, e.g.*, Del. S.J. Res. 12, 147th Gen. Assem. (2014).

[169] Much of the opposition to FFPs seems to be based upon a concern that if upheld, the "next move" might be forum provisions that require arbitration of internal corporate claims. Such provisions, at least from our state law perspective, would violate Section 115 which provides that, "no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this state." 8 *Del. C.* §115; *see* Del. S.B. 75 syn. ("Section 115 does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, *or an arbitral forum*, if it would preclude litigating such claims in the Delaware courts." (emphasis added)).

[170] *See, e.g., Jones Apparel*, 883 A.2d at 845 ("[Delaware corporations have] the broadest grant of power in the English-speaking world to establish the most appropriate internal organization and structure for the enterprise.").

[171] *Boilermakers*, 73 A.3d at 953. "[O]ur corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs. Merely because the [DGCL] is silent as to a specific matter does not mean that it is prohibited." *Id.*

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Table1 (Return to related document text**)**

[*126] ***Edgar v. MITE Corp.***	***McDermott v. Lewis***	***Sciabacucchi v. Salzberg***
"The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands."[103]	"Internal corporate affairs involve those matters which are peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders."[104]	"A claim under [**35] the 1933 Act does not turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation."[105]

Table1 (Return to related document text**)**

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[104] 531 A.2d at 214 (citing *Edgar*, 457 U.S. at 645 and Restatement (Second) of Conflict of Laws § 313, Comment *a* (1971)).

[105] 2018 Del. Ch. LEXIS 578, 2018 WL 6719718, at *1. The court also stated:

As the sovereign that created the entity, Delaware can use its corporate law to regulate the corporation's internal affairs. For example, Delaware corporate law can specify the rights, powers, and privileges of a share of stock, determine who holds a corporate office, and adjudicate the fiduciary relationships that exist within the corporate form. When doing so, Delaware deploys the corporate law to determine the parameters of the property rights that the state has chosen to create. [**36]

2018 Del. Ch. LEXIS 578, [WL] at *2.

[103] 457 U.S. at 645 (citing Restatement (Second) of Conflict of Laws § 302, Comment *b*, pp. 307-08 (1971)).

Stiner v. Amazon.com, Inc.

Supreme Court of Ohio

April 29, 2020, Submitted; October 1, 2020, Decided

No. 2019-0488

Reporter
2020-Ohio-4632 *; 2020 Ohio LEXIS 2205 **; CCH Prod. Liab. Rep. P20,971

STINER, ADMR., APPELLANT, v. AMAZON.COM, INC., APPELLEE.

Notice: THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

Prior History: APPEAL from the Court of Appeals for Lorain County, 2019-Ohio-586, 120 N.E.3d 885 [**1] .

Stiner v. Amazon.com Inc., 2019-Ohio-586, 2019 Ohio App. LEXIS 617, 120 N.E.3d 885 (Ohio Ct. App., Lorain County, Feb. 19, 2019)

Disposition: Judgment affirmed.

Case Summary

Overview
HOLDINGS: [1]-In an action under the Ohio Products Liability Act, stemming from the death of a teenager after his ingestion of caffeine powder, the court held that an e-commerce company, on whose website the product was purchased from a third-party seller, was not a "supplier" as defined in R.C. 2307.71(A)(15)(a) because when reading the definition of "supplier" in R.C. 2307.71(A)(15)(a)(i) together with the list of entities that were not suppliers found in R.C. 2307.71(A)(15)(b), a person who "otherwise participates in the placing of a product in the stream of commerce" must exert some control over the product as a prerequisite to supplier liability, and the e-commerce company did not have the requisite control over the caffeine powder.

Outcome
Judgment affirmed.

Counsel: Brian K. Balser Co., L.P.A., and Brian K. Balser; and Merriman, Legando, Williams & Klang, L.L.C., Drew Legando, and Edward S. Jerse, for appellant.

Porter, Wright, Morris & Arthur, L.L.P., Joyce D. Edelman, Kathleen M. Trafford, and L. Bradfield Hughes; and Perkins Coie, L.L.P., and Julie L. Hussey, for appellees.

Christopher J. Walker, urging affirmance for amici curiae Chamber of Commerce of the United States of America and Ohio Chamber of Commerce.

Judges: FRENCH, J. O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, and STEWART, JJ., concur. DONNELLY, J., concurs in judgment only, with an opinion.

Stiner v. Amazon.com, Inc.

Opinion by: FRENCH

Opinion

FRENCH, J.

[*P1] This products-liability lawsuit requires us to decide whether appellee, Amazon.com, Inc., has participated in placing [**2] a product in the stream of commerce and therefore can be held liable as a "supplier" under the Ohio Products Liability Act, R.C. 2307.71 et seq. Under the facts of this case, we conclude that Amazon is not a supplier, as defined in R.C. 2307.71(A)(15)(a)(ii). Accordingly, we affirm the judgment of the Ninth District Court of Appeals and conclude that the trial court properly granted summary judgment to Amazon on the product-liability claim of appellant, Dennis Stiner, the administrator of the estate of Logan Stiner.

FACTS AND PROCEDURAL BACKGROUND

[*P2] This lawsuit arises from the tragic death of 18-year-old Logan Stiner, appellant's son. Logan died in May 2014 after ingesting a fatal dose of caffeine powder that he obtained from his friend, K.K. Several months earlier, K.K. went to Amazon's website and performed a product search using the term "pre-workout." Her search generated several products. When she clicked on one of the listed products, Hard Rhino Pure Caffeine Powder appeared as an option. Tenkoris, L.L.C., a third-party vendor, sold the caffeine powder and posted the product on Amazon's website under the storefront name TheBulkSource.

[*P3] Tenkoris listed the powder on the Amazon.com Marketplace. To become a seller on the marketplace, [**3] third-party vendors must agree to the Amazon Services Business Solutions Agreement. The agreement requires third-party vendors to "source, sell, fulfill, ship and deliver" the products they sell on the marketplace. The seller is responsible for ensuring proper packaging of its product, including compliance with all applicable laws and minimum-age, marking, and labeling requirements. The product description displayed to the buyer on the Amazon marketplace comes from the seller, who must provide "accurate and complete Required Product Information for each product or service that [it] make[s] available to be listed through the Amazon Site and promptly update such information as necessary to ensure it at all times remains accurate and complete." The seller sets the price, subject to certain restrictions, including that the seller must maintain price parity between products it sells on the Amazon marketplace and on other sales channels. The seller is "responsible for any non-conformity or defect in, or any public or private recall of, any of [its] Products." While the seller may offer a warranty of its choosing, Amazon does not warrant third-party products sold on the marketplace.

[*P4] Third-party [**4] sellers can choose to use the "Fulfillment by Amazon" program. For a fee, Amazon stores the seller's product in an Amazon fulfillment center until it is purchased, at which point Amazon packages and ships the product to buyers. Tenkoris, however, did not use the Fulfillment by Amazon program to sell the Hard Rhino caffeine powder to K.K. Tenkoris kept the powder in its own inventory, fulfilled the order, packaged it, and shipped it directly to K.K.

[*P5] K.K. purchased the caffeine powder on February 27, 2014. Her purchase order states that the powder is "Sold by: TheBulkSource," provides a link to TheBulkSource's return and replacement policy, and indicates that the buyer should contact TheBulkSource for any questions about the order. According to Tenkoris, Amazon never had possession of the caffeine powder and never physically touched the product.

[*P6] Three months after purchasing the caffeine powder, K.K. poured some into a plastic bag and gave it to her friend Logan. That same day, Logan was found unresponsive in his home and was pronounced dead on the scene. The coroner concluded that Logan had died of cardiac arrhythmia and seizure from acute caffeine toxicity.

[*P7] At the time of K.K.'s purchase, [**5] the Federal Drug Administration ("FDA") had not restricted pure caffeine powder and had not taken a public position that it was dangerous. In July 2014, Amazon removed caffeine-powder listings from its website in response to the FDA's publication of an advisory warning consumers of the dangers of pure powdered caffeine.

[*P8] After Logan's death, Stiner commenced this action against Amazon and its affiliated companies, Tenkoris, K.K., CSPC Pharmaceutical Co. Ltd. (the manufacturer of the caffeine powder), and Green Wave Ingredients, Inc. (the importer). The complaint asserted 12 causes of action, alleging strict product liability and negligence under the Ohio Products Liability Act, violations of the

Ohio Food and Drug Safety Act, supplier negligence, breach of the implied warranty of merchantability, punitive damages, and fraud. Stiner eventually dismissed Tenkoris, Green Wave, and K.K. from the action. Stiner was unable to complete service of process on CSPC Pharmaceutical, a Chinese company.

[*P9] Amazon remained in the lawsuit as the sole defendant. Amazon and Stiner both filed motions for summary judgment. The trial court granted summary judgment to Amazon on all counts and denied Stiner's [**6] motion.

[*P10] The Ninth District affirmed. On appeal, Stiner abandoned all but his claims under the Ohio Products Liability Act and the Ohio Pure Food and Drug Act. The court of appeals noted that Stiner's product-liability claims turned on whether Amazon is a "supplier," defined in R.C. 2307.71(A)(15) as a person who "sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." The court concluded that Stiner could not point to any evidence in the record to establish that Amazon is a supplier within the meaning of the statute. The court also affirmed summary judgment for Amazon on Stiner's claims under the Pure Food and Drug Safety Act.

QUESTIONS PRESENTED

[*P11] This court initially declined to review Stiner's discretionary appeal. 156 Ohio St.3d 1443, 2019-Ohio-2496, 125 N.E.3d 911. But on reconsideration, we accepted the appeal, 156 Ohio St.3d 1487, 2019-Ohio-3331, 129 N.E.3d 461, which presents two propositions of law limited to Stiner's product-liability claims:

> (1) Where an internet provider such as Amazon acts as more than a neutral platform for third-party sales and actively promotes the sale of a deadly product, courts must apply public policy considerations underlying Ohio's consumer protection laws, including incentivizing [**7] safety and shifting risk away from consumers, in determining supplier status.
> (2) An internet provider such as Amazon "otherwise participates in placing a product in the stream of commerce" and is a "supplier" under O.R.C. [2307.71(A)(15)] when it agrees to promote a deadly consumable product, introduces and recommends that product to a consumer, and otherwise uses its influence to lead that consumer to believe the product is safe.

ANALYSIS

Meaning of "supplier" under the Ohio Products Liability Act

[*P12] Stiner asserted four claims under the Ohio Products Liability Act, R.C. 2307.71 et seq. Three of his claims sought to hold Amazon liable for defects in design (R.C. 2307.75), inadequate warnings or instructions (R.C. 2307.76), and failure to conform to representations, (R.C. 2307.77). While these provisions impose liability on manufacturers, Stiner does not contend that Amazon is a manufacturer. Rather, he seeks to impose liability on Amazon by way of R.C. 2307.78(B), which subjects a supplier to product liability "as if it were the manufacturer" under certain circumstances, including if the manufacturer is not subject to judicial process in Ohio or if the claimant cannot enforce a judgment against the manufacturer due to actual or asserted insolvency. R.C. 2307.78(B)(1) and (2) [**8] . Stiner's fourth claim seeks to hold Amazon liable for supplier negligence under R.C. 2307.78(A). Stiner's product-liability and negligence claims therefore all depend on whether Amazon is a "supplier" under the Act.

[*P13] For the purposes of the Act, the definition of a "supplier" includes "[a] person that, in the course of a business conducted for the purpose, sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." R.C. 2307.71(A)(15)(a)(i). Stiner argues that Amazon is a supplier because it participated in the placing of the caffeine powder in the stream of commerce.

[*P14] In construing the definition of "supplier" in R.C. 2307.71, our paramount concern is the General Assembly's intent in enacting the statute. *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003-Ohio-1630, 786 N.E.2d 39, ¶ 12. To discern that intent, we review the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. When interpreting a statute, we must consider the text in its entirety and not just isolated words or phrases. *Vossman v. AirNet Sys., Inc.*, ___ Ohio St.3d ___, 2020-Ohio-872, ___ N.E.3d ___, ¶ 14.

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[*P15] We start with the language immediately preceding the operative catchall provision. A supplier is one who "sells, distributes, leases, prepares, blends, packages, labels, [**9] or *otherwise* participates in the placing of a product in the stream of commerce." (Emphasis added). R.C. 2307.71(A)(15)(a)(i). The phrase "otherwise participates" signifies that the catchall phrase must be read in conjunction with the preceding list of specific actions that may subject a supplier to liability. When, as here, a statute contains a list of specific terms followed by a catchall term linked to the previous list, "we consider the catchall term as embracing only things of a similar character as those comprehended by the preceding terms." *Fraley v. Estate of Oeding*, 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶ 23. "When the initial terms all belong to an obvious and readily identifiable genus, one presumes that the speaker or writer has that category in mind for the entire passage." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012).

[*P16] Applying that rule here, the catchall provision—"otherwise participates in the placing of a product in the stream of commerce"—embraces conduct of a similar character as the sale, distribution, lease, preparation, blending, packaging or labeling of a product. All the specified actions involve some act of control over a product or preparation of a product for use or consumption.

[*P17] The next subsection of the statute further [**10] demonstrates that the General Assembly did not intend to impose supplier liability on persons who do not exercise a requisite level of control over a product. The Act states that the definition of "supplier" does not include "[a]ny person who acts only in a financial capacity with respect to the sale of a product" or a party "who leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor." R.C. 2307.71(A)(15)(b)(iv). This provision recognizes that certain persons may participate in the chain of a product's distribution by providing the financial means for its sale or arranging a lease of the product. But those persons do not become "suppliers" in the absence of control over the product, exhibited by actions such as the selection, possession, maintenance, and operation of the product.

[*P18] The language in R.C. 2307.71(A)(15)(b)(iv) codifies a common-law distinction between a commercial lessor, who can be held strictly liable for supplying or selecting the equipment at issue, and a financial lessor, who participates only in the financing of a transaction. *See Long v. Tokai Bank of California*, 114 Ohio App.3d 116, 123-125, 682 N.E.2d 1052 (2d Dist.1996) (citing *Miles v. General Tire & Rubber Co.*, 10 Ohio App.3d 186, 10 Ohio B. 258, 460 N.E.2d 1377 (10th Dist.1983), and other common-law cases predating the Act). While a financial [**11] lessor may have participated in the delivery of a product into the stream of commerce, courts have recognized that "this tangential participation does not justify the imposition of strict liability." *Id.* at 125. The Act therefore codifies a well-settled principle in products-liability law that strict liability does not extend to every participant in a product's chain of distribution.

[*P19] When reading the definition of "supplier" in R.C. 2307.71(A)(15)(a)(i) together with the list of entities that are not suppliers found in R.C. 2307.71(A)(15)(b), we conclude that a person who "otherwise participates in the placing of a product in the stream of commerce" must exert some control over the product as a prerequisite to supplier liability.

Amazon is not a supplier

[*P20] Based on the understanding that placing a product in the stream of commerce requires some act of control over the product, we conclude that Amazon should not be held liable as a supplier under the Ohio Products Liability Act. Tenkoris, the seller of the caffeine powder, had sole responsibility for the fulfillment, packaging, labeling, and shipping of the product directly to customers. Amazon has no relationship with the manufacturer or entities in the seller's distribution channel. Tenkoris, [**12] not Amazon, decided what to sell on Amazon, and by agreement, took on the responsibility of sourcing the product from the manufacturer until it reached the end user. Tenkoris wrote the product description for the caffeine powder that buyers would see on the Amazon marketplace. K.K.'s purchase order clearly states that the powder is "Sold by: TheBulkSource" and indicates that the buyer should contact TheBulkSource for any questions about the order. And Tenkoris acknowledges that Amazon never had possession of the caffeine powder and never physically touched the product.

[*P21] Stiner points to various factors to argue that Amazon controls all aspects of sales by third-party vendors. According to Stiner, Amazon prevents sellers from contacting customers; retains sole discretion to determine the content, appearance, and design of its website; reserves the right to alter the content of product

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descriptions; and imposes restrictions on pricing. While these factors may demonstrate the degree of control that Amazon seeks to exert in its relationship with sellers, they do not establish that Amazon exercised control over the product itself sufficient to make it a "supplier" under the Act.

[*P22] Other courts, [**13] focusing similarly on the degree of control that Amazon had exerted over a product, have declined to hold Amazon liable for products sold on its marketplace by third-party vendors. In *Allstate N.J. Ins. Co. v. Amazon.com*, *Inc.*, D.N.J. No. 17-2738, 2018 U.S. Dist. LEXIS 123081 (July 24, 2018), the court construed a provision in New Jersey's products-liability act that is similar to Ohio's act. The New Jersey law defined a seller as "any party involved in placing a product in the line of commerce." *Id.* at *19. The court concluded that "control over the product is the touchstone" under that state's law for determining whether a party has the requisite involvement to be a product seller. *Id.* at *20. And it found that Amazon never exercised control over the product sufficient to make it the seller when the third-party seller had decided what to sell, sourced the product from the manufacturer, and ensured the product was properly packaged and complied with all applicable laws. *Id.* at *22-23.

[*P23] The United States Sixth Circuit Court of Appeals also considered Amazon's liability under Tennessee's products-liability law, which also hinged on a seller's degree of control over a product. *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 424-425 (6th Cir.2019). The court found that Amazon could not be held liable for a defective hoverboard sold on its website because it had not chosen to offer the hoverboard [**14] for sale, had not set the price, and had not made any representations about the safety or specifications of the hoverboard on the Amazon marketplace. *Id.* at 425. *See also Carpenter v. Amazon.com, Inc.*, N.D. Cal. No. 17-cv-03221, 2019 U.S. Dist. LEXIS 45317, *13-14 (Mar. 19, 2019) (granting summary judgment to Amazon because plaintiffs did not establish that Amazon's role was integral to the business enterprise and a necessary factor in bringing hoverboards to the consumer market).

[*P24] While not controlling on this court, these decisions demonstrate a prevailing understanding that Amazon's role in the chain of distribution is not sufficient to trigger the imposition of strict liability for defective products sold by third-party vendors on its marketplace.

The policy objectives of products-liability law

[*P25] Stiner argues that our determination whether Amazon is a "supplier" under the Act should take into account the policy objectives of products-liability law, as articulated in 2 Restatement of the Law 2d, Torts, Section 402A (1965), which this court had approved as the state of the law governing products-liability claims in Ohio before the January 5, 1988 effective date of the Act. *See* Am.Sub.H.B. No. 1, 142 Ohio Laws, Part I, 1661, 1757; *see also Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 322, 364 N.E.2d 267 (1977).

[*P26] Stiner relies specifically on *Anderson v. Olmsted Util. Equip.*, *Inc.*, 60 Ohio St.3d 124, 573 N.E.2d 626 (1991), to argue that the [**15] policy considerations evident in the Restatement warrant the imposition of liability on Amazon for placing a product into the stream of commerce. In *Anderson*, this court held that the rebuilder of a defective device could be held strictly liable under Section 402A, even if it did not actually sell the device. *Id.* at 129. In reaching that conclusion, the court noted the rationale in Section 402A for imposing strict liability: "'public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained.'" *Id.* at 128, quoting 2 Restatement, Section 402A, Comment c.

[*P27] This court has recognized that the principles of strict liability in Section 402A developed in order to achieve the policy objectives of promoting product safety and shifting the costs of injuries away from consumers. *Queen City Terminals, Inc., v. Gen. Am. Transp. Corp.*, 73 Ohio St.3d 609, 621, 1995-Ohio-285, 653 N.E.2d 661 (1995). We also presume that the General Assembly knows the common law when it enacts legislation. *Walden v. State*, 47 Ohio St.3d 47, 56, 547 N.E.2d 962 (1989) (Resnick, J., concurring in part and dissenting in part), citing *Davis v. Justice*, 31 Ohio St. 359, 364 (1877). Yet, when the General Assembly enacted the Products Liability Act in 1988, it did not include any language, either codified or uncodified, adopting the policy considerations articulated in [**16] Restatement Section 402A or in our common-law precedent. To the contrary, the General Assembly amended R.C. 2307.71(B), effective April 7, 2005, to add subsection (B), which expressly states that R.C. 2307.71 through 2307.80 "are intended to abrogate all common law product liability claims or causes of action." Am.Sub.S.B. No. 80, 150 Ohio Law 7955, Part V, 7915, 7955. Given this clear statement of legislative intent that the statutory text now controls Ohio's products-liability law, we must discern the General Assembly's intent from the text of the Act itself.

For the reasons we stated earlier, we conclude that the inclusion of the phrase "otherwise participates in the placing of a product in the stream of commerce" in R.C. 2307.71(A)(15)(a)(i) means that a person must exert some control over the product as a prerequisite to supplier liability. Stiner has not shown that Amazon exercised the requisite amount of control over the caffeine powder sold on its marketplace.

[*P28] But even if we were to consider the policy objectives of products-liability law predating the Act, Stiner has not demonstrated that holding Amazon liable would promote product safety. Because Amazon does not have a relationship with the manufacturers of third-party products, Amazon lacks control over product safety. Amazon [**17] did not choose to offer the caffeine powder for sale and has no role in manufacturing, labeling or packaging the product. While Amazon can address safety issues by suspending or removing sellers, Amazon's control over its website does not establish that Amazon is in a position to eliminate the unsafe character of products in the first instance. Under the facts of this case, Stiner has not demonstrated that Amazon was in a position to safeguard the quality and safety of the caffeine powder before it entered the stream of commerce.

[*P29] Finally, Stiner points to Amazon's retail dominance to argue that Amazon is the party best positioned to compensate injured consumers and to allocate those costs to itself and third-party vendors. Stiner's arguments for cost-spreading and risk allocation, however, implicate policy concerns that we reserve for the General Assembly to address.

CONCLUSION

[*P30] Under the facts of this case, we find that Amazon is not a supplier, as defined in R.C. 2307.71(A)(15)(a), for the purposes of the Ohio Products Liability Act. Accordingly, we affirm the judgment of the Ninth District Court of Appeals and conclude that the trial court properly granted summary judgment to Amazon on the product-liability [**18] claims of Stiner.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY, FISCHER, DEWINE, and STEWART, JJ., concur.

DONNELLY, J., concurs in judgment only, with an opinion.

Concur by: DONNELLY

Concur

DONNELLY, J., concurring in judgment only.

[*P31] Reluctantly, I agree that the definition of "supplier" in the Ohio Products Liability Act, R.C. 2307.71 et seq., is worded in such a way that it does not allow us to incorporate in it the role that appellee, Amazon.com, plays when a sale on its website is fulfilled by a third-party merchant. I disagree, though, with the notion that it would not promote the purpose of products-liability law to hold Amazon liable for unsafe products that would not reach consumers but for the consumers' decision to shop on Amazon's website. To the contrary, the failure to hold Amazon liable for injuries to its customers thwarts the purpose of products-liability law because it puts Amazon's customers at risk of being injured by a seller that can easily make itself unreachable for redress. The use of strict liability would incentivize Amazon to select and monitor reputable merchants with safer products just as strict liability incentivizes sellers to select safer products that are sourced from reputable wholesalers [**19] or manufacturers.

[*P32] The Ohio Products Liability Act states that a "supplier" is a person that "sells, distributes, leases, prepares, blends, packages, labels, or otherwise participates in the placing of a product in the stream of commerce." R.C. 2307.71(A)(15)(a)(i). Although the catchall phrase "otherwise participates" is extremely broad, the canon of ejusdem generis requires us to limit a broad phrase that follows specific examples to items similar to those specific examples. *See Yates v. United States*, 574 U.S. 528, 545, 135 S.Ct. 1074, 191 L.Ed.2d 64 (2015). Accordingly, the Act considers a person participating in placing a product in the stream of commerce to be akin to a person selling, distributing, leasing, preparing, blending, packaging, or labeling a product.

[*P33] When the Ohio Products Liability Act became effective in 1988, Am.Sub.H.B. No. 1, 142 Ohio Laws, Part 1, 1661, we were still in the pre-Internet age, when brick-and-mortar retail was the norm and even mail-order retailers facilitated their own sales and fulfilled their own orders. *See* Thompson, *The History of Sears Predicts Nearly Everything Amazon Is Doing*, The Atlantic (Sept. 25, 2017), available at https://www.theatlantic.com/business/archive/2017/09/sears-predicts-amazon/540888/ (accessed Sept. 8,

2020) [https://perma.cc/F47L-TY6J]. [**20] We did not yet have a product-distribution model involving a virtual company providing the face of a retail sale, publishing information about products for sale, engaging in all customer interactions regarding a sale, taking the customer's payment during a sale, ensuring that the product is received by the customer in exchange for that payment, and handling returns and other customer-service issues arising from that sale, all without ever owning, possessing, or even seeing the product that was sold. Thus, when the Act became effective, the General Assembly undoubtedly had seller-facilitated and seller-fulfilled sales in mind. We should remember that the descriptors used in R.C. 2307.71(A)(15)(a)(i) to explain the meaning of "supplier" reflect the paradigm of retail sales in the 1980s; they need not be viewed as bedrock concepts that dictate our understanding of the purpose behind the Act.

[*P34] Applying the 1980s retail-sales paradigm to modern e-commerce produces results that strike me as inequitable. The Act applies to a person with a role as minor as placing a sticker on a product but not to a person that controls every single aspect of placing a product in the stream of commerce except for transferring ownership [**21] or physically controlling the product. The Act applies to a mom-and-pop retail store with a small, exclusively local customer base, but not to a business that is responsible for hundreds of millions of dollars' worth of retail sales in Ohio.[1] Indeed, the Act does not address many of the contemporary standards in technology, communications, and commerce—standards that have changed radically since 1988. The divide between the pre-Internet age and the current age is so profound that laws like this Act might as well have been written in the stone age. Notwithstanding all the foregoing, though, this court cannot modernize the Act by judicial fiat; we must apply the statutory scheme as it is currently written. *See State ex rel. Carna v. Teays Valley Local School Dist. Bd. of Edn.*, 131 Ohio St.3d 478, 2012-Ohio-1484, 967 N.E.2d 193, ¶ 18-20. So, in the stone age we must remain.[2]

[*P35] If the purposes and policy objectives at the foundation of products-liability law were taken into consideration, however, I believe that those objectives would be well-served by holding Amazon liable for unsafe, defective products that it allows its customers to purchase on its website. The fundamental purpose of the products-liability law is to [**22] protect consumers from harm, particularly to protect them from suffering harm without recourse. *See* Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1122-1123 (1960). The mechanism historically used to accomplish the purpose of consumer protection is to incentivize manufacturers to make safe products, to incentivize wholesalers to choose safe, reputable manufacturers, and to incentivize sellers to choose safe, reputable wholesalers. *See generally Brooks v. Beech Aircraft Corp.*, 1995- NMSC 043, 120 N.M. 372, 376, 902 P.2d 54 (1995), citing *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256, 262-263, 37 Cal.Rptr. 896, 391 P.2d 168 (1964). The mechanism used to ensure that consumers have recourse for any harm caused is to apply strict liability along the entire supply chain. By doing so, we ensure that at least one entity along that line—most likely the one with direct contact with the consumer—will be reachable by the consumer. Cavico Jr., *The Strict Tort Liability of Retailers, Wholesalers, and Distributors of Defective Products*, 12 Nova L.Rev. 213, 221-222 (1987); *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F.Supp.3d 964, 970 (W.D.Wis.2019) ("sellers and distributors are liable, not because of any particular activity on their part, but because they are proxies for the absent manufacturer").

[*P36] Even if Amazon cannot be considered a supplier in the traditional, pre-Internet sense, I believe that its all-encompassing participation in the sales transactions of its third-party [**23] merchants places Amazon squarely on the supply chain, between the seller and the consumer. Amazon plays the role of the seller by taking all customer orders, handling all payment processing, guaranteeing shipment terms, and processing returns. *State Farm*, 390 F.Supp.3d at 972. It even exceeds the role of the seller because it directly controls third-party merchants' pricing through explicit restrictions. Doyer, *Who Sells? Testing Amazon.com for Product Defect Liability in Pennsylvania and Beyond*, 28 J.L. & Pol'y 719, 748 (2020), discussing *Oberdorf v. Amazon.com Inc.*,

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[1] One source estimated that Amazon collected approximately $310 million in sales taxes to be paid to Ohio in 2018. Exner, *Amazon's huge impact on Ohio's sales tax base: Numbers Behind the News* (June 4, 2019), available at https://www.cleveland.com/datacentral/2019/06/amazons-huge-impact-on-ohios-sales-tax-base-numbers-behind-the-news.html (accessed Sept. 8, 2020) [https://perma.cc/3CME-5XTW].

[2] I take heart in the fact that the majority has emphasized that Amazon is not subject to the Ohio Products Liability Act *under the facts of this case*. The decision today does not foreclose the possibility that Amazon constitutes a "supplier" under R.C. 2307.71(A)(15)(a)(i) in all contexts other than sales that are fulfilled by third parties.

930 F.3d 136, 149 (3d Cir.2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir.2019).

[*P37] Perhaps even more importantly, Amazon exceeds the role of the seller because it indirectly controls the pricing of all products through its "proprietary 'Buy Box' system," its "inherent position of competition" with its third-party merchants, and its ability to collect and exploit all merchants' business data to drive down prices. *Id.* at 754, 756. Amazon controls all communication with the customer—"[t]hird-party sellers * * * are prohibited from communicating with Amazon customers except through the Amazon website, where such interactions are anonymized," *Bolger v. Amazon.com, L.L.C.*, __ Cal.Rptr.3d __, 53 Cal.App.5th 431, *11 (2020)—and Amazon is the party that customers will most likely be able to reach for any matter, including a products-liability lawsuit. Because [**24] Amazon is so deeply involved in the chain of distribution leading to the Amazon customer, Amazon is well positioned to monitor third-party sellers and their products and to limit its e-commerce services to reputable third-party sellers that select safer products, just as sellers are in a position to select safer products that are sourced from reputable wholesalers or manufacturers.

[*P38] The majority maintains that even if the court were to consider policy objectives, holding Amazon liable in this case would not promote the policy objectives of products-liability law, because Amazon does not have a relationship with the manufacturers of the third parties' products, does not choose the products to be sold, and does not make any choices about their preparation or marketing. But the majority's position merely identifies what Amazon is *not* obligated to do under the Ohio Products Liability Act, not what Amazon *should* be obligated to do to satisfy policy objectives. The fact that the limited wording of the Act leaves a gap that allows e-commerce entities like Amazon to evade any obligation does not mean that there is a corresponding gap in the policy underlying the law; it means that the Act is [**25] failing to fully realize its purpose.

[*P39] The central mechanism of products-liability law is to force members of the supply chain to make safer decisions about products that reach consumers. Amazon is the final stop in the supply chain, and it is capable of making decisions about third-party sales that would better protect Amazon's customers from defective, hazardous products. Accordingly, from a policy standpoint, the objectives underlying products-liability law would be accomplished by treating Amazon—in the context of its sales fulfilled by third parties—the same way it treats sellers.

[*P40] Closing the obligation gap in the Ohio Products Liability Act for actors like Amazon would ensure the utmost protection that Ohio consumers deserve. But as the majority says, such policy concerns are for the General Assembly, not this court, to address. Accordingly, I concur in judgment only.

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EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.

United States Court of Appeals for the Sixth Circuit

April 15, 2020, Filed

File Name: 20a0215n.06

Case Nos. 19-5836/5838

Reporter
810 Fed. Appx. 389 *; 2020 U.S. App. LEXIS 12158 **; 2020 FED App. 0215N (6th Cir.)

EPAC TECHNOLOGIES, INC., Plaintiff-Appellant/Cross-Appellee, v. HARPERCOLLINS CHRISTIAN PUBLISHING, INC., fka Thomas Nelson, Inc., Defendant-Appellee/Cross-Appellant.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: [**1] ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

Epac Techs., Inc. v. Harpercollins Christian Publ., Inc., 362 F. Supp. 3d 446, 2019 U.S. Dist. LEXIS 33377 (M.D. Tenn., Feb. 27, 2019)

EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc., 398 F. Supp. 3d 258, 2019 U.S. Dist. LEXIS 109693 (M.D. Tenn., July 1, 2019)

Case Summary

Overview

HOLDINGS: [1]-In an action brought by a book printer against a publisher, the choice-of-law provision in the parties' contract applied to the printer's promissory fraud claim under Tennessee contract law because that claim put the validity of the contract in issue, and such a claim appeared to be encompassed by the language; [2]-The publisher's claim for a new trial based on spoliation adverse inference instructions failed because the instructions were merely permissive, in accordance with Fed. R. Civ. P. 37(e)(1). Only mandatory adverse instructions required a culpable state of mind in the destruction of evidence; [3]-The district court did not err in denying the publisher's motion for attorneys' fees because it was entitled to only the fees spent defending the claim on which it prevailed and failed to separate out its fees so that the court could sufficiently determine reasonable fees.

Outcome
Judgment affirmed.

Counsel: For Epac Technologies, Inc. (19-5836, 19-5838), Plaintiff - Appellant Cross-Appellee: Timothy Travelstead, Attorney, Narayan Travelstead P.C., Pleasanton, CA.

For Harper Collins Christian Publishing, Inc., fka: Thomas Nelson, Inc. (19-5836, 19-5838), Defendant - Appellee Cross-Appellant: Steven A. Riley, Keane Addison Barger, David Alexander Fardon, John R.

EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.

Jacobson, Riley, Warnock & Jacobson, Nashville, TN.

Judges: BEFORE: SUTTON, McKEAGUE, and DONALD, Circuit Judges.

Opinion by: McKEAGUE

Opinion

[*391] **McKEAGUE, Circuit Judge**.

What should have been a "simple" contract dispute—as the district court labeled [*392] this case at the summary judgment stage—has cost both parties millions of dollars in attorneys' fees and years of litigation. This dispute started when defendant Thomas Nelson, Inc. (acquired by HarperCollins Christian Publishing, Inc.) prematurely terminated a Master Services Agreement ("MSA") it had executed with plaintiff EPAC Technologies, Inc. EPAC sued, bringing numerous claims. Most claims were thrown out before trial, with only two claims going to the jury: breach of the MSA and fraudulent concealment. The jury returned [**2] a verdict in EPAC's favor on both claims. But the district court granted judgment notwithstanding the verdict in Thomas Nelson's favor on the fraudulent concealment claim. EPAC now appeals and Thomas Nelson cross appeals. We affirm.

I. FACTUAL BACKGROUND

EPAC is a book printer, and by 2008, EPAC was implementing a new, highly-automated digital "print-on-demand" process called EPAC2, which would allow it to print smaller quantities of books quickly (even having the capability of a 24-hour turnaround).

Thomas Nelson is an established book publisher that takes content from authors and other services and develops that content into consumable products such as print books, electronic books, and audiobooks. To meet its printing needs, Thomas Nelson contracts with various third-party printers, and its contracts vary by book type (including hard cover, soft cover, and color feature), turnaround time, and volume.

The parties first made contact in 2007 when EPAC's Senior Vice President for Sales and Marketing, Robert Cubelo, cold-called George Gower, a Thomas Nelson executive. At the time, Thomas Nelson was working with over 15 printers, and the parties began discussing whether EPAC could be one [**3] of Thomas Nelson's printers. Thomas Nelson was interested from the start because it was looking to reduce its inventory costs. Thomas Nelson eventually toured EPAC's Edison, New Jersey plant with Robert Cubelo and Sasha Dobrovolsky, EPAC's CEO. Before touring, Thomas Nelson signed a Confidentiality and Non-Disclosure Agreement ("CNDA"), which is at issue in this appeal. Through 2008 and 2009, the parties continued discussions and negotiations.

Critical to this appeal is how the two parties define this period. EPAC argues that the parties discussed forming a relationship and a "partnership," and the parties didn't wait until an agreement had been formalized before they started integrating their data sharing systems. EPAC claims Thomas Nelson wanted to team up with EPAC to fundamentally change the logistics of its business. According to EPAC, Thomas Nelson suggested EPAC build a printing facility inside of the Thomas Nelson warehouse in Nashville. And EPAC opened a new printing facility in Fairfield, Ohio using the EPAC2 printing system to meet the expected printing needs of Thomas Nelson. On the other hand, Thomas Nelson characterizes this time as a period of extensive arm's-length contract [**4] negotiations.

The parties, both represented by counsel, finally executed the MSA in the summer of 2010. The contract was highly negotiated, and it went through more than ten versions. The MSA obligated Thomas Nelson to purchase certain categories of books from EPAC:

> Customer will order from EPAC all of Customer's requirements of 1-color softbound books that are in formats that EPAC supports . . . and that are defined by Customer as either Print-on-Demand, Short-Run, and Mid-Run but specifically [*393] excluding Web Offset/IRON. For avoidance of doubt and to be clear, titles with quantities exceeding 1,500 units are herein defined as Web/Offset/IRON. Print-on-Demand titles are defined to mean titles delivered with one day (1) turnaround in any quantity up to 499 units per title . . . . Short-Run titles are defined to mean titles delivered with four days (4) turnaround in quantities up to 499 units per title. Mid-Run titles are defined to mean titles delivered within seven (7) business days in quantities of 500 to 1,500 units per title.

The MSA provided for a five-year deal and for the primary production of books to occur at EPAC's Fairfield, Ohio facility, which was closest to Thomas Nelson's [**5] location.

Several circumstances surrounding the signing of the MSA are at issue in this appeal. Leading up to the execution of the MSA, Thomas Nelson was continuing discussions with one of its vendors, Lightning Source, Inc. Again, Thomas Nelson had various vendors to fill its needs. Thomas Nelson had a contract with Lightning Source, which had previously handled Thomas Nelson's digital printing needs—the same line of business arguably covered by the MSA. EPAC knew about Thomas Nelson's relationship with Lightning Source but claims that Thomas Nelson "confirmed that EPAC would be the exclusive printer" for this area of business, except for a "handful of some old, very small volume books," where Lightning Source, rather than Thomas Nelson, owned the electronic files. So, at the very least, EPAC knew that Thomas Nelson still had some obligations to Lightning Source.

On the other hand, Thomas Nelson claims the MSA did not require it to use EPAC as the exclusive printer for all 1-inch, softbound books for orders of 1,500 or less. It was required only to use EPAC for the categories of books described above—those books defined as Print-on-Demand, Short Run, and Mid Run. And so, Thomas Nelson [**6] decided to go with both vendors. Indeed, in June 2010, Thomas Nelson informed Lightning Source that some of the work covered by Lightning Source would be shifted to EPAC, per the MSA. On July 6, 2010, at Thomas Nelson's request, EPAC signed the MSA. After EPAC signed the MSA, Thomas Nelson continued to discuss pricing with Lightning Source. Lightning Source even submitted offers to reduce its pricing. Thomas Nelson finally executed the MSA on July 16, 2010. And then in November, Thomas Nelson signed a contract with Lightning Source. Again, EPAC knew that Thomas Nelson was still working with Lightning Source for at least some purposes.

Thomas Nelson began ordering books from EPAC, and the parties ran into trouble from the start. Thomas Nelson constantly complained about the quality, saying there was scuffing, chipping, and out-of-square edges. In February 2011, Thomas Nelson sent a formal notice of breach to EPAC, describing the ongoing quality issues and invoking the MSA's 60-day cure period. Right before the end of the cure period, Thomas Nelson said "the quality seemed to be good." EPAC indicated it would be best for the parties to revisit the contract, especially taking a look at [**7] the volume terms. The parties never revised the MSA, and in April 2011, Thomas Nelson terminated the MSA.

II. PROCEDURAL HISTORY

EPAC filed its first complaint against Thomas Nelson in May 2012, alleging breach of contract (including breach of the CNDA and the MSA), breach of the implied covenant of good faith and fair dealing, unfair competition under California Business and Professional Code § 17200 et seq., [*394] promissory fraud, fraudulent concealment, unfair and deceptive acts under the Tennessee Consumer Protection Act, and negligence per se.

At the summary judgment stage, all but four claims were resolved. One issue in this appeal concerns the district court's grant of summary judgment for Thomas Nelson on the promissory fraud claim. As the basis for this claim, EPAC alleged that Thomas Nelson, by contracting with Lightning Source in addition to EPAC, knew that it would not perform under the contract but entered into the agreement with EPAC anyway. The district court found that New York law applied and foreclosed a claim of promissory fraud when there was also a breach of contract claim. EPAC challenges this ruling on appeal.

The remaining claims went to trial: breach of the CNDA;[1] breach of the MSA; and fraudulent concealment. At the close [**8] of EPAC's case-in-chief, Thomas Nelson moved under Federal Rule of Civil Procedure 50(a) for judgment as a matter of law on all the claims. The court granted Thomas Nelson's motions as to the breach of the CNDA. EPAC alleged that Thomas Nelson breached the CNDA when it disclosed the pricing terms and delivery terms they were discussing to Lightning Source. However, the district court found that if any breach occurred, it occurred outside of the one-year time limit specified. The district court took under advisement, and then eventually denied, Thomas Nelson's motion with respect to the fraudulent concealment claim. For that

[1] The district court stated that two claims, one for a breach of the CNDA and one for a breach of "a separate Non-Disclosure Agreement" went to trial. But the district court analyzed only the breach of the CNDA, which contains two provisions (Section 3 and Section 6) governing various non-disclosure mandates. Moreover, the parties make clear that there is only one confidentiality and non-disclosure agreement that is at issue and in evidence in this case.

claim, EPAC alleged Thomas Nelson concealed the fact it was negotiating with Lightning Source to obtain lower pricing for orders it was required to send to EPAC. The district court also denied Thomas Nelson's motion with respect to the breach of the MSA claim, in which EPAC argued Thomas Nelson breached the MSA by terminating the agreement after just one year. Thomas Nelson renewed its motion at the close of its own case, but the district court declined to revisit the issues.

Those two claims—fraudulent concealment and breach of the MSA—went to the jury. And the jury returned a verdict for EPAC on both [**9] claims, awarding $3 million in compensatory damages for the breach of the MSA claim, as well as $60,000 in compensatory damages and $12 million in punitive damages for the fraudulent concealment claim. Thomas Nelson renewed its motion for judgment as a matter of law and, alternatively, moved for a new trial. The district court denied Thomas Nelson's motion as to the breach of the MSA claim, letting the jury verdict and damages award stand. The district court granted Thomas Nelson's motion as to the fraudulent concealment claim, finding that Thomas Nelson did not have a duty to disclose, which is necessary to maintain a fraudulent concealment claim.

EPAC appealed, challenging the district court's (a) grant of Thomas Nelson's Rule 50(b) motion for judgment notwithstanding the verdict for the fraudulent concealment claim; (b) grant of summary judgment on the promissory fraud claim, and (c) judgment as a matter of law on the breach of the CNDA claim. Thomas Nelson cross appealed, arguing it is (a) entitled to reduced damages or a new trial for the [*395] breach of the MSA claim and (b) entitled to attorneys' fees for the breach of the CNDA claim.

III. ANALYSIS

A. Fraudulent Concealment Claim

EPAC alleged that [**10] Thomas Nelson had a duty to disclose "that it had fraudulently obtained new pricing or otherwise improved terms for the same services from another vendor." The jury agreed and returned a verdict in favor of EPAC, but the district court found otherwise, holding that there was no duty to disclose because EPAC and Thomas Nelson were simply negotiating at arm's-length—a fact that forecloses a fraudulent concealment claim. EPAC appeals this finding, arguing numerous errors. Chief among these are that the district court applied the wrong law, erroneously treated the question as one of law, and consequently applied the wrong standard of review. While the district court's analysis was less than perfect, the ultimate conclusion reached is correct and we can affirm on different grounds. *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002).

1. Applicable Law

We review the district court's application of law de novo. *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). In Tennessee, the "tort of fraudulent concealment is committed when a party who has a duty to disclose a known fact or condition fails to do so, and another party reasonably relies upon the resulting misrepresentation, thereby suffering injury." *Shah v. Racetrac Petroleum Co.*, 338 F.3d 557, 571 (6th Cir. 2003) (citing *Chrisman v. Hill Home Dev., Inc.*, 978 S.W.2d 535, 538-39 (Tenn. 1998)). The duty to disclose arises in three circumstances: (1) where there is a previous [**11] fiduciary relation; (2) where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other; and (3) when the contract or transaction is intrinsically fiduciary. *Id.* (citing *Domestic Sewing Mach. Co. v. Jackson*, 83 Tenn. 418, 425 (1885)). Only the second type of relationship—one of trust and confidence—is at issue here. Our circuit has made clear that "Tennessee law defines a confidential relationship as one created when confidence is placed by one on the other and the recipient of that confidence is the dominant personality with the ability because of that confidence to influence and exercise dominion over the weaker or dominated party." *Id.* (citation and quotation marks omitted). Whether there is a requirement that one party exercise dominion and influence over the other is at the heart of the parties' arguments.

We have consistently held there is a requirement of dominion and influence. *See Shah*, 338 F.3d at 571; *McGuirk Oil Co. v. Amoco Oil Co.*, 889 F.2d 734, 737-38 (6th Cir. 1989); *Edwards v. Travelers Ins. of Hartford*, 563 F.2d 105, 115 (6th Cir. 1977). And there's no clear indication from the Tennessee courts that *Shah, Edwards*, and *McGuirk* were wrongly decided—which could warrant reconsidering those decisions. *See Blaine Constr. Corp. v. Ins. Co. of N. Am.*, 171 F.3d 343, 350 (6th Cir. 1999) (noting that a panel cannot reconsider a binding decision "absent an indication by the Tennessee courts that they would have decided" the [**12] case

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differently).

Despite this clear precedent, EPAC challenges the district court's legal analysis on two grounds. First, even if dominion and influence is a requirement, it is limited to equitable contexts. And second, Tennessee recognizes an alternative way to find a duty to disclose, which does not require a showing of a relationship of trust and confidence. Both arguments fail.

[*396] First, the requirement of dominion and influence is not limited to equitable contexts to determine whether undue influence is present. *See Condo. Mgmt. Assocs. v. Fairway Vill. Owner's Ass'n*, No. W2009-00688-COA-R3-CV, 2010 Tenn. App. LEXIS 105, 2010 WL 424592, at *8 (Tenn. Ct. App. Feb. 8, 2010); *Foster Bus. Park, LLC v. Winfree*, No. M2006-02340-COA-R3-CV, 2009 Tenn. App. LEXIS 45, 2009 WL 113242, at *13 (Tenn. Ct. App. Jan. 15, 2009).

Second, EPAC is wrong to argue that the jury instructions should have included an alternative ground for finding a duty to disclose: that a party to a contract may have a duty to disclose (so there need not be a showing of a relationship of trust and confidence).

According to EPAC, Tennessee courts have adopted the Restatement (Second) of Torts § 551, which establishes that "each party to a contract is bound to disclose to the other all he may know respecting the subject matter materially affecting a correct view of it." *Simmons v. Evans*, 185 Tenn. 282, 206 S.W.2d 295, 296 (Tenn. 1947) (quoting *Perkins v. M'Gavock*, 3 Tenn. 415, 417 (Tenn. 1813)); *GuestHouse Int'l, LLC v. Shoney's N. Am. Corp.*, 330 S.W.3d 166, 196 (Tenn. Ct. App. 2010). This is known as the "*Simmons* rule." [**13] But again, we are bound by our precedent that says the *Simmons* rule wouldn't apply here—absent a clear indication from the Tennessee Supreme Court that we were previously wrong.

In *Shah* (in 2003), we found the *Simmons* rule limited to real estate purchases and car sales and we "decline[d] to anticipate that the Tennessee Supreme Court would extend the *Simmons*" cases to the context of a franchise (or similar) dispute. *Shah*, 338 F.3d at 572 n.9. And this remains true. *See Stanfill v. Mountain*, 301 S.W.3d 179, 185 (Tenn. 2009) (involving real property); *Fayne v. Vincent*, 301 S.W.3d 162, 177 (Tenn. 2009) (same).

EPAC cites to *Bearden v. Honeywell Int'l Inc.*, which found that "since *Shah* was decided in 2003, Tennessee courts have repeatedly applied *Simmons* in contexts other than car and real estate sales." 720 F. Supp. 2d 932, 940 (M.D. Tenn. 2010). True, to an extent. Since *Shah*, district courts have recognized Tennessee law surrounding fraudulent concealment is somewhat unsettled. *See id.* at 939-41; *Myers v. Peoples Bank of Ewing*, No. 3:11-CV-380, 2012 U.S. Dist. LEXIS 112979, 2012 WL 3288179, at *5 (E.D. Tenn. Aug. 10, 2012).

But the law is not as unsettled as EPAC makes it out to be and it certainly is not "clear" that the Tennessee Supreme Court would extend the *Simmons* rule to EPAC's claim here. Tennessee courts still apply the *Simmons* rule only to sales of physical property or to disputes tangentially related to real estate (like construction [**14] disputes). *See, e.g., Classic City Mech., Inc. v. Potter S. E., LLC*, No. E2015-01890-COA-R3-CV, 2016 Tenn. App. LEXIS 765, 2016 WL 5956616, at *14-15 (Tenn. Ct. App. Oct. 14, 2016); *Case Handyman Serv. of Tenn., LLC v. Lee*, No. M2011-00751-COA-R3-CV, 2012 Tenn. App. LEXIS 384, 2012 WL 2150857, at *1, 7 (Tenn. Ct. App. June 13, 2012); *Robert J. Denley Co., Inc. v. Neal Smith Constr. Co., Inc.*, No. W2006-00629-COA-R3-CV, 2007 Tenn. App. LEXIS 229, 2007 WL 1153121, at *1, 6 (Tenn. Ct. App. Apr. 19, 2007).

EPAC cites to only one case, *GuestHouse Int'l, LLC v. Shoney's N. Am. Corp.*, where a Tennessee court applied the *Simmons* rule to a licensing agreement dispute. 330 S.W.3d 166, 196 (Tenn. Ct. App. 2010). But *GuestHouse* is the outlier, and we can't anticipate Tennessee will expand the *Simmons* rule to service agreements based on one outlier. Moreover, *GuestHouse* related to a sale of service marks for a motel business—sales tangentially related to real estate. *Id.* at 169. [*397] And this even fits the limited scope to which the *Simmons* rule is applied.

The district court therefore applied Tennessee law correctly when it found that a duty to disclose requires a showing of dominion and influence and refused to instruct the jury on the *Simmons* rule.

2. Standard of Review Under Tennessee Law

Apart from applying the correct law for a claim of fraudulent concealment, the district court's analysis of Thomas Nelson's Rule 50(b) motion is flawed. Yet even so, the end result does not change. We also find there was no duty to [**15] disclose. *See Abercrombie & Fitch Stores, Inc.*, 280 F.3d at 629 (noting court of appeals can affirm on different grounds supported by the record).

To review a motion under Rule 50(b), "[a] federal court exercising its diversity jurisdiction applies the law of the

state whose substantive law governs the action to determine whether to grant or deny a motion for judgment as a matter of law based on insufficiency of the evidence." *Estate of Riddle ex rel. Riddle v. S. Farm Bureau Life Ins. Co.*, 421 F.3d 400, 408 (6th Cir. 2005) (citing *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 506 (6th Cir. 1998)). However, legal determinations (even in diversity cases) are always reviewed de novo. *Zurich Ins. Co.*, 97 F.3d at 176. The Tennessee standard of review provides:

> In ruling on the motion, the court must take the strongest legitimate view of the evidence in favor of the non-moving party. In other words, the court must remove any conflict in the evidence by construing it in the light most favorable to the nonmovant and discarding all countervailing evidence. The court may grant the motion only if, after assessing the evidence according to the foregoing standards, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence.

State Indus., Inc. v. Twin City Fire Ins. Co., 158 F. App'x 694, 696 (6th Cir. 2005) (citing *Conatser v. Clarksville Coca-Cola Bottling Co.*, 920 S.W.2d 646, 647 (Tenn. 1995)).

As an initial matter, the question of whether a confidential relationship exists, giving rise to a duty to disclose, is a question of fact. *Matlock v. Simpson*, 902 S.W.2d 384, 385 (Tenn. 1995) ("[T]he issue of whether or [**16] not a confidential relationship existed, if not admitted, was a question of fact.") (emphasis removed); *Condo. Mgmt. Assocs.*, 2010 Tenn. App. LEXIS 105, 2010 WL 424592, at *8; *see also U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967, 200 L. Ed. 2d 218 (2018).

The district court mistakenly applied the federal standard of review for a motion under Rule 50(b). Whether the Tennessee and federal standards differ is beside the point. It's clear the district court didn't view the evidence in the light most favorable to EPAC. Instead, it analyzed all the evidence that shows an arm's length transaction (arguably, all the evidence that favors Thomas Nelson's theory of the claim), not EPAC's material evidence presented to show something more than an arm's length transaction.

Tennessee law requires us to take all of *EPAC's* material facts that show dominion and control. *See In re Estate of Blackburn*, 253 S.W.3d 603, 613 (Tenn. Ct. App. 2007). And when reviewing a Rule 50(b) motion, we cannot weigh evidence or stand as the thirteenth juror. *Mairose v. Fed. Exp. Corp.*, 86 S.W.3d 502, 511 (Tenn. Ct. App. 2001). But what if there is a complete lack of evidence? Then the answer is clear. *See Harrogate Corp. v. Sys. Sales Corp.*, 915 S.W.2d 812, 817 [*398] (Tenn. Ct. App. 1995); *Handley v. May*, 588 S.W.2d 772, 777 (Tenn. Ct. App. 1979). There is no material evidence in the record that shows Thomas Nelson was in a position to exercise influence and control over EPAC. Therefore, there's no duty to disclose.

EPAC challenges this conclusion on multiple grounds. First, EPAC argues that the district court can't even consider "dominion and control" [**17] in analyzing Thomas Nelson's Rule 50(b) post-verdict motion. EPAC argues that if a showing of dominion and influence is required, then EPAC is entitled to a new trial because the jury was erroneously instructed. We usually analyze whether a new trial is warranted based on an erroneous jury instruction by asking if that jury instruction was "prejudicial." *Miami Valley Fair Housing Cent., Inc. v. Connor Grp.*, 725 F.3d 571, 580 (6th Cir. 2013). It's hard to see how a jury instructed on an arguably lower standard that resulted in a favorable decision to EPAC somehow prejudiced EPAC. To grant a new trial, the real question is whether there is any material dispute as to the issue of dominion and influence—and here there is no material dispute—therefore, a new trial is not warranted.

Next, EPAC argues (in its reply brief only) that Thomas Nelson waived the ability to include "exercise of dominion and influence" as a requirement because it never raised that argument in its Rule 50(a) pre-verdict motion. Thomas Nelson's first Rule 50(a) motion was specific enough, in that it argued there was no duty to disclose and even argued more specifically that there wasn't a relationship of trust and confidence. Either way, the whole point of a Rule 50(a) motion is to provide notice to the nonmoving party of the arguments raised [**18] against it. *See Bach v. First Union Nat. Bank*, 149 F. App'x 354, 360 (6th Cir. 2005). And EPAC never argues it lacked notice of the dominion and influence requirement. EPAC likely did have notice of the more granular issues of what constitutes a relationship of trust and confidence: dominion and influence is wrapped up in the very definition of a relationship of trust and confidence. Indeed, EPAC doesn't say what further evidence it would have presented to show dominion and influence—in its reply brief it cites to evidence already presented.

Finally (again, in its reply brief only), EPAC argues that there is evidence that shows dominion and influence. To support this assertion, EPAC largely relies on two pieces

of evidence: one, that Thomas Nelson "directed" EPAC to open a new print facility and two, that Thomas Nelson had confidential information about EPAC's business that it could use against EPAC. Apart from the fact EPAC likely waived this argument by raising it for the first time in its reply brief, this evidence is not material evidence that shows dominion and influence. *Cf. A & B Food Servs. Corp. v. Judy's Foods, Inc.*, 798 F.2d 468 (6th Cir. 1986) (per curiam) (table); *Edwards v. Travelers Ins. of Hartford, Conn.*, 563 F.2d 105, 115 (6th Cir. 1977). Duty to disclose under Tennessee law occurs where "confidence is placed by one in the other and the recipient of that confidence is the dominant personality, [**19] with the ability, because of that confidence, to influence and exercise dominion over the weaker or dominated party . . . ." *Edwards*, 563 F.2d at 115. Reasonable minds wouldn't differ—EPAC's purported evidence doesn't show dominion and influence. With a complete lack of evidence, there is only one conclusion: there was no duty to disclose.

B. Promissory Fraud Claim

EPAC argues the district court erred in dismissing EPAC's promissory fraud claim at the summary judgment [*399] stage. EPAC's promissory fraud claim alleged that Thomas Nelson "promised that it would provide all of its requirements of the specified ranges or printing to EPAC" but in reality, Thomas Nelson "had already obtained lower pricing from [Lightning Source]" and it "had no intention to perform under the Requirements Contract." According to EPAC, the district court erroneously applied New York law to the claim, arguing instead that Tennessee law applies. Not so. The district court correctly applied New York law.

We review choice-of-law questions de novo, *Mill's Pride, Inc. v. Cont'l Ins. Co.*, 300 F.3d 701, 704 (6th Cir. 2002), as well as a district court's grant of summary judgment, *GMC v. Lanard Toys, Inc.*, 468 F.3d 405, 412 (6th Cir. 2006). Two choice-of-law levels govern this dispute. First, federal courts apply the forum state's choice-of-law provisions to state law claims, [**20] *Performance Contracting, Inc. v. DynaSteel Corp.*, 750 F.3d 608, 611 (6th Cir. 2014), which is Tennessee. Second, we turn to Tennessee law to see what state law governs EPAC's promissory fraud (tort) claim.

This issue boils down to whether the choice-of-law provision in the MSA encompasses EPAC's promissory fraud claim:

> This Agreement will be governed by and construed in accordance with the laws of the State of New York as applicable to agreements entered into and to be performed entirely within that state by residents thereof. Any dispute arising under this Agreement, if brought by Customer, shall be resolved exclusively in the state and federal courts of New York, New York; and, if brought by EPAC shall be resolved exclusively in the state and federal courts of Nashville, Tennessee.

Because the parties executed the agreement in Tennessee, we turn to Tennessee contract law to interpret the choice-of-law provision. *Town of Smyrna, Tenn. v. Mun. Gas Auth. of Georgia*, 723 F.3d 640, 646 (6th Cir. 2013). Tennessee will honor a choice-of-law provision "so long as the provision was executed in good faith, there is a material connection between the law and the transaction, and the chosen law is not contrary to the fundamental policies of Tennessee." *Id.* at 645-46. Tennessee is apt to construe choice-of-law provisions broadly. *See Frizzell Constr. Co. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999). And there's no indication from a Tennessee [**21] court that the language in the choice-of-law provision above does not contain related tort claims. Persuasively, our circuit has already found that a nearly identical contract provision encompasses related tort claims. *Banek Inc. v. Yogurt Ventures U.S.A., Inc.*, 6 F.3d 357, 363 (6th Cir. 1993); *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131, 1139-40 (6th Cir. 1991) (finding "governed by" language is the key phrase that encompasses tort claims). Accordingly, the choice-of-law provision here applies to EPAC's promissory fraud claim because the promissory fraud claim "put[s] the validity of the contract in issue, and such a claim would appear to be encompassed by the language." *Moses*, 929 F.2d at 1140.

Therefore, New York law applies and bars EPAC's promissory estoppel claim. Under New York law, a claim based on promissory fraud is barred if (1) the legal duty to perform under the contract is the same; (2) the fraudulent misrepresentation is not collateral or extraneous to the contract; and (3) the damages for this claim are the same under the contract. *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996)). All of this is true here, and EPAC doesn't dispute this.

Rather, EPAC argues New York law can't apply because there are no material [*400] connections between New York and the transaction, and, in any event, New York law offends fundamental policies of Tennessee law. *See Town of Smyrna*, 723 F.3d at 645-46. Not so.

First, there are material connections [**22] between the transaction at issue and New York. EPAC argued as much earlier on in the case. EPAC's President and CEO who signed the MSA was based in EPAC's New York office and negotiated the terms of the contract from New York. Thomas Nelson continued to have discussions with EPAC's CEO, based in New York. Further, communications with an EPAC officer (based in New York) continued even after the termination of the MSA. This is enough to establish a material connection to New York. *Cf. Curtis 1000, Inc. v. Martin*, 197 F. App'x 412, 418-19 (6th Cir. 2006) (finding no material connection to Delaware where no work was performed in Delaware and where there was no Delaware office).

Second, applying New York law here does not offend a fundamental policy of Tennessee. Under Tennessee law, a fundamental policy is something that implicates "public health, safety, or welfare." *Franklin v. Swift Transp. Co., Inc.*, 210 S.W.3d 521, 529 (Tenn. Ct. App. 2006) (quoting *Guy v. Mut. Of Omaha Ins. Co.*, 79 S.W.3d 528, 537 (Tenn. 2002)). Or it concerns an activity that is "in violation of the criminal or civil code of" Tennessee. *Sanders v. Henry Cty.*, No. W2008-01832-COA-R3-CV, 2009 Tenn. App. LEXIS 156, 2009 WL 1065916, at *8 (Tenn. Ct. App. Apr. 21, 2009) (quoting Tenn. Code Ann. § 50-1-304((a)(3) (2008)). No Tennessee fundamental policy is offended simply because New York law bars a promissory fraud claim, and Tennessee law may allow it. *See Carbon Processing & Reclamation, LLC v. Valero Mktg. & Supply Co.*, 694 F. Supp. 2d 888, 908 (W.D. Tenn. 2010) (reconsidered on different grounds).

All to say, New York law applies and bars [**23] EPAC's promissory fraud claim.

C. Breach of the CNDA

EPAC argues the district court erred in granting Thomas Nelson's Rule 50(a) motion for judgment as a matter of law on EPAC's claim for breach of the confidentiality agreement. For that claim, EPAC argues that Thomas Nelson breached the CNDA by disclosing pricing and other terms to Lightning Source. The district court found, however, that EPAC's claim failed because the relevant one-year provision in the CNDA expired by the time any alleged disclosure occurred. On the other hand, EPAC argues the CNDA is ambiguous and could be read to prohibit Thomas Nelson from disclosing information for up to five years, not just one year.

We review de novo the district court's grant of a Rule 50(a) motion for judgment as a matter of law. *Watts v. United Parcel Service, Inc.*, 701 F.3d 188, 190 (6th Cir. 2012). And, as the district court correctly found, the CNDA's one-year term applies, and Thomas Nelson did not breach within one year of the CNDA (if Thomas Nelson even breached at all).

All parties agree Tennessee law governs, as the CNDA provides. And under Tennessee law, courts look first to the "usual, natural, and ordinary meaning of the contractual language." *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95 (Tenn. 1999). Further, "[a]ll provisions in the contract should be construed in harmony [**24] with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract." *Id.*

There are two sections of the CNDA that prohibit Thomas Nelson from disclosing certain information. Section 3 of the CNDA, which contains a five-year term, protects "Confidential Information," which [*401] is "defined as that Information which a Party hereto desires to protect against disclosure or competitive use and which is designed as such in the manner provided by this Agreement." "Confidential Information" includes "[a]ll non-public information concerning the business, Technology, internal structure and strategies of EPAC or Nelson." Section 6, which contains a one-year term, provides that "the Parties agree not to disclose to any person either the fact that discussions are taking place concerning the Project or any of the terms, conditions or other facts with respect to such Project, including the status thereof . . . for a period of one (1) year from the date hereof." The "Project" is the "potential business transaction." If Section 6 applies, then it's clear Thomas Nelson did not commit any breach within the one-year governing term of Section 6.

In *Guiliano*, the Tennessee Supreme Court said that [**25] a contract should be construed to avoid repugnancy between the various provisions. *Guiliano*, 995 S.W.2d at 95. So Section 3 and Section 6 should be read to avoid protecting overlapping information. And a plain reading of the two sections shows those sections protect different information. Section 3 protects the proprietary technology and business information, along with the internal structures of EPAC. Section 6 protects any party from disclosing the fact that "discussions are taking place concerning the Project" (the potential business transaction). The main question is, do all of Thomas Nelson's alleged disclosures fall under discussions concerning the parties' potential business transaction. The answer is yes.

EPAC maintains Thomas Nelson disclosed the following:

- the pricing terms
- "We have to turn orders in by 2:00 pm to receive next day";
- "They also have a four-and seven-day turnaround";
- "The orders range from 1 to 1,500 units";
- "The freight is included in cost";
- "They will ship to us or any location."

These are terms concerning their potential business transaction. This is not information concerning EPAC's business, technology, internal structure, or strategies. Therefore, only the one-year term applies and EPAC cannot show Thomas Nelson breached [**26] within one year.

D. Cross Appeal by Thomas Nelson

Thomas Nelson cross appeals arguing the jury verdict on the breach of the MSA claim should not stand, or at the very least, the damages award should be reduced. Thomas Nelson also appeals the district court's denial of its request for attorneys' fees.

1. Challenges to the Breach of the MSA Verdict

Thomas Nelson challenges the jury verdict on the breach of the MSA in three ways. First, the damages amount is too high, given not all orders accounted for in the damages amount were subject to the contract. Second, EPAC's presentation of evidence on its improper fraudulent concealment claim unfairly prejudiced Thomas Nelson. And third, the district court's adverse inference instructions based on destruction of evidence also prejudiced Thomas Nelson. All challenges fail.

a. Damages Award for the Breach of the MSA

Thomas Nelson argues EPAC failed to present evidence to support the jury's determination of compensatory damages in the amount of $3 million.

[*402] New York substantive law governs the breach of the MSA claim; therefore, we look to New York's standard of review for judgments as a matter of law. Under New York law, a party can recover lost profit [**27] damages in a breach of contract claim if it demonstrates the alleged loss with reasonable certainty and the damages were fairly within the contemplation of the parties to the contract at the time it was made. *Trademark Research Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 332 (2d Cir. 1993) (citing New York Law).

And "[d]rawing all inferences in the favor of the non-moving party, as we must, the evidence—including but not limited to the expert testimony—sufficed to establish reasonable certainty for the damages awarded." *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 972 (9th Cir. 2013) (applying New York law to breach of contract lost profits damages claim). Especially so, since damages need not be determined with absolute certainty. *Myheal Techs., Inc. v. Fonar Corp.*, 100 F.3d 944 (2d Cir. 1996) (table).

The district court found that each side presented its arguments, its experts, and its calculations regarding damages. EPAC's expert presented a figure of $5,598,634 in lost profits. Thomas Nelson's expert found at most the lost profits were $632,549. Thomas Nelson had urged the district court to reduce the damages amount to $2 million at most. The district court found it could not "reweigh the evidence (expert reports and testimony) and the credibility of" both parties' experts. And the district court found it would be unreasonable to grant Thomas Nelson judgment as a matter of law when the [**28] jury verdict of $3 million "lies within a range suggested by both EPAC and Thomas Nelson." The district court didn't err here, given EPAC presented evidence that could support with "reasonable certainty" a damages amount of $3 million and the damages amount lies within the range contemplated by both parties. *Trademark Research Corp.*, 995 F.2d at 332.

b. Unfair Prejudice from Fraudulent Concealment Claim Evidence

Thomas Nelson argues that EPAC's presentation of its "non-viable" fraud claim unfairly prejudiced Thomas Nelson, and so Thomas Nelson moved for a new trial on the breach of contract claim. We review a district court's denial of a new trial motion for abuse of discretion. *Pittington v. Great Smoky Mt. Lumberjack Feud, LLC*, 880 F.3d 791, 798-99 (6th Cir. 2018).

The district court found that there was no indication that the jury was inflamed or considered inadmissible parol evidence when resolving the breach of contract issue. The district court gave a limiting instruction, telling the jury that it "may consider any such evidence only for the purpose for which it was admitted[.]" And the district court correctly noted that "[f]ederal courts generally presume the jury will follow the instructions correctly as given." *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 822 (6th Cir. 2000). Without any indication in the record

that the jury was "inflamed" or improperly swayed, *Hinds v. Titan Wheel Int'l, Inc.*, 45 F. App'x 490, 496 (6th Cir. 2002) [**29] (per curiam), we conclude that the district court didn't abuse its discretion in denying a motion for a new trial on these grounds.

c. Adverse Inference Instructions

Thomas Nelson argues it is entitled to a new trial because it was unfairly prejudiced by two adverse inference instructions given to the jury—one relating to damaged books, the other to electronic warehouse data:

> [*403] • **Books**. Thomas Nelson had a duty to preserve evidence relevant to this litigation; it breached that duty by negligently allowing the books in its control to be sold, lost, or destroyed; and you may infer that, if available, the books would support EPAC's claims and be adverse to Thomas Nelson.
>
> • **"Warehouse" Data**. Thomas Nelson also had a duty to preserve its warehouse data as of April 18, 2011, and negligently failed to do so. Such data, now lost, may have shown whether EPAC-printed books were sold or returned, whether Thomas Nelson received customer complaints about EPAC-printed books, the quantity and timeliness of EPAC's order fulfillment, and from what EPAC facility the books were shipped. You may give this whatever weight you deem appropriate as you consider all of the evidence presented at trial.

As way of background, [**30] Thomas Nelson allegedly failed to preserve any damaged books, customer complaints, or electronic warehouse data, despite knowing of its duty to preserve as early as April 2011 (when EPAC sent a letter to Thomas Nelson telling it to preserve all relevant evidence).

District courts have broad discretion to craft sanctions for spoliated evidence, *Adkins v. Wolever*, 554 F.3d 650, 651 (6th Cir. 2009), and we review a district court's decision to give an adverse inference instruction for abuse of discretion. *Ross v. Am. Red Cross*, 567 F. App'x 296, 301 (6th Cir. 2014); *Flagg v. City of Detroit*, 715 F.3d 165, 177 (6th Cir. 2013). *But see West v. Tyson Foods, Inc.*, 374 F. App'x 624, 635 (6th Cir. 2010) (propriety of jury instruction is reviewed de novo but noting *Adkins* rule that federal courts have broad discretion in crafting proper sanction for spoliation). The district court didn't err in issuing the above two jury instructions.

First off, the instructions above are merely permissible, telling the jury what they "may" infer. The fact that Thomas Nelson was only "negligent" does not defeat the instructions. Only mandatory adverse instructions require a culpable state of mind in the destruction of evidence. *See generally Flagg*, 715 F.3d at 178. Second, both instructions were no greater than necessary because they were only permissive in nature. *Tyson Foods, Inc.*, 374 F. App'x at 635 ("The jury instruction the district court gave here was merely a permissive one, allowing, but not [**31] requiring, the jury to draw a negative inference."); Fed. R. Civ. P. 37(e)(1) (for failure to preserve electronic evidence, district court "may order measures no greater than necessary to cure the prejudice"). Giving broad discretion to the district court and even reviewing the propriety of the instructions de novo, we find that Thomas Nelson's claim for a new trial based on these instructions fails.

2. Claim for Attorneys' Fees

Thomas Nelson moved for attorneys' fees as the winning party for the breach of the CNDA claim. The district court denied that request. The CNDA provides for attorneys' fees, and states in relevant part:

> In the event [an] action or proceedings are instituted to enforce or interpret the obligations of the Parties to this Agreement, the prevailing Party will be entitled to recover from the other Party all reasonable attorneys' fees and attendant costs and expenses for the action or proceeding.

The district court denied Thomas Nelson's request, finding Thomas Nelson could not identify and segregate discrete activity or costs related specifically to the [*404] CNDA claim. Thomas Nelson argues the district court is required to award *some* of the attorneys' fees and its decision to deny any fees at [**32] all is wrong as a matter of law. Any contractual interpretations, like interpreting who is the "prevailing party" under the CNDA, we review de novo. *Gerken Paving, Inc. v. LaSalle Grp., Inc.*, 558 F. App'x 510, 516 (6th Cir. 2014). The magnitude of attorneys' fees (or whether they were granted or not), we review for abuse of discretion. *Id.*

Like the district court, we need not decide whether Thomas Nelson was the prevailing party on the CNDA claim because we too find that Thomas Nelson failed to meet its burden of proving reasonable fees. True, a prevailing party is entitled to reasonable attorneys' fees under a contract that explicitly provides for such fees. *Monroe v. Zierden*, No. W2007-01818-COA-R3-CV, 2008 Tenn. App. LEXIS 529, 2008 WL 4253850, at *2

(Tenn. Ct. App. Sept. 17, 2008). But a party is entitled to only the fees spent defending (or pursuing) that particular claim. *See Furnco, LLC v. Laneventure, Inc.*, No. 07-2333, 2010 U.S. Dist. LEXIS 154089, 2010 WL 11598119, at *3 (W.D. Tenn. Oct. 5, 2010); *Williams v. Williams*, No. M2013-01910-COA-R3-CV, 2015 Tenn. App. LEXIS 51, 2015 WL 412985, at *14 (Tenn. Ct. App. Jan. 30, 2015). And, crucially, a prevailing party "has the burden to make out a *prima facie* case for [its] request for reasonable attorney's fees." *Monroe*, 2008 Tenn. App. LEXIS 529, 2008 WL 4253850, at *2 (citing *Wilson Mgmt. Co. v. Star Distribs. Co.*, 745 S.W.2d 870, 873 (Tenn. 1988)).

For proof of its "reasonable" request, Thomas Nelson offered almost all fees from the time EPAC amended its complaint to include the CNDA claim to the time the CNDA claim was dismissed, disregarding the fact it was defending against all of EPAC's other claims as well. Thomas Nelson [**33] excluded only fees during that time related to pursuing its counterclaims and fees incurred for additional privilege logging. Thomas Nelson's documentation of fees submitted to the district court totaled over 500 pages and the fees totaled over $4 million, an amount certainly not reasonable for defending just the CNDA claim. Not only did Thomas Nelson fail to attempt to separate the fees for the breach of the CNDA claim, Thomas Nelson claimed it was "not possible" to separate the fees because of EPAC's trial strategy and so it was therefore entitled to all $4 million in fees. Thomas Nelson, in a complete reversal of its earlier position before the district court, now argues the district court erred in failing to grant a portion of the fees—an argument Thomas Nelson has likely waived. But, regardless, a party that fails to separate out its fees so that a court can sufficiently determine reasonable fees has not met its burden of proof. *Furnco*, 2010 U.S. Dist. LEXIS 154089, 2010 WL 11598119, at *2-3 (citing *Wilson Mgmt. Co.*, 745 S.W.2d at 873). The district court therefore did not err in denying Thomas Nelson's motion for attorneys' fees.

IV. CONCLUSION

For these reasons, we affirm.

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Alsadi v. Intel Corp.

United States District Court for the District of Arizona

July 17, 2020, Decided; July 17, 2020, Filed

No. CV-16-03738-PHX-DGC

Reporter
2020 U.S. Dist. LEXIS 126153 *; 2020 WL 4035169

Ahmad Alsadi and Youssra Lahlou, husband and wife, Plaintiffs, vs. Intel Corporation, a Delaware corporation, Defendant.

Prior History: Alsadi v. Intel Corp., 2019 U.S. Dist. LEXIS 30066 (D. Ariz., Feb. 25, 2019)

Case Summary

Overview
HOLDINGS: [1]-In a tort action, the Court found no risk of unfair prejudice or confusion and denied plaintiffs' motion in limine regarding the 11.7 ppm measurement of hydrogen sulfide (H2S) because the Court did not agree that defendants should be precluded from presenting available evidence on H2S concentration levels and making arguments about findings that should be made from that evidence; [2]-Plaintiffs have not shown that the issues of causation and permanence were actually litigated in the Industrial Commission of Arizona proceedings, that defendant had a full and fair opportunity to litigate those issues, or that there was common identity of the parties. Collateral estoppel therefore did not apply and defendant was not barred from challenging causation and the permanence of plaintiff's symptoms.

Outcome
Plaintiffs' motion in limine regarding 11.7 ppm measurement of H2S denied.

Counsel: [*1] For Ahmad Alsadi, husband, Youssra Lahlou, wife, Plaintiffs: Aaron Dawson, LEAD ATTORNEY, Dawson & Rosenthal PC - San Diego, CA, San Diego, CA; Anita Rosenthal, LEAD ATTORNEY, Dawson & Rosenthal PC - Sedona, AZ, Sedona, AZ; Frederic Gary Lemberg, LEAD ATTORNEY, Law Office of Frederic C Lembers, Scottsdale, AZ; Sander Ruggill Dawson, LEAD ATTORNEY, Dawson & Rosenthal PC - Sedona, AZ, Sedona, AZ; Scott B Seymann, LEAD ATTORNEY, Begam Marks & Traulsen PA, Phoenix, AZ; Steven C Dawson, LEAD ATTORNEY, Dawson & Rosenthal PC - Sedona, AZ, Sedona, AZ; Steven Jay German, LEAD ATTORNEY, Begam Marks & Traulsen PA, Phoenix, AZ; Susan Ali Bassal, LEAD ATTORNEY, Law Office of Frederic C Lembers, Scottsdale, AZ.

For Intel Corporation, a Delaware corporation, Defendant: Kendall Douglas Steele, LEAD ATTORNEY, Jardine Baker Hickman & Houston PLLC, Phoenix, AZ; Michael Warzynski, LEAD ATTORNEY, Jardine Baker Hickman & Houston PLLC, Phoenix, AZ.

Judges: David G. Campbell, Senior United States District Judge.

Opinion by: David G. Campbell

Alsadi v. Intel Corp.

Opinion

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ORDER

The trial in this tort action was set for May 2020, but was postponed because of the COVID-19 pandemic. The Court plans to reset the trial at the earliest opportunity. The parties have [*2] filed 14 motions in limine ("MILs") and Plaintiffs have filed a motion for negative inference. Docs. 207-08, 231-43. The Court heard oral argument on July 17, 2020. This order resolves each motion.

I. Background.

Intel owns an industrial wastewater system ("IWS") housed in the CH-8 building of its technology development campus in Chandler, Arizona. Technicians at Jones Lange LaSalle ("JLL") operate the IWS. Plaintiff Ahmad Alsadi worked for JLL as a HVAC technician at Intel's Chandler campus.

On February 28, 2016, an overdose of the chemical Thio-Red caused the IWS to emit hydrogen sulfide ("H_2S") and possibly other toxic gases. CH-8 and the nearby CN-3 building, where Alsadi was working at the time, were evacuated. Alsadi and other JLL employees were assembled near CH-8. Alsadi began experiencing a tingly throat, cough, headache, and watery eyes. He was evaluated by a nurse and then taken to an urgent care facility for treatment.

Plaintiffs filed suit against Intel in September 2016. Doc. 1-2 at 5-8. The second amended complaint asserts negligence and loss of consortium claims. Doc. 20. Plaintiffs allege that as a result of Alsadi's exposure to toxic gases, he has experienced coughing, [*3] pulmonary and respiratory distress, and other injuries requiring medical care. *Id.* ¶ 21. Alsadi seeks damages for his alleged injuries and future medical care. *Id.* ¶ 26. He claims that he is permanently disabled. *See* Docs. 161 at 5, 195 at 3.

The Court denied Intel's motion for summary judgment on Alsadi's negligence claim. Doc. 204 at 26-30. The Court granted Intel's motions to preclude Plaintiffs' experts from offering causation opinions in Plaintiffs' case-in-chief (*see id.* at 2-19, 22-25), but denied summary judgment on the issue of causation because a jury reasonably could find, without the benefit of expert medical testimony, that Alsadi was exposed to H_2S and the exposure caused an immediate toxic inhalation injury (*see id.* at 30-33). Following supplemental briefing, the Court granted summary judgment in Intel's favor on whether Alsadi's exposure to H_2S caused reactive airways dysfunction syndrome ("RADS"), but denied summary judgment on the extent and duration of his symptoms. Doc. 216 at 2-7.

II. Plaintiffs' Motion for Negative Inference (Doc. 207).

John MacDonald, Intel's emergency response team ("ERT") leader, responded to the chemical release at CH-8. Doc. 197-1 ¶ 39. MacDonald and Michael Torbert, a JLL [*4] employee, obtained an H_2S reading of 11.7 parts per million ("ppm') inside CH-8 using a digital Altair 5X Gas Detector ("Altair detector"). *Id.* ¶ 43. The 11.7 ppm measurement is reflected as the "highest level detected" in an ERT report MacDonald prepared after the incident. Doc. 196-10 at 5. The ERT report is the only record of H_2S measurements taken during the incident. Doc. 207 at 2, 7. Intel contends that an H_2S level of 11.7 ppm could not have caused the permanent symptoms claimed by Alsadi, and that there is no evidence that Alsadi was exposed to even that level. Doc. 210 at 4.

Plaintiffs contend that to accurately assess the highest level of Alsadi's actual exposure, "adequate data would be required — measurements of ambient gas levels over numerous points in time from the locations where [Alsadi] was working throughout the day." Doc. 207 at 3. Plaintiffs assert that no such data exist because Intel failed to preserve data recorded by the Altair detector and did not collect other data of H_2S levels. *Id.* Plaintiffs request that a negative inference be applied in light of Intel's alleged failure to collect and preserve data showing actual levels of hazardous emissions, and that [*5] an appropriate jury instruction be given at trial. *Id.* at 2-3; Doc. 207-1 at 1. Since the briefing of this motion, the parties have agreed to a bench trial. Doc. 276 at 2. The issue presented by the motion, therefore, is whether the Court should apply a negative inference when deciding this case.[1]

Intel argues that it had no duty to preserve evidence before it received notice that litigation was probable, that it had no duty to create evidence of hazardous emission

[1] The parties' agreement to a bench trial was confirmed during the hearing on July 17, 2020.

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levels, and that Plaintiffs ignore Federal Rule of Civil Procedure 37(e), which governs negative inference sanctions for the loss of electronically stored information ("ESI"). Doc. 210 at 2-3.

A. Sanctions for Spoliation of Evidence.

"It is well established that [a] 'duty to preserve arises when a party knows or should know that certain evidence is relevant to pending or future litigation.'" *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011) (quoting *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 800 (N.D. Tex. 2011)). The failure to preserve relevant evidence, "once the duty to do so has been triggered, raises the issue of spoliation of evidence and its consequences." *Id.* (quoting *Thompson v. United States HUD*, 219 F.R.D. 93, 100 (D. Md. 2003)). "Spoliation is the destruction or material alteration of evidence, or the failure to otherwise preserve evidence, for another's use in litigation." *Id.* (citing *Ashton*, 772 F. Supp. 2d at 799-800); *see Pettit v. Smith*, 45 F. Supp. 3d 1099, 1104 (D. Ariz. 2014) (same).

Rule 37(b)(2) permits a court to sanction a [*6] party for disobeying a discovery order, and Rule 37(e) permits a court to sanction a party for losing or destroying ESI it had a duty to preserve. Plaintiffs do not contend that Intel violated a discovery order or that a negative inference otherwise is warranted under Rule 37(b)(2). Nor do Plaintiffs address Rule 37(e) in their motion. *See* Doc. 207. Plaintiffs instead seek a negative inference based on the Court's inherent authority to make appropriate rulings in response to the spoliation of non-ESI evidence. *Id.* at 3 (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993)).

The evidence Intel allegedly failed to preserve — electronic data recorded by the Altair detector (*see id.* at 2) — clearly constitutes ESI. Plaintiffs note in their motion that the Altair detector "has the ability to store data readings." Doc. 207 at 5. They noted in their reply brief that Altair detectors "have the capability to log their data, and this data can be uploaded to a computer." Doc. 215-1 at 8.[2]

Plaintiffs argued during the July 17 hearing that the data recorded on the Altair detector is not ESI within the meaning of Rule 37(e) because it was not stored on a computer system, but this is too narrow a reading of the phrase "electronically stored information." That phrase was first added to the Federal [*7] Rules of Civil Procedure in 2006 and is used in a number of rules. *See, e.g.*, Fed. R. Civ. P. 16, 26, 34, 37. Rule 34 states that ESI includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in *any medium* from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." Fed. R. Civ. P. 34(a)(1)(A) (emphasis added). The 2006 advisory committee note to Rule 34 explains that the meaning of ESI "is expansive and includes any type of information that is stored electronically." Fed. R. Civ. P. 34(a)(1) advisory committee note to 2006 amendment. Although Rule 37(e) was not amended to its current form until 2015, the advisory committee note for the 2015 amendment makes clear that it was intended to apply to ESI as defined broadly in 2006: "The new rule applies only to electronically stored information, also the focus of the 2006 rule." Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment. That the 2015 rule was not limited to data stored on a computer system — as Plaintiffs argued at the hearing — is also made clear by the advisory committee's observation that the amendment to Rule 37(e) was warranted by "the ever-increasing volume of electronically stored [*8] information and *the multitude of devices that generate such information*[.]" *Id.* (emphasis added). The Altair detector is one of those devices, and data recorded electronically on it clearly constitute ESI within the meaning of Rule 37(e).

Plaintiffs' citation to *Glover* and their reliance on the Court's inherent authority to sanction a party for spoliating evidence is not persuasive. "The 2015 amendment to Rule 37(e) now 'forecloses reliance on inherent authority' to determine whether and what sanctions are appropriate for a party's loss of discoverable ESI." *Small v. Univ. Med. Ctr.*, No. 2:13-CV-0298-APG-PAL, 2018 U.S. Dist. LEXIS 134716, 2018 WL 3795238, at *66 (D. Nev. Aug. 9, 2018) (quoting Rule 37(e) advisory committee's note to 2015 amendment); *see Sherwood v. BNSF Ry. Co.*, No. 2:16-CV-00008-BLW, 2019 U.S. Dist. LEXIS 53701, 2019 WL 1413747, at *1 (D. Idaho Mar. 28, 2019) (noting that *Glover* may be revisited given the 2015 amendment to Rule 37(e)).

The drafters of Rule 37(e) specifically "intended to preempt use of other sources of sanctions — such state

[2] *See also* MSA, The Safety Company, Home/Portable Gas Detection/Multi-Gas/ALTAIR® 5X Multigas Detector, available at https://us.msasafety.com/c/ALTAIR%C2%AE-5X-Multigas-Detector/p/000080001600001023 (last visited July 9, 2020).

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law or the long-established 'inherent power' doctrine — and require findings consistent with Rule 37(e) as the only path to remedying the loss of [ESI]." *Stevens v. Brigham Young Univ.*, No. 4:16-CV-530-BLW, 2019 U.S. Dist. LEXIS 209981, 2019 WL 6499098, at *3 (D. Idaho Dec. 3, 2019). They did so because they were seeking to bring uniformity to an area of the law that had been badly splintered by various courts' reliance [*9] on inherent authority. *See* Rule 37(e) advisory committee note to 2015 amendment ("Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve [ESI]. . . . Rule 37(e) . . . authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.").

Once adopted through the procedures of the Rules Enabling Act, Rule 37(e) became the controlling authority for sanctions that can be imposed for the loss of ESI. *See* 28 U.S.C. § 2072 ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."). The exclusive nature of Rule 37(e) sanctions for the loss of ESI has been widely recognized. *See, e.g., Mannion v. Ameri-Can Freight Sys.*, No. CV-17-03262-PHX-DWL, 2020 U.S. Dist. LEXIS 12695, 2020 WL 417492, at *5 (D. Ariz. Jan. 27, 2020) ("[A] court cannot rely on its inherent authority or state law when deciding whether sanctions based on the loss of ESI are appropriate — the standards supplied by Rule 37(e) are exclusive.") (citing S. Gensler, 1 Federal Rules of Civil Procedure, Rules and Commentary, Rule 37, at 1073 (2018)); [*10] *Long Nguyen v. Lotus by Johnny Dung, Inc.*, No. SACV 17-1317 JVS (JDEx), 2019 U.S. Dist. LEXIS 77821, 2019 WL 1950294, at *4 (C.D. Cal. Mar. 14, 2019) ("Rule 37(e) . . . was amended to establish the findings necessary to support certain curative measures for failure to preserve [ESI]. This amendment 'forecloses reliance on inherent authority . . . to determine when certain measures should be used' to address spoliation of [ESI].") (emphasis in original); *Waymo LLC v. Uber Techs., Inc.*, No. C 17-00939 WHA, 2018 U.S. Dist. LEXIS 16020, 2018 WL 646701, at *14 (N.D. Cal. Jan. 30, 2018) ("Because the evidence in question consists of [ESI], [Rule] 37(e), not inherent authority, supplies the controlling legal standard."); *Tipp v. Adeptus Health Inc.*, No. CV-16-02317-PHX-DGC, 2018 U.S. Dist. LEXIS 7419, 2018 WL 447256, at *3 (D. Ariz. Jan. 17, 2018) ("A party seeking sanctions for spoliation of [ESI] must address the factors set forth in Rule 37(e) . . . . That rule, which was amended on December 1, 2015, identifies the circumstances under which various kinds of sanctions can be imposed for the loss of ESI."). Plaintiffs' reliance on *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (Ariz. 1964), is unhelpful for the same reason. *See* Doc. 207 at 6.

Plaintiffs do not address the requirements of Rule 37(e) in their motion. *See* Doc. 210 at 3. Intel's response argues that a negative inference is not appropriate under Rule 37(e) because Plaintiffs do not contend that Intel acted with intent to deprive Plaintiffs of ESI. *Id.* at 11-14. Plaintiffs counter in their [*11] reply that a negative inference is warranted under Rule 37(e). Doc. 215-1 at 10-12.

B. Negative Inferences Under Rule 37(e).

Under Rule 37(e), if ESI that "should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> > (A) presume that the lost information was unfavorable to the party;
> >
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> >
> > (C) dismiss the action or enter a default judgment.

There are two levels of sanctions under Rule 37(e). Rule 37(e)(1) permits a court, upon finding prejudice to another party from loss of ESI, to order measures no greater than necessary to cure the prejudice. Rule 37(e)(2) permits a court to impose more severe sanctions — including a negative inference — only if it finds that the spoliating party "acted with the intent to deprive another party of [*12] the information's use in the litigation." Fed. R. Civ. P. 37(e)(2); *see Miller v. Thompson-Walk*, No. CV 15-1605, 2019 U.S. Dist. LEXIS 83249, 2019 WL 2150660, at *10 (W.D. Pa. May 17, 2019); *Sherwood*, 2019 WL 1413747, at *1; *Mfg. Automation & Software Sys. v. Hughes*, No. CV 16-8962-CAS (KSX), 2018 U.S. Dist. LEXIS 227206, 2018 WL 5914238, at *6 (C.D. Cal. Aug. 20, 2018); *Leidig v. Buzzfeed, Inc.*, No. 16-CV-542, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *7 (S.D.N.Y. Dec. 19, 2017).

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"Rule 37(e)(2)'s drafters included its intent standard with a specific purpose: to reject cases that had authorized an adverse-inference instruction 'on a finding of negligence or gross negligence.'" *EPAC Techs., Inc. v. Harpercollins Christian Publ'g., Inc.*, No. 3:12-CV-00463, 2018 U.S. Dist. LEXIS 53360, 2018 WL 1542040, at *18 (M.D. Tenn. Mar. 29, 2018) (quoting Rule 37(e)(2) advisory committee's note to 2015 amendment). The reason was explained by the Advisory Committee:

> Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.

Fed. R. Civ. P. 37(e) advisory committee note to 2015 amendment.

Plaintiffs [*13] do not contend that Intel intentionally lost or destroyed data of H_2S levels to preclude Plaintiffs from using the data in litigation. Plaintiffs instead assert that the Altair detector "MacDonald used on the night of the incident to check H_2S emission levels has the ability to store data readings, *but for whatever reason* Intel did not preserve the data collected that night." Doc. 207 at 5 (emphasis added). "Whatever reason" is not sufficient to support an adverse inference under Rule 37(e)(2). Without evidence that Intel's reason was to deprive Plaintiffs of the collected data, a negative inference is not available. *See Wolff v. United Airlines, Inc.*, No. 1:18-CV-00591-RM-SKC, 2019 U.S. Dist. LEXIS 158350, 2019 WL 4450255, at *4 (D. Colo. Sept. 17, 2019) (declining to impose a severe sanction under Rule 37(e)(2) where Plaintiff "produced no evidence to suggest that Defendant, when failing to suspend its automatic deletion of emails, acted with the intent to deprive Plaintiff of that evidence"); *Robinson v. Renown Reg'l Med. Ctr.*, No. 3:16-CV-00372-MMD-WGC, 2017 U.S. Dist. LEXIS 80503, 2017 WL 2294085, at *3 (D. Nev. May 24, 2017) (denying motion for spoliation sanctions where the Plaintiff presented "no credible evidence of any intent by Renown to deprive Plaintiff of the telephonic data, an indispensable element of the criteria for imposition of [an] adverse jury instruction"); [*14] *Porter v. City & Cty. of San Francisco*, No. 16-CV-03771-CW(DMR), 2018 U.S. Dist. LEXIS 151349, 2018 WL 4215602, at *4 (N.D. Cal. Sept. 5, 2018) (finding an adverse inference instruction unwarranted where there was no evidence that the defendant intentionally spoliated a phone call record). The Court will deny Plaintiffs' motion for a negative inference to the extent it is based on Intel's alleged failure to preserve electronic data the Altair detector collected on the night of the incident.[3]

Plaintiffs contend that the factfinder must be fully informed of the reasons behind Intel's single H_2S measurement of 11.7 ppm so that it may evaluate that evidence in the appropriate context. Doc. 215-1 at 12. The Court agrees. Plaintiffs will be free at trial to present admissible evidence about the measurement and other relevant facts, and to argue that the measurement is not a reliable indicator of Alsadi's H_2S exposure.

C. Evidence Intel Did Not Collect.

Plaintiffs assert that Intel was required to have early warning detection systems in place for hazardous emissions, including a "fixed 24/7 monitoring system" and "personal monitoring devices[.]" Doc. 207 at 5-6. Plaintiffs claim that Intel is to blame for the lack of adequate data because it had no such systems in place at the time of [*15] the incident. *Id.* at 3.

But spoliation sanctions apply when a party has lost or destroyed evidence, not when it has failed to create evidence. *See Mizzoni v. Allison*, No. 3:15-cv-00313-MMD-VPC, 2018 U.S. Dist. LEXIS 80969, 2018 WL 3203623, at *4 (D. Nev. Apr. 4, 2018). "When determining whether to impose discovery sanctions for spoliation, the threshold question that the court must decide is whether relevant evidence existed. If no relevant evidence existed, then the motion for spoliation is moot." *Burton v. Walgreen Co.*, No. 2:14-CV-84 JCM VCF, 2015 U.S. Dist. LEXIS 90581, 2015 WL 4228854, at *2 (D. Nev. July 10, 2015)); *see Garcia-Garrido v. Outback Steakhouse of Fla., LLC*, No. 2:16-CV-01294-CWH, 2018 U.S. Dist. LEXIS 90192, 2018 WL 2434062, at *4 (D. Nev. May 30, 2018) ("[B]efore a court will sanction a party for spoliation of relevant evidence, the moving party must demonstrate that the relevant evidence existed."); *Lakes v. Bath & Body Works, LLC*, No. 2:16-CV-02989 MCE AC, 2019 U.S. Dist. LEXIS 82353, 2019 WL 2124523, at *4 (E.D. Cal. May 15, 2019) ("The court will not order an adverse

[3] Given this ruling, the Court need not decide whether Intel had a duty to preserve ESI or when the duty was triggered. *See* Docs. 207 at 3-4, 210 at 6-9.

inference instruction with respect to documents related to the possible chemical analysis or the alleged recall of the Pina Colada candle because there is an insufficient basis to conclude that such documents actually exist.").

The Court will deny Plaintiffs' motion for a negative inference. This ruling does not preclude Plaintiffs from presenting admissible evidence concerning Intel's [*16] alleged failure to collect data of hazardous emission levels.

III. Plaintiffs' MIL Regarding the 11.7 ppm Measurement of H_2S (Doc. 241).

Plaintiffs move to preclude Intel from presenting evidence or argument that 11.7 ppm was the maximum level of H_2S that Alsadi inhaled during the incident because any such suggestion has no evidentiary basis. Doc. 241. Intel notes that 11.7 ppm was the highest measured level of H_2S in the vicinity of Alsadi's alleged injury. Doc. 254 at 2; *see* Doc. 196-10 at 5. Intel contends that it is Plaintiffs, not Intel, who would confuse the factfinder about the amount of H_2S to which Alsadi was exposed. Doc. 254 at 3.

Alsadi's level of H_2S exposure will be for the factfinder to decide on the basis of available evidence. That evidence includes the 11.7 ppm reading by the Altair detector. The factfinder will be free to determine the significance, if any, of Intel's failure to take additional measurements of H_2S levels. *See EEOC v. GLC Rests., Inc.*, No. CV05-618 PCT-DGC, 2007 U.S. Dist. LEXIS 399, 2007 WL 30269, at *8 (D. Ariz. Jan. 4, 2007) (denying motion in limine where the significance of a personnel file's absence was for the jury to decide). The Court does not agree that Defendants should be precluded from presenting available evidence [*17] on H_2S concentration levels and making arguments about the findings that should be made from that evidence. Plaintiffs may do the same. Now that this is a bench trial, the Court finds no risk of unfair prejudice or confusion and will deny Plaintiffs' MIL. Doc. 241.

IV. Plaintiffs' MIL on Causation and Permanence of Symptoms (Doc. 208).

Alsadi filed a workers' compensation claim with the Industrial Commission of Arizona ("ICA") several months before bringing this tort action in September 2016. Alsadi, JLL, and Hartford Accident & Indemnity Company ("Hartford") — JLL's workers' compensation insurer — were parties to the ICA proceeding. In October 2017, and pursuant to a stipulation of the parties, the ICA issued a decision awarding Alsadi permanent partial disability. *See* Doc. 208-6. Plaintiffs now invoke the doctrine of offensive collateral estoppel and contend that the ICA's decision bars Intel from disputing causation and the permanence of Alsadi's injury in this case. Doc. 208 at 2-5. The Court does not agree.

A. Collateral Estoppel.

Federal courts apply the collateral estoppel doctrine of the state where the prior decision was rendered. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *see Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994). Under Arizona law, offensive collateral [*18] estoppel applies where (1) the issue was actually litigated in the prior proceeding, (2) there was a full and fair opportunity to litigate the issue, (3) resolution of the issue was essential to the decision, (4) a valid and final decision on the merits was entered, and (5) there is common identity of the parties. *Hullett v. Cousin*, 204 Ariz. 292, 63 P.3d 1029, 1034 (Ariz. 2003); *see also Garcia v. Gen. Motors Corp.*, 195 Ariz. 510, 990 P.2d 1069, 1073 (Ariz. Ct. App. 1999); *N. Improvement Co. v. United States*, 398 F. Supp. 3d 509, 527 (D. Ariz. 2019). As the parties asserting collateral estoppel, Plaintiffs bear the burden of establishing each of the five elements. *Bayless v. ICA*, 179 Ariz. 434, 880 P.2d 654, 659 (Ariz. Ct. App. 1993). Plaintiffs have failed to establish the first, second, and fifth elements.

1. The Issues Were Not Actually Litigated.

"An issue is 'actually litigated' when it 'is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined.'" *Faulkner v. Wausau Bus. Ins. Co.*, No. CV-10-1064-PHX-ROS, 2011 U.S. Dist. LEXIS 159295, 2011 WL 13092025, at *3 (D. Ariz. June 1, 2011) (quoting *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 716 P.2d 28, 30 (Ariz. 1986)). Where a decision is entered by stipulation, consent, or default, "none of the issues is actually litigated." *Id.* And "[i]f the issue was not actually litigated, that issue simply cannot be given issue preclusive effect." *Id.*; *see 4501 Northpoint LP v. Maricopa Cty.*, 212 Ariz. 98, 128 P.3d 215, 219-20 (Ariz. 2006) ("Issue preclusion . . . applies only as to issues that have in fact been litigated and were essential to a prior judgment.").

Plaintiffs assert that "[i]n determining the amount of

benefits to [*19] which Alsadi was entitled, the ICA necessarily had to determine whether his medical limitations were caused by the [i]ncident and whether they were permanent[.]" Doc. 208 at 6. But Plaintiffs admit that the ICA's decision was based in part on a stipulation between the parties. *Id.* at 4, 9; *see also* Doc. 208-6 at 2 (ICA decision explaining that Hartford, "[t]he defendant insurance carrier[,] notified the [ICA] that a permanent partial disability pursuant to A.R.S. § 23-1047 exists"). "The Arizona Supreme Court does not apply issue preclusion when the issue was resolved by way of stipulation." *Faulkner*, 2011 U.S. Dist. LEXIS 159295, 2011 WL 13092025, at *3; *see Chaney Bldg.*, 716 P.2d at 30.

Plaintiffs argue that the ICA considered a great deal of evidence before determining the amount of Alsadi's benefits, but have not shown that the issues of causation and permanence were "actually litigated" in the ICA proceedings. *Hullett*, 63 P.3d at 1034. Because the issues Plaintiffs "asks the Court to give preclusive effect to were not 'actually litigated' before the ICA [they] are not binding on [Intel] in this case." *Faulkner*, 2011 U.S. Dist. LEXIS 159295, 2011 WL 13092025, at *3; *see Kloberdanz v. Pellino*, No. 2:13-CV-2182 JWS, 2017 U.S. Dist. LEXIS 5, 2017 WL 20253, at *2 (D. Ariz. 2017) ("The party asserting issue preclusion bears the burden of proof as to all elements and must introduce a sufficient record to reveal [*20] the controlling facts and the exact issues litigated.") (citation omitted).

2. Intel Had No Full and Fair Opportunity to Litigate the Issues.

Plaintiffs assert that "JLL had a full and fair opportunity to litigate this matter and did so." Doc. 7 at 13. But JLL's litigation of issues in the ICA proceeding is irrelevant. Plaintiffs seek to bind Intel, which had no opportunity to participate in the ICA proceedings between Alsadi, JLL, and Hartford. *See* A.R.S. § 23-901(10) (defining an "[i]nterested party" for purposes of Arizona's workers' compensation statute as "the employer, the employee, . . . the commission, [and] the insurance carrier"); *see also Smith v. CIGNA HealthPlan of Ariz.*, 203 Ariz. 173, 52 P.3d 205, 212 (Ariz. Ct. App. 2002) (finding that the plaintiff "was never afforded a 'full and fair opportunity' to litigate the issues that were before the NLRB" where she "was 'not allowed to examine or cross-examine witnesses, lodge objections,' or otherwise litigate her claim") (citations omitted).

3. There Is No Common Identity of the Parties.

"Although the doctrine of collateral estoppel precludes parties and their privies from relitigating issues, it is axiomatic that a stranger to a litigation may not be bound by a determination made therein for purposes of subsequent litigation." *Fremont Indem. Co. v. ICA*, 144 Ariz. 339, 697 P.2d 1089, 1092 (Ariz. 1985) (citing [*21] *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)). "This rule is premised upon preventing the inherent unfairness of binding a party to an issue determination he had no opportunity to contest." *Id.* at 1092-93.

Plaintiffs make several arguments in an attempt to show that Intel was not a stranger to the ICA proceedings. Doc. 208 at 5, 7-9. None has merit.

Plaintiffs contend that JLL is the "real party in interest" in this case because JLL accepted Intel's tender of defense and will be responsible for paying any judgment or settlement amount. Doc. 208 at 5. Plaintiffs argue that collateral estoppel "applies to prevent JLL, Alsadi's employer standing in Intel's shoes, from relitigating issues it has already conceded and that were properly decided by the ICA." *Id.* at 8 (citing *Fremont*, 697 P.2d at 1095; *Pollard v. ICA*, 159 Ariz. 299, 767 P.2d 22, 23-24 (Ariz. Ct. App. 1988)).

It must be remembered, however, that Intel, not JLL, is the defendant in this case. Plaintiffs must establish Intel's liability if they are to recover anything in this litigation. The fact that JLL has agreed to defend and indemnify Intel does not change this fact; it merely means that Intel, if held liable, can turn to JLL for indemnification. The question to be litigated remains Intel's liability, and Intel took no part in the previous ICA proceeding.[4]

Plaintiffs' reliance on *Fremont [*22]* is not persuasive. The Arizona Supreme Court made clear in *Fremont* that the "common identity of the parties" element "applies in compensation-related applications of the [collateral estoppel] doctrine." 697 P.2d at 1093. *Fremont* involved

[4] Intel notes that if JLL is in fact the real party in interest, this tort action must be dismissed based on the exclusivity provisions of the workers' compensation statute. Doc. 211 at 9; *see* A.R.S. § 23-1022(A) ("The right to recover compensation pursuant to this chapter for injuries sustained by an employee . . . is the exclusive remedy against the employer[.]"). Plaintiffs' briefing is silent on this point.

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separate work-related injuries sustained by the claimant in New Jersey and Arizona. In deciding whether to treat the New Jersey disability judgment as dispositive on the issue of earning capacity, the Arizona Supreme Court held that the parties were not bound under principles of collateral estoppel: "[B]ecause neither the employer nor the carrier were parties to the New Jersey disability judgment, neither could be collaterally estopped . . . from contesting that judgment's validity." *Id.* at 1094.

Plaintiffs cite no Arizona case holding that one who was not a party to ICA proceedings can be bound by ICA findings in a subsequent civil action for tort damages. Plaintiffs' citation to *Pollard* is inapposite. Doc. 208 at 8. *Pollard* held that "where the employer is the same for two industrial injuries, and the first injury is determined to be scheduled, a subsequent carrier may not challenge that characterization[.]" 767 P.2d at 24. This case does not involve separate injuries involving the same [*23] employer, and it is Intel — not JLL's carrier — that seeks to challenge causation and the permanence of symptoms in this tort action.

Plaintiffs' citation to *Special Fund Division/No Insurance Section v. ICA*, 181 Ariz. 387, 891 P.2d 854 (Ariz. Ct. App. 1994), fares no better. Doc. 208 at 7, 9. In that case, the Special Fund Division of the ICA brought a special action challenging a disability classification of a successive claim because it was not a party to the underlying proceedings. 891 P.2d at 858-59. The court of appeals "concluded that notice and an opportunity to be heard are not required to bind a party *such as the Special Fund Division*[.]" *Id.* at 859 (emphasis added). Plaintiffs cite no case extending this rule to a private-party defendant in a tort action.

Plaintiffs further contend that "based on the nature of the relationship between Intel and JLL in this litigation, they clearly stand in privity with each other." Doc. 208 at 8. But "privity between a party and a non-party requires both a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party in the litigation." *Hall v. Lalli*, 194 Ariz. 54, 977 P.2d 776, 779 (Ariz. 1999) (internal quotations and citation omitted). The protection must have occurred in the prior litigation — the one argued to have preclusive [*24] effect. *Id.* ("the determinative question was whether mother and child had been in privity *at the time of the previous paternity claim*") (emphasis added). Plaintiffs have not shown that JLL and Intel had a working or functional relationship in the ICA proceedings, or that JLL protected Intel's interests in that proceeding. JLL clearly did not protect Intel's interests by stipulating to causation and permanency, issues that are hotly contested in this case and which affect the amount of tort damages that could be awarded. In short, there is no "substantial identity of interests" between Intel and JLL or Hartford. *Hall*, 977 P.2d at 779.

Plaintiffs cite *French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (Cal. 1953), for the proposition that JLL was acting as Intel's agent in the ICA proceedings and Intel therefore is bound by the ICA's decision. Doc. 208 at 9. In *French*, a fire department's pension board claimed that it was not bound by a decision of California's industrial accident commission where the city, but not the pension board, was a party to the proceedings. But under the city charter, the pension board and the city had an agency relationship. *French*, 254 P.2d at 29. Plaintiffs present no similar evidence to support their agency theory, and Intel notes that the Facilities Management [*25] Services Agreement between Intel and JLL makes clear that JLL is not Intel's agent. Doc. 211 at 11-12; see Doc. 211-3 at 4 ("No contract of agency . . . [is] intended hereby. [JLL] is not an agent of Intel and has no authority to represent Intel as to any matters[.]").

4. Collateral Estoppel Conclusion.

Plaintiffs have not shown that the issues of causation and permanence were actually litigated in the ICA proceedings, that Intel had a full and fair opportunity to litigate those issues, or that there is common identity of the parties. *See Hullett*, 63 P.3d at 1034. Collateral estoppel therefore does not apply and Intel is not barred from challenging causation and the permanence of Alsadi's symptoms.

B. Presumptive Validity.

Alternatively, Plaintiffs argue that the ICA's decision is entitled to "presumptive validity." Doc. 208 at 10-12. The Court does not agree.

"Because we live in a society with a highly mobile workforce, to require that an injured employee prove again the fact and degree of a prior disability, remote in place and time, would place an impractical burden upon him." *Fremont*, 697 P.2d at 1095. Arizona courts thus have discretion to apply a presumptive validity rule in the workers' compensation context, which allows workers [*26] to continue receiving benefits awarded in one state when they move to another state. *See id.* ("[B]y reasons of comity, we recognize that the claimant

suffered an industrial injury in New Jersey."). In this case, Plaintiffs seek tort damages allegedly caused by negligent conduct in Arizona, not workers' compensation benefits awarded in another state.

Citing *Gnatkiv v. Machkur*, 239 Ariz. 486, 372 P.3d 1010, 1015 (Ariz. Ct. App. 2016), Plaintiffs also contend that "'no compelling reason exists not to defer to the' ICA's findings." Doc. 208 at 11. But as explained above, the ICA's decision was based in large part on a stipulation that a permanent disability exists. *See* Doc. 208-6 at 2. Neither the permanence of Alsadi's symptoms nor the issue of causation was actually litigated before the ICA. The Court, in its discretion, declines to accord presumptive validity to the ICA's decision. *See Fremont*, 697 P.2d at 1095 ("[T]he principle of 'comity' is that the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect."); *Gnatkiv*, 372 P.3d at 1014 ("The scope and applicability of comity rest within the court's discretion.").

The Court will deny Plaintiffs' motion to exclude evidence and [*27] argument challenging causation and the permanence of Alsadi's symptoms. Doc. 208.

V. Plaintiffs' MIL to Exclude Evidence of Alsadi's Convictions (Doc. 240).

On September 30, 2010, Alsadi was sentenced to probation after pleading guilty to misdemeanor simple assault and disorderly conduct in Pennsylvania. Doc. 258-1 at 3. Plaintiffs move to exclude evidence of the convictions under Federal Rules of Evidence 609 and 403 because the convictions do not involve dishonesty and their probative value, if any, is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, and wasting time. Doc. 240 at 1-2.

During oral argument, the parties agreed that the COVID-delayed trial in this case will now occur more than 10 years after Alsadi's conviction. As a result, the conviction is admissible only if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b). This standard is not met. The conviction has little or no probative value — it bears no relationship to the facts of this case, and would have little impeachment effect. *See* 4 Weinstein's Federal Evidence § 609.05 (2020) ("crimes of violence generally have limited probative value concerning the witness's character [*28] for truthfulness"). The Court will grant Plaintiffs' motion to exclude evidence of Alsadi's convictions for assault and disorderly conduct. Doc. 240.[5]

VI. Plaintiffs' MIL to Exclude Untimely Disclosed Evidence (Doc. 242).

Plaintiffs move to exclude testimony from Intel employee Nathan Anders and four documents Intel disclosed in its sixth supplemental disclosure statement on April 19, 2019. Doc. 242; *see* Doc. 242-1 at 3-4. Intel does not oppose the motion with respect to the four documents at issue. The Court will grant the MIL in this regard.[6]

On May 16, 2018, Plaintiffs' served a Rule 30(b)(6) deposition notice on Intel. Doc. 242 at 2. Topic 9 of the notice sought a knowledgeable deponent to explain the "meaning and significance of . . . alarm messages, event titles, and report details contained in the Alarm Logs dated 2/26/16, and the ERT Event Details Report dated 1/26/18[.]" *Id.* Intel designated witness Robbie McGill. *Id.* She appeared for her deposition on September 14, 2018 — the discovery cutoff date — and testified that she was not able to address Topic 9. *Id.* More than four months later, on February 4, 2019, Intel disclosed Nathan Anders as its Rule 30(b)(6) witness for Topic [*29] 9. Doc. 255-1 at 2.

Citing Rule 37(c)(1), Plaintiffs argue that Intel should be precluded from calling Anders as a witness at trial due to the late disclosure. Doc. 242 at 2-3. Rule 37(c)(1) provides that a party that fails to disclose information required by Rule 26(a) "is not allowed to use that information . . . at a trial, unless the failure was substantially justified or harmless." Intel asserts that any prejudice is of Plaintiffs' own making because Intel offered to make Anders available for a deposition. Doc. 255 at 3. But Intel's offer was made months after the close

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[5] Intel asserts that Plaintiffs waived their objection by not raising it in the meet and confer process (*see* LRCiv 7.2(l)), but doing so clearly would not have changed the briefing as shown by Intel's opposition to the motion. *See GEICO Indem. Co. v. Smith*, No. 3:12-CV-08127 JWS, 2017 U.S. Dist. LEXIS 52471, 2017 WL 1282789, at *1 n.1 (D. Ariz. Apr. 5, 2017) (electing to waive the meet and confer requirement in light of the parties' briefing).

[6] Two of the documents are job descriptions dated September 2015 and July 2016, the third document is a JLL organizational chart dated December 2015, and the fourth is an "Events Log" detailing the dosing of Thio-Red. Doc. 242 at 3.

of fact discovery, and the Court had made clear before that time that "**no further** extensions of deadlines shall be granted absent extraordinary circumstances." Doc. 98 at 1 (emphasis in original). Intel notes that it had asked Plaintiffs about the relevance of Topic 9, but Intel never sought a court order precluding testimony by a Rule 30(b)(6) witness on the topic.

During the July 17 hearing, Intel argued that its delay in identifying Anders was substantially justified because Plaintiffs worked cooperatively with Intel in awaiting the identification of a Topic 9 witness. But "the burden is on the party facing the sanction to demonstrate that the failure to comply [*30] . . . is substantially justified or harmless." *Transoceanic Cable Ship Co. LLC*, 2018 U.S. Dist. LEXIS 122061, 2018 WL 3521174, at *2-3 (quoting *Torres v. City of L.A.*, 548 F.3d 1197, 1213 (9th Cir. 2008)); *see Yeti by Molly, Ltd.*, 259 F.3d at 1107 ("Implicit in Rule 37(c)(1) is that the burden is on the party facing sanctions to prove harmlessness."). And Intel makes no showing that plaintiffs acquiesced in the four-month delay. The only communication attached to Intel's response is an email identifying Anders four months after the close of discovery. Doc. 255-1 at 2.

Absent a showing of substantial justification or harmlessness, the exclusion of untimely disclosed witnesses under Rule 37(c)(1) "has been described by courts as a 'self-executing, automatic sanction to provide a strong inducement for disclosure of material.'" *West v. City of Mesa*, 128 F. Supp. 3d 1233, 1247 (D. Ariz. 2015) (quoting *Yeti by Molly*, 259 F.3d at 1106); *see* Fed. R. Civ. P. 37 advisory committee's note to 1994 amendment. Indeed, "Rule 37(c)(1) gives teeth to [disclosure] requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed." *Yeti by Molly*, 259 F.3d at 1106. Because Intel has not shown that its failure to timely disclose Anders as a witness is substantially justified or harmless, the Court will grant Plaintiffs' motion and preclude Anders from testifying at trial. *See Nunes v. Cty. of Stanislaus*, No. 1:17-cv-00633-DAD-SAB, 2020 U.S. Dist. LEXIS 48910, 2020 WL 1324808, at *1 (E.D. Cal. Mar. 20, 2020) ("Where a party does not provide a sufficient explanation for its late disclosure, preclusion [*31] of the witness and/or evidence is appropriate."); *Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1061-62 (9th Cir. 2005) (upholding preclusion where party did not provide adequate explanation for late disclosure); *Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255, 1258 (9th Cir. 1998) (affirming preclusion of witness due to the plaintiff's failure to justify his disregard for court's discovery deadline); *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991) (upholding decision to disregard evidence based on "tardy submission of the evidence without explanation").

VII. Plaintiffs' MIL Regarding the Cause of the Off-Gassing Incident (Doc. 243).

Plaintiffs move to preclude Intel from presenting evidence or argument that it did not cause the IWS "off-gassing" incident because this would confuse and mislead the jury regarding the concept of negligence and would invite the jury to assign fault to JLL. Doc. 243 at 1. Plaintiffs contend that because Intel retained affirmative duties with respect to the safety of the IWS, "it retained sufficient control to be liable for negligently exercising its safety responsibilities." *Id.* at 2 (citing *Rause v. Paperchine, Inc.*, 743 F. Supp. 2d 1114, 1122 (D. Ariz. 2010)).

Intel notes, correctly, that Plaintiffs essentially seek a summary judgment ruling on the issues of duty and causation. Doc. 256 at 1. A "motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim, particularly after the deadline [*32] for filing such motions has passed." *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1162 (9th Cir. 2013) (citing *Dubner v. City & Cty. of S.F.*, 266 F.3d 959, 968 (9th Cir. 2001)). Moreover, the issue of retained control is "a *question of fact* which ordinarily should be left to the fact finder." Doc. 204 at 29 (quoting *Lewis v. N.J. Riebe Enters., Inc.*, 170 Ariz. 384, 825 P.2d 5, 11 (Ariz. 1992) (emphasis in *Lewis*); *see also Lee v. M & H Enters., Inc.*, 237 Ariz. 172, 347 P.3d 1153, 1159 (Ariz. Ct. App. 2015) (the issue of retained control generally is for the jury to decide "[b]ecause the issue of a breach of duty is inextricably linked with the scope of retained control") (citing *Lewis*).

The Court will deny Plaintiffs' motion to exclude evidence that Intel did not cause the off-gassing incident. Doc. 243.

VIII. Intel's MIL Regarding Health Effects Not at Issue (Doc. 231).

Intel moves to exclude (1) the use of "inflammatory language" to describe H_2S, such as the terms "toxic," "hazardous," and "poisonous"; (2) evidence and argument regarding health effects that H_2S exposure can cause but that were not suffered by Alsadi; and (3) testimony from Plaintiffs' standard of care expert, Greg Gerganoff, about the dangerous nature of H_2S and health effects caused by exposure to the gas. Doc. 231.

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A. The Purported Inflammatory Language.

The Environmental Protection Agency classifies H_2S as an "extremely hazardous substance." 40 C.F.R. pt. 355, App. B. The Occupational Safety and Health Administration ("OSHA") [*33] describes H_2S as "a highly flammable, explosive gas" that "produces other toxic vapors and gases, such as sulfur dioxide." U.S. Dep't of Labor, OSHA, https://www.osha.gov/SLTC/hydrogensulfide/hazards.html (last visited July 9, 2020). The OSHA fact sheet for H_2S explains that it is an "extremely hazardous gas" and "both an irritant and a chemical asphyxiant[.]" OSHA Fact Sheet, https://www.osha.gov/OshDoc/data_Hurricane_Facts/hydrogen_sulfide_fact.pdf (last visited July 9, 2020). The Centers for Disease Control describes H_2S as a "flammable, highly toxic gas," noting that "[t]here is no proven antidote for [H_2S] poisoning." CDC, Agency for Toxic Substances and Disease Registry, https://www.atsdr.cdc.gov/mmg/mmg.asp?id=385&tid=67# (last visited July 9, 2020). Thus, referring to H_2S as toxic, hazardous, and poisonous is not inflammatory; it is a technically-correct description of the gas. The Court will deny Intel's motion in this regard.

B. Potential Health Effects Caused by H_2S Exposure.

Intel contends that reference to health effects caused by H_2S that Alsadi did not experience would serve only to confuse and mislead the jury. Doc. 231 at 2. Because this will now be a bench trial, that [*34] risk is reduced significantly. In addition, the potential dangers posed by exposure to H_2S are relevant to the standard of care. *See* Doc. 262 at 4. The Court does not find that the probative value of potential health effects caused by H_2S exposure is substantially outweighed by the danger of confusing the issues or misleading the factfinder. *See* Fed. R. Evid. 403; *see also Benson Tower Condo. Owners Ass'n v. Victaulic Co.*, 702 F. App'x 537, 541 (9th Cir. 2017) ("Given the relevance of the health-related evidence, the district court did not abuse its discretion in finding that its probative value was not substantially outweighed by the danger of unfair prejudice."). The Court will deny Intel's motion in this regard.

C. Gerganoff's Proposed Testimony.

Gerganoff is a work-place safety expert whose opinions are based on his technical knowledge, training, and experience. *See* Doc. 164-3. He opines that Intel failed to reasonably safeguard workers from a known hazardous condition and the failure caused Alsadi's injuries. *See* Doc. 180 at 13. The Court denied Intel's motion to exclude Gerganoff's safety-related opinions. Doc. 204 at 19-22.

Intel now moves to preclude Gerganoff from (1) describing H_2S as "an extremely flammable gas, inhalation hazard, and deadly poison," and (2) opining that H_2S "causes [*35] damage to the cardiovascular, central nervous, and respiratory systems" and is "known to cause apnea, coma, convulsions, dizziness, headache, weakness, irritability, insomnia, and stomach upset." Doc. 231 at 3 (quoting Doc. 164-4 at 4-5). For reasons stated above, the Court will not preclude Gerganoff from describing H_2S as an extremely flammable gas, inhalation hazard, or deadly poison, or from describing the health effects it is known to cause.

Gerganoff is not a medical causation exert — he expressly states that his "role in this matter was not to make determinations of medical causation[.]" Doc. 181 at 5. Instead, his "role is to address how Intel's knowledge of hazardous conditions associated with its wastewater treatment system should have steered its safety practices and procedures, and how Intel fell woefully short." *Id.* Gerganoff may described the hazardous nature of H_2S in opining on the adequacy of Intel's safety practices, but he may not give medical causation opinions — he may not opine that H_2S caused any particular illness or symptoms in Alsadi. *See* Doc. 262 at 4. The Court will grant Intel's motion with respect to such causation opinions.

IX. Intel's MIL Regarding Causation [*36] **and Alsadi's Symptoms (Doc. 232)**.

Three of Plaintiffs' experts opined that Alsadi's alleged symptoms were caused by H_2S exposure: treating physician Dr. Anselmo Garcia and rebuttal experts Drs. Kelly Johnson-Arbor and Charles Landers. Applying Rule 702, the Court ruled that Dr. Garcia's causation opinions are not admissible and Dr. Landers's and Dr. Johnson-Arbor's opinions that exposure to H_2S caused Alsadi to develop RADS are not admissible. Doc. 204 at 3-13, 18-19. The Court further held that Dr. Johnson-Arbor's general causation opinion concerning RADS is not relevant given the grant of summary judgment on Plaintiffs' claim that Alsadi's exposure to H_2S caused RADS. Doc. 216 at 8. The Court made clear, however, that it has made no ruling on the admissibility of any opinion of Dr. Johnson-Arbor that H_2S can cause some of the symptoms Alsadi has experienced since the

exposure. *Id.*

Intel now contends that Plaintiffs' experts "should be precluded from offering *any* opinions on causation of any of Alsadi's claimed symptoms or diseases, whatever Plaintiffs' experts choose to call such outcomes." Doc. 232 at 3 (emphasis in original). Plaintiffs concede that the Court has excluded all three experts [*37] from testifying to specific causation — that Alsadi's exposure caused his symptoms — and vow to abide by the Court's rulings. Doc. 266 at 2-3.[7]

A. Dr. Garcia.

Plaintiffs assert that Dr. Garcia's testimony will not stray beyond the observations and opinions he formed as part of Alsadi's treatment. Doc 266 at 3. They argue that such observations and opinions are "percipient witness" testimony, not expert testimony, and therefore are not subject to Rule 702 of the Federal Rules of Evidence. *Id.* 1-2. In support, Plaintiffs rely on two unpublished decision of the Ninth Circuit — *Hoffman v. Lee*, 474 F. App'x 503, 505 (9th Cir. 2012), and *Oakberg v. Zimmer, Inc.*, 211 F. App'x 578, 580 (9th Cir. 2006) — and one published decision — *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011). *Id.* The Court does not agree with Plaintiffs' arguments. The unpublished Ninth Circuit decision are not binding on the Court, and the published decision does not support their argument.

The published decision, *Goodman*, concerned the disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure, not the admissibility of expert opinions under Rule 702 of the Federal Rules of Evidence. Whether a treating physician's testimony is expert testimony subject to Rule 702 or non-expert fact testimony (including non-expert opinions subject to Rule 701) must be determined by looking at the Federal Rules of Evidence. What is more, Rule 26 was amended in 2010, after the decision in *Goodman*, to clarify the disclosure requirements for treating [*38] physicians like Dr. Garcia.[8] A brief review of the rule's history is relevant to Plaintiffs' claim that Dr. Garcia can testify about his treatment of Alsadi without regard to Rule 702.

Before the 2010 amendments, Rule 26 required detailed expert reports from witnesses who were "retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B). Because treating physicians generally were not retained or specially employed to provide expert opinions in a case, but instead were asked to testify and express opinions on the basis of their treatment of the plaintiff, they were not required to prepare expert reports. *See* Fed. R. Civ. P. 26(a)(2)(B) advisory committee note to 1993 amendment ("A treating physician, for example, can be deposed or called to testify at trial without any requirement for a written report."). This is not because the physicians were not giving expert opinions, but because they were not "retained or specially employed" as required by Rule 26(a)(2)(B).

The Ninth Circuit drew a sensible line in *Goodman*: physicians can testify about conclusions and opinions formed during the course of their treatment of the plaintiff without having [*39] to provide a Rule 26(a)(2)(B) expert report, but they cannot express new opinions formed for purposes of the litigation without disclosing them in such a report. In effect, physicians were deemed to be "retained or specially employed," and therefore subject to the report requirement, if they develop opinions for purposes of the litigation. *Goodman*, 644 F.3d at 826 ("Today we join those circuits that have addressed the issue and hold that a treating physician is only exempt from Rule 26(a)(2)(B)'s written report requirement to the extent that his opinions were formed during the course of treatment.").

The expert disclosures rules were amended in 2010 to close the discovery gap between retained experts who were required to provide a detailed report and non-retained experts who could provide expert testimony without a report. Rule 26(a)(2)(C) was added to require that any party who planned to call a non-retained expert to express expert opinions must disclose the "subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702" and "a summary of the facts and opinions to which the witness is expected to testify." Fed. R. Civ P. 26(a)(2)(C). The advisory committee note provided this explanation:

> A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a [*40] fact witness and also provide expert

[7] The Court also found inadmissible Dr. Johnson-Arbor's opinions that Alsadi likely was exposed to concentrations of H_2S higher than 11.7 ppm and that he likely has RADS. Doc. 204 at 16-18. Plaintiffs shall abide by these rulings as well.

[8] *Goodman* was issued in 2011, but it concerned events that occurred before December 1, 2010, the effective date of the Rule 26 amendments.

> testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C).

Fed. R. Civ. P. 26(a)(2)(C) advisory committee note to 2010 amendment.

These rules make clear, contrary to Plaintiffs' suggestion, that treating physicians can provide expert testimony subject to Rule 702 even when they are not required to provide an expert report. For disclosure purposes, the line drawn in *Goodman* continues to make sense even after the 2010 amendments — treating physicians who will testify only to conclusions and opinions formed in the course of treating the plaintiff need only be disclosed in the party's Rule 26(a)(2)(C) summary of the testimony, but treating physicians who will express opinions developed outside of their treatment must provide a Rule 26(a)(2)(B) report for those opinions. Both categories of physicians, however, are subject to challenges under Rule 702 because both can present expert opinions. True, some of a treating physician's testimony may be purely factual ("I provided plaintiff with a breathing treatment on June 1, 2017"), [*41] but some may be expert opinion under Rule 702 even though the opinion was developed in the course of treatment ("I provided the June 1, 2017 breathing treatment because I had concluded that the plaintiff suffered from chemically-induced asthma due to his exposure on March 1, 2017.").

In summary, Plaintiffs are incorrect in their claim that Dr. Garcia can testify about his treatment of Plaintiff without regard to Rule 702. If he expresses opinions formed during the course of treatment, those opinions likely will be based on based on Dr. Garcia's scientific, technical, or other specialized knowledge and therefore will be subject to the requirements of Rule 702. *See* Fed. R. Evid. 701(c), 702. As the Court stated in a previous order, "any testimony Dr. Garcia might give about the cause of Alsadi's injuries would be expert opinion under Rule 702." Doc. 204 at 7 (citing cases).

The Court held in its previous order that Plaintiffs had not shown by a preponderance of the evidence that Dr. Garcia's causation opinions are based on sufficient facts or data to which reliable principles and methods had been applied reliably. *Id.* at 10. The Court therefore concluded that his causation opinions are not admissible under Rule 702. *Id.*

Plaintiffs now suggest that Dr. Garcia [*42] may testify about "the *opinions*, actions, and observations formed during and relating to Alsadi's treatment." Doc. 266 at 3 (emphasis added). But the Court clearly has ruled that he cannot state causation opinions, and this ruling applies to opinions that identify the cause of Alsadi's injuries even if they are couched in language other than causation. Intel may object if it thinks Dr. Garcia is expressing a causation opinion. Further, any other opinions he states likely will be based on his scientific, technical, or other specialized knowledge and therefore will be subject to the requirements of Rule 702, even if the opinions were formed during the course of his treatment of Alsadi. Intel may object if it believes any such opinion is not admissible under Rule 702.

B. Drs. Landers and Johnson-Arbor.

Intel contends that Dr. Landers should be precluded from providing any causation testimony at trial with respect to any of Alsadi's symptoms. Doc. 232 at 4. The Court agrees. The Court previously held that Plaintiffs have not shown by a preponderance of the evidence that Dr. Landers' causation opinion is based on reliable principles and methods applied reliably to the facts of this case. Doc. 204 at 13. [*43] The Court therefore held that his causation opinion is not admissible under Rule 702. *Id.* As with Dr. Garcia, this ruling applies to any opinion that identifies the cause of Alsadi's injuries even if it is couched in language other than causation. Intel may object if it thinks Dr. Landers is expressing a causation opinion.[9]

Intel contends that Dr. Johnson-Arbor should not be permitted to provide any causation testimony at trial with respect to any of Alsadi's symptoms. Doc. 232 at 4. The

[9] With respect to Dr. Landers, Plaintiffs note, correctly, that the Court found his diagnosis of RADS sufficiently reliable to be admissible under Rule 702. *Id.* (citing Doc. 204 at 15). But the Court made this finding before granting summary judgment to Intel on whether Alsadi's alleged exposure to H_2S caused RADS. Doc. 216 at 5. Because Plaintiffs are now "precluded from seeking to recover for RADS" (*id.*), Dr. Landers' diagnosis of RADS is irrelevant. *See id.* at 16 ("The Court will enter summary judgment on Plaintiffs' claim that Alsadi's exposure caused RADS, and with no such claim in the case, Dr. Johnson-Arbor's general causation opinion is not relevant.") (citing Fed. Rs. Evid. 401-02). Intel, however, did not challenge Dr. Landers's RADS diagnosis as irrelevant in its MIL. *See* Doc. 266 at 3. Intel may object at trial.

Court agrees as to specific causation. The Court previously held that Plaintiffs have not shown by a preponderance of the evidence that Dr. Johnson-Arbor is qualified to render a specific causation opinion in this case or that her causation opinion is reliable. Doc. 204 at 19. The Court therefore held that her causation opinion is not admissible under Rule 702. *Id.* As with Drs. Garcia and Landers, this ruling applies to any opinion that identifies the cause of Alsadi's injuries even if it is couched in language other than causation. Intel may object if it thinks Dr. Landers is expressing a causation opinion.

Plaintiffs suggest, however, that Dr. Johnson-Arbor may provide general causation opinions with [*44] respect to Alsadi's non-RADs symptoms. Doc. 266 at 4. The Court agrees. The Court previously clarified that it "has made no ruling on the admissibility of any opinion of Dr. Johnson-Arbor that H_2S can cause some of the symptoms Alsadi has experienced since the exposure event. Intel has not challenged any such opinion." Doc. 216 at 8. Thus, the Court has not precluded Dr. Johnson-Arbor from giving a general causation opinion that H_2S can cause symptoms of the kind Alsadi is experiencing. But she cannot testify to specific causation — that the exposure in fact caused those symptoms. That finding, if made in this case, must be based on Plaintiff's non-expert evidence.

X. Intel's MIL Regarding New and Worsening Symptoms (Doc. 233).

The Court denied summary judgment on the issue of causation because a jury reasonably could find, without the benefit of expert medical testimony, that Alsadi was exposed to H_2S and the exposure caused a toxic inhalation injury on the night in question and immediately thereafter. Doc. 204 at 30-33. After receiving supplemental briefing, the Court granted summary judgment on the issue of whether Alsadi's exposure to H_2S caused RADS and denied summary judgment on [*45] the extent and duration of Plaintiffs' injuries. Doc. 216 at 9 ("[A]lthough Plaintiff now lacks evidence to show that he suffers from RADs, he is not precluded under Arizona law from presenting evidence that he suffered an inhalation injury on the night in question, that has persisted.") (citations omitted).

Intel now moves to exclude evidence and argument of new and worsening symptoms. Doc. 233. Intel claims that Plaintiffs intend to present evidence that Alsadi's initial symptoms "somehow 'triggered' the development of new and different symptoms, such as wheezing, coughing fits, 'electric shock' type chest pain, shortness of breath, vomiting, and incontinence." *Id.* at 3. Intel contends that proving such new and different symptoms requires admissible expert testimony that Plaintiffs cannot offer, and that such evidence is also necessary to show that "Alsadi's immediate symptoms grew substantially worse over the months and years following the alleged exposure." *Id.* at 3-4.

As previously explained, the Court intends "to permit Plaintiffs to present evidence, if offered in admissible form, that Alsadi's symptoms which developed immediately upon exposure (and which the jury therefore could properly conclude [*46] were caused by the exposure) have continued and likely will continue into the future, but not to permit them to present evidence of new or different symptoms that were not immediately apparent upon exposure." Doc. 216 at 7. The Court maintains its view that this is the correct approach given Plaintiffs' lack of expert causation evidence, but the Court must "engage in this line-drawing as the evidence is presented at trial." *Id.* The Court's task will be to determine from the evidence whether Alsadi's claimed injuries are new and different symptoms or a continuation of the symptoms he experienced at the time of exposure. The parties will be permitted to present evidence and arguments on this issue, and the Court will make its findings based on what the evidence proves, not on speculation. Intel's motion (Doc. 233) will be denied.[10]

XI. Intel's MIL Regarding Michael Torbert's Trial Testimony (Doc. 234).

Torbert worked for JLL at Intel's Chandler campus when the off-gassing incident occurred. Intel asserts that Torbert offers three categories of inadmissible testimony in his deposition — expert opinions, hearsay, and "additional objectionable testimony." Doc. 234 at 2. Intel provides various [*47] examples of the purported inadmissible testimony, but "has not attempted to list every instance of inadmissible testimony in [Torbert's] deposition." *Id.*

[10] Intel asserts in a footnote that Plaintiffs did not timely disclose Dr. Gerald Schwartzberg to offer expert opinions as required by Rule 26(b)(2). Doc. 233 at 3, n.3. Plaintiffs address this argument in their response to Intel's motion in limine regarding expert testimony of certain medical professionals (Docs. 237, 267).

Intel's motion "sweeps too broadly and is an improper attempt to pre-try the case." *Smilovits v. First Solar, Inc.*, No. CV12-0555-PHX-DGC, 2019 U.S. Dist. LEXIS 212792, 2019 WL 6698199, at *4 (D. Ariz. Dec. 9, 2019); *see PCT Int'l Inc. v. Holland Elecs. LLC*, No. CV-12-01797-PHX-JAT, 2015 U.S. Dist. LEXIS 24730, 2015 WL 875200, at *14 (D. Ariz. Mar. 2, 2015) ("motions in limine are not an opportunity to pre-try the case"); *Universal Engraving Inc. v. Metal Magic Inc.*, No. CV 08-1944 PHX RJB, 2011 U.S. Dist. LEXIS 159016, 2011 WL 13070114, at *1 (D. Ariz. July 12, 2011) (same). Intel may object at trial to testimony it believes is expert opinion, hearsay, or inadmissible under Rule 403. The Court will be far better equipped to rule on specific testimony at that time.

The Court will deny Intel's motion regarding Torbert's trial testimony. Doc. 234.

XII. Intel's MIL Regarding Testimony of Gases Other than H_2S (Doc. 235).

Intel moves to preclude Dr. Thomas Abia, an Intel chemical engineer, and three of Plaintiffs' experts, from testifying about sulfur dioxide or gases other than H_2S. Doc. 235.

A. Dr. Johnson-Arbor.

The rebuttal expert disclosure deadline in this case was January 11, 2019. Doc. 142 at 1. On March 29, 2019 — more than two months [*48] after the deadline — Plaintiffs filed a new declaration from Dr. Johnson-Arbor in which she opines, among other things, that Alsadi inhaled sulfur dioxide ("SO_2") and possibly other hazardous gases and the exposure caused various symptoms and RADS. Doc. 159-2. Intel moved to strike the declaration as untimely and because Johnson-Arbor's new SO_2 opinions are inadmissible speculation. Doc. 167. The Court denied the motion as moot given its ruling that Dr. Johnson-Arbor is not qualified to render a causation opinion in this case and her causation opinions are not reliable. Doc. 204 at 19 & n.13.

Intel contends that if Dr. Johnson-Arbor's belated SO_2 exposure opinion survived the Court's exclusion of her causation opinions and H_2S exposure opinion (*see* Doc. 204 at 16-19), her SO_2 opinion should be precluded for reasons stated in Intel's motion to strike and *Daubert* motion (*see* Docs. 147, 167). Doc. 235 at 2-3. In response to this argument, Plaintiffs do not explain their failure to comply with the January 11, 2019 rebuttal expert disclosure deadline. Doc. 142 at 1. The Court cannot conclude that Plaintiffs' failure was "substantially justified or harmless," Fed. R. Civ. P. 37(c)(1), and will grant Intel's motion [*49] to exclude Dr. Johnson-Arbor's SO_2 exposure opinion set forth in her March 29, 2019 declaration (Doc. 159-2). *See Nunes*, 2020 U.S. Dist. LEXIS 48910, 2020 WL 1324808, at *1; *Food Servs. of Am., Inc. v. Carrington*, No. CV-12-00175-PHX-GMS, 2013 U.S. Dist. LEXIS 120194, 2013 WL 4507593, at *17 (D. Ariz. Aug. 23, 2013) (striking untimely expert disclosures).

B. Greg Gerganoff.

Intel asserts that Gerganoff's expert reports and declarations "are littered with unsupported speculation that SO_2 and other unknown 'hazardous gases' might have been released during the incident at issue." Doc. 235 at 3 (citing Docs. 164-4 at 3-5, 181 ¶¶ 12, 22). Intel argues that because Gerganoff provides opinions from a safety standpoint, and not from a scientific perspective, he should be precluded from speculating that SO_2 and other toxic gases may have been released. *Id.* (citing Doc. 204 at 20-21).

Plaintiffs assert that they do not seek to introduce evidence of a specific amount of SO_2 or any other gas in the ambient air on the night in question, but only the likelihood that SO_2 was present based on the known fact that SO_2 is a by-product of the IWS System and Intel's own testimony. Doc. 261 at 2. But Plaintiffs do not explain why expert testimony is necessary for this purported "known fact." Nor have Plaintiffs shown that Gerganoff is qualified to [*50] offer a scientific opinion that there was a significant release of SO_2 from the overdosing of the chemical Thio-Red. *See, e.g.*, Doc. 181 ¶ 22.

Plaintiffs note that Gerganoff formed his opinion about the potential for SO_2 exposure from data provided by Intel and the testimony of Dr. Abia and Jennifer Francis, an Intel industrial hygienist. Doc. 261 at 2. Gerganoff may rely on that testimony and Intel's data in offering standard of care opinions, but he may not opine from a scientific perspective that SO_2 and toxic gasses other than H_2S may have been released. The Court will grant Intel's motion in this regard.

C. Derrick Denis.

Intel moves to preclude Derrick Denis, an indoor environmental quality expert, from opining that SO_2 may have been present because H_2S can be involved in certain chemical reactions that produce SO_2. Doc. 235 at

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4. But Intel provides only four pages of Denis' 25-page declaration in support of its motion. The Court cannot conclude on the present record that Denis is not qualified to offer the challenged opinion. The Court will rule at trial on any objection to Denis' testimony. Intel's motion will be denied in this regard.

D. Dr. Abia.

Dr. Abia is an Intel chemical [*51] engineer and the "system owner" of Intel's IWS. *See* Doc. 261 at 3. Intel moves to preclude Dr. Abia from testifying that SO_2 likely was released because Plaintiffs "completely mischaracterize Dr. Abia's testimony." Doc. 235 at 4. But Intel presents no argument or legal authority for excluding "mischaracterized" testimony. *See id.*; Doc. 190 at 10.

Intel contends that any such testimony from Dr. Abia would constitute expert opinion that was not properly disclosed. Doc. 235 at 4-5. But Dr. Abia is a fact witness whom Intel designated as its Rule 30(b)(6) deponent on "what other hazardous gases, fumes or substances could have potentially been released on the date of the subject incident as a result of the IWS processes." *Id.* (quoting Doc. 261-6 at 3). "Courts routinely permit witnesses to offer lay opinion testimony concerning matters they learn or experience they gain as a result of their employment." *Vasserman v. Henry Mayo Newhall Mem'l Hosp.*, 65 F. Supp. 3d 932, 946-47 (C.D. Cal. 2014) (citing cases). The Court will not preclude Dr. Abia from testifying as a fact witness about the possible release of SO_2. If Plaintiffs seek to elicit inappropriate expert opinions from Dr. Abia, Intel may object. *See Wilson v. Maricopa County*, No. CV-04-2873-PHX-DGC, 2007 U.S. Dist. LEXIS 15451, 2007 WL 686726, at *16 (D. Ariz. Mar. 2, 2007) (allowing the defendants' consultant on the [*52] issue of inmate safety in Tent City to testify as a fact witness at trial, but noting that defendants could object to any inadmissible expert opinions). Intel's motion will be denied with respect to Dr. Abia's testimony as a fact witness.

XIII. Intel's MIL Regarding Certain OSHA Regulations (Doc. 236).

The Ninth Circuit has recognized that "safety standards such as those contained in OSHA assist 'a jury's determination of negligence because they represent the community's judgment as to what conduct is reasonable and what conduct is not.'" *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991) (citations omitted). Consistent with this authority, the Arizona Court of Appeals has held that "an OSHA standard may be considered as some evidence of the standard of care even when OSHA requirements are not binding on the defendant, so long as there is sufficient foundation (1) establishing that the standard at issue is directly related to the exercise of reasonable care and (2) a reasonable nexus exists between the proffered standard and the circumstances of the injury." *Wendland v. AdobeAir, Inc.*, 223 Ariz. 199, 221 P.3d 390, 396 (Ariz. Ct. App. 2009).

Intel contends that certain OSHA-based opinions Gerganoff sets forth in his report (Doc. 164-4) are inadmissible under *Wendland* because the OSHA rules do not set a standard of [*53] care and otherwise are irrelevant. Doc. 236 at 3-4. As the Court previously explained, Gerganoff is not required to accept Intel's interpretation of OSHA standards. Doc. 204 at 21. The Court cannot conclude on the present record that Gerganoff's OSHA-based opinions are inadmissible. Intel will be free to cross-examine Gerganoff at trial and to object on the basis of foundation, relevancy, Rule 403, or other grounds. The Court will rule on objections as they are made. *See id.* Intel's motion regarding certain OSHA regulations will be denied.

XIV. Intel's MIL Regarding Certain Medical Professionals (Doc. 237).

A. Drs. Vu, Spangenberg, Shobe, and Kamarinos.

Plaintiffs disclosed various treating physicians who may testify about their evaluations and treatment of Alsadi's injuries, the extent of those injuries, and treatment costs. Docs. 237-2, 267-1, 267-2. Intel moves to preclude Drs. Le Vu, Bethanie Spangenberg, Darren Shobe, and Syros Kamarinos from offering expert opinions of any kind, including on causation, diagnosis, and prognosis, because they were not properly identified as expert witnesses under Rule 26(a)(2). Doc. 237 at 2-3. Plaintiffs vow that the doctors will not testify to causation, but assert [*54] that as properly disclosed percipient fact witnesses, they "may testify to and opine on what they saw and did[.]" Doc. 267 at 2 (quoting *Goodman*, 644 F.3d at 819).

As explained above, however, treating physicians are not exempt from the requirements of Rule 702 simply because they formed their opinions in the course of treatment, and therefore are not exempt from the

disclosure requirements of Rule 26(a)(2)(C). As other courts have recognized, treating physicians "are often considered 'hybrid experts' because they can provide both fact testimony (as percipient witnesses to the services rendered to the patient) and expert testimony (based on their specialized knowledge)." *Scolaro v. Vons Cos.*, No. 2:17-cv-01979-JAD-VCF, 2019 U.S. Dist. LEXIS 221547, 2019 WL 7284738, at *3 (D. Nev. Dec. 27, 2019) (citing *Goodman*, 644 F.3d at 819; Fed. R. Civ. P. 26, advisory committee's note to 2010 amendment). If Plaintiffs intended to call treating physicians to opine about the treatment of Alsadi, they were required by Rule 26(a)(2)(C) to disclose "the subject matter on which the witness is expected to present evidence under Rule 702" and "a summary of the facts and opinions to which the witness is expected to testify." *Alsadi*, 2019 U.S. Dist. LEXIS 169867, 2019 WL 4849482, at *3; *see Transoceanic Cable Ship Co. LLC v. Bautista*, No. CV 17-00209 ACK-KSC, 2018 U.S. Dist. LEXIS 122061, 2018 WL 3521174, at *2 (D. Haw. July 20, 2018) ("Treating physicians testifying as to opinions formed during the course of treatment are 'experts' regarding [*55] whose testimony the Rule 26(a)(2)(C) disclosures are required.") (citing *Republic of Ecuador v. Mackay*, 742 F.3d 860, 865 n.1 (9th Cir. 2014)). The Rule 26(a)(2)(C) "summary, although clearly not as detailed as a Rule 26(a)(2)(B) report, must be sufficiently detailed to provide fair notice of what the expert will say at trial." *Leland v. Cty. of Yavapai*, No. CV-17-8159-PCT-SPL (DMF), 2019 U.S. Dist. LEXIS 44984, 2019 WL 1547016, at *6 (D. Ariz. Mar. 18, 2019); *see Flonnes v. Property & Cas. Ins. Co.*, No. 2:12-cv-01065-APG, 2013 U.S. Dist. LEXIS 74018, 2013 WL 2285224, at *5 (D. Nev. May 22, 2013) ("[I]dentification of the subject matter on which the witness is expected to testify is insufficient to comply with the summary of facts and opinions requirement of Rule 26(a)(2)(C).").

Plaintiffs' disclosures identify the subjects on which the treating physicians may opine under Rule 702 — the treatment of Alsadi's injuries, the extent of those injuries, and the cost of treatment — but come "nowhere close to providing a summary of the facts and opinions of any single physician[,] as required by Rule 26(a)(2)(C)." *Frederick v. Frederick*, No. CV-17-00368-PHX-JJT, 2018 U.S. Dist. LEXIS 132353, 2018 WL 3738199, at *1 (D. Ariz. Aug. 7, 2018); *see Meza v. Wacker Neuson Sales Ams. LLC*, No. 2:18-CV-0574-HRH, 2019 U.S. Dist. LEXIS 96800, 2019 WL 2417396, at *5 (D. Ariz. June 10, 2019) ("While plaintiffs' disclosure as to Dr. Foltz arguably identifies the subject matter on which he will testify, it does not contain a summary of Dr. Foltz's facts and opinions. Plaintiffs have not complied with Rule 26(a)(2)(C)."); *Garrett v. Woodle*, No. CV-17-08085-PCT-BSB, 2018 U.S. Dist. LEXIS 198406, 2018 WL 6110924, at *4 (D. Ariz. Nov. 21, 2018) (plaintiff's disclosures failed to comply with Rule 26(a)(2)(C) where [*56] they indicated that "the healthcare providers will have opinions in certain areas, including [p]laintiff's injuries and the causation of those injuries, but do not state what the opinions are, and do not identify the factual basis for those opinions"); *Deguzman v. United States*, No. 2:12-CV-0338 KJM AC, 2013 U.S. Dist. LEXIS 86390, 2013 WL 3149323, at *4 (E.D. Cal. June 19, 2013) ("Plaintiff's disclosure of Dr. Anderson was accompanied by a statement that fails to meet even the most liberal interpretation of Rule 26(a)(2)(C). That Dr. Anderson intended to testify to 'the nature and extent of plaintiff's injuries, cause of those injuries, diagnosis, prognosis, reasonableness of medical expenses and necessity of treatment' is obvious and hardly promotes the goal of increasing efficiency and reducing unfair surprise."); *Pineda v. City & County of San Francisco*, 280 F.R.D. 517, 523 (N.D. Cal. 2012) (merely stating that the treating physician "will present fact and opinion testimony on causation, diagnosis, prognosis, and extent of injury" based on medical records was an inadequate disclosure under Rule 26(a)(2)(C)).

A party that fails to disclose information required by Rule 26(a) is not allowed to use that information at a trial unless the failure was substantially justified or harmless. Fed. R. Civ. P. 37(c)(1). Plaintiffs do not contend that their failure [*57] to comply with the disclosure requirements of Rule 26(a)(2)(C) was substantially justified or harmless. The Court will grant Intel's motion to preclude Drs. Vu, Spangenberg, Shobe, and Kamarinos from offering expert opinions at trial.[11]

B. Drs. Leff and Schwartzberg.

[11] The doctors may testify as percipient fact witnesses because Plaintiffs properly disclosed them under Rule 26(a)(1)(A)(i). *See* Doc. 267-2; *Transoceanic Cable Ship Co. LLC*, 2018 U.S. Dist. LEXIS 122061, 2018 WL 3521174, at *6 ("Dr. Joaquin may testify at trial in the limited capacity of a fact witness, but . . . he may not give any testimony that draws on his medical expertise. Said another way, Dr. Joaquin may testify regarding what he perceived and did during his visits with Bautista, the timing and frequency of such visits, and other matters to which he is competent to testify by way of personal — but not specialized — knowledge.").

Alsadi v. Intel Corp.

Plaintiffs disclosed Drs. Ben Leff and Gerald Schwartzberg as persons who may have knowledge regarding their findings and independent medical examinations of Alsadi in his worker's compensation matter. Docs. 237-2 at 4, 267-2 at 4. Intel moves to preclude the doctors from offering expert opinions because Plaintiffs failed to comply with the Rule 26 expert disclosure requirements. Docs. 233 at 3 n.3, 237 at 4.

Plaintiffs do not contend that they disclosed Drs. Leff and Schwartzberg as expert witnesses under Rule 26(a)(2). *See* Doc. 161-1. Instead, Plaintiffs state that they have "no interest in any opinions these doctors formed outside of their examinations of Alsadi," and that the doctors' "opinions and reports are [to be] treated as would be those of a treating doctor and percipient witnesses." Doc. 267 at 2. Again, however, if Plaintiffs intend to call the physicians to offer opinions under Rule 702 about their evaluation or treatment of Alsadi, they must make Rule 26(a)(2)(C) disclosures. [*58] Plaintiffs did not provide the information required by this rule in their disclosures about Drs. Leff and Schwartzberg.

Plaintiffs contend that the Court should allow Dr. Leff to testify consistent with his reports because their failure to properly disclose him as an expert witness was substantially justified and harmless. Doc. 267 at 3-4 (citing Fed. R. Civ. P. 37(c)(1)). The Court does not agree.

Dr. Leff examined Alsadi and prepared a report of his findings on January 18, 2017. Doc. 161-12.[12] But Plaintiffs did not disclose him as a potential witness until May 2018, and have never disclosed him as an expert witness. *See* Docs. 237 at 4, 267 at 3. The fact that the Court has excluded certain opinions of Plaintiffs' designated experts does justify the failure to properly disclose Dr. Leff as an expert witness. *See* Doc. 267 at 4 n.3; *Mettias v. United States*, No. CIV. 12-00527 ACK-KS, 2015 U.S. Dist. LEXIS 27561, 2015 WL 998706, at *5 (D. Haw. Mar. 6, 2015) (failure to disclose medical providers as experts was not substantially justified where their identities were known to the government when the action was commenced and it had more than a year to provide expert disclosures); *see also Bauer Bros., LLC v. Nike, Inc.*, No. 09-CV-0500-WQH BGS, 2011 U.S. Dist. LEXIS 158768, 2011 WL 12828588, at *3-4 (S.D. Cal. Oct. 19, 2011) (finding that the plaintiff's failure to provide an expert report [*59] more than two months after the court clarified the role of "hybrid experts" in light of *Goodman* was not substantially justified).

Plaintiffs contend that so long as an expert's opinions at trial do not differ substantially from opinions offered in the expert report, they are not late for purposes of Rule 26(a) and therefore are not subject to Rule 37 preclusion. *Id.* at 4 (citing *Godinez v. Huerta*, No. 16-CV-0236-BAS-NLS, 2018 U.S. Dist. LEXIS 73623, 2018 WL 2018048, at *8 (S.D. Cal. May 1, 2018)). But Plaintiffs never disclosed Dr. Leff as an expert witness. Plaintiffs' citation to *Godinez* is misplaced because the plaintiff in that case properly disclosed its expert witness and his report under Rule 26(a)(2). 2018 U.S. Dist. LEXIS 73623, 2018 WL 2018048, at *8.

The fact that Intel has been aware of Dr. Leff's examination of Alsadi for workers' compensation purposes does not render harmless Plaintiffs' failure to affirmatively disclose him as an expert witness in this case. The issue is not whether Intel knew of the existence and work of Dr. Leff, but whether they knew Plaintiffs intended to call him as a Rule 702 witness at trial. Only the latter knowledge would enable Intel to prepare to meet his opinions at trial. *See* Doc. 267 at 3; *Pac. Indem. Co. v. Nidec Motor Corp.*, 203 F. Supp. 3d 1092, 1097 (D. Nev. 2016) ("Harmlessness may be established if a disclosure is made sufficiently before the discovery cutoff to enable the movant to depose [*60] the expert and challenge his expert report.") (citations omitted). "This is not a case where Plaintiffs have substantially complied with the rule but a minor, technical failing . . . is at issue. Plaintiffs have clearly failed to comply with the basics of the rule, and their attempt to downplay the significance of this failure to comply by speculating as to [Intel's] prejudice (or lack thereof) is unavailing." *Montalvo v. Am. Family Mut. Ins. Co.*, No. CV-12-02297-PHX-JAT, 2014 U.S. Dist. LEXIS 90192, 2014 WL 2986678, at *7 (D. Ariz. July 2, 2014).

Plaintiffs assert that they should be allowed to call Dr. Schwartzberg to offer opinions about his examination of Alsadi because he "was retained and properly disclosed by Intel" and Plaintiffs disclosed "any witnesses listed by [Intel], whether or not withdrawn prior to trial." Doc. 267 at 3. This tactic, if accepted, would defeat the purpose of Rule 26 disclosures, which are meant "to give each side clear notice of who will be giving opinion testimony . . . so that each side can prepare to respond, including taking depositions. A vague cross-reference to the other side's witnesses does not provide that notice." *Castillo v. City & County of San Francisco*, No. C 05-00284 WHA, 2006

[12] Dr. Leff corrected a mistake he made concerning Alsadi's weight in a subsequent addendum. *See* Doc. 267 at 4.

U.S. Dist. LEXIS 13698, 2006 WL 618589, at *2 (N.D. Cal. Mar. 9, 2006) (holding that the defense disclosure did not adequately put plaintiff on notice [*61] that it intended to call a doctor and ask him Rule 702 opinion questions).

The Court will grant Intel's motion to preclude Plaintiffs from calling Drs. Leff and Schwartzberg as expert witnesses. Docs. 233 at 3 n.3, 237 at 4-5.[13]

XV. Intel's MIL Regarding Gerganoff's Opinions and Building CH-8 (Doc. 238).

The Court denied Intel's motion for summary judgment on the duty element of Alsadi's negligence claim because a jury reasonably could find that Intel retained some control over the work that allegedly caused Alsadi's injuries. Doc. 204 at 26-30. The Court also denied Intel's motion to exclude Gerganoff's opinions that Intel failed to reasonably safeguard workers from a known hazardous condition. *Id.* at 19-22.

Intel now claims that the issue of duty at trial should focus not on what could have been done to prevent an H?S release inside the CH-8 building, but rather the duty of care applicable to Alsadi outside of CH-8 once Intel recognized there was an off-gassing occurrence. Doc. 238 at 2. Intel essentially seeks a summary judgment ruling on the scope of its duty in this case. A "motion in limine is not the proper vehicle for seeking a dispositive ruling on a claim[.]" *Hana Fin*, 735 F.3d at 1162.

Moreover, Intel's argument that what [*62] happened inside CH-8 is irrelevant to Alsadi's negligence claim is not convincing. *See* Docs. 238 at 2-3, 259 at 1. Intel does not dispute that it owns the entire Chandler campus, including the CH-8 building and the evacuation area where Alsadi allegedly was injured. Doc. 196-3 at 6; *see* Doc. 204 at 27. Scott Graunke, Intel's environmental health and safety manager, testified that Intel controls both the mixture of chemicals used in the IWS and the amount of H_2S in the ambient air. Doc. 196-3 at 3-4, 14-15. From this evidence, a jury reasonably could find that Intel retained at least some measure of control over JLL's operation of the IWS and H_2S emissions inside CH-8. *See* Doc. 204 at 28.

The Court will deny Intel's motion to exclude Gerganoff's opinions regarding what occurred in CH-8 and Intel's IWS operations. Doc. 238.

XVI. Intel's MIL Regarding Bakkenson's Opinions (Doc. 239).

Intel moves to exclude the opinions of Gretchen Bakkenson, Plaintiffs' vocational expert, because some of her opinions are based in part on the now-inadmissible opinions of Drs. Garcia and Landers regarding causation and RADS. Doc. 239.

Plaintiffs note, correctly, that although they lack evidence to show that [*63] Alsadi suffers from RADS, they are not precluded from presenting evidence that Alsadi suffered an immediate inhalation injury that has persisted, or from seeking future damages for his symptoms, provided Plaintiffs can present evidence that the symptoms are likely to continue into the future. Doc. 264 at 2 (citing Doc. 216 at 6). Plaintiffs make clear that Bakkenson will offer no opinion regarding the cause of Alsadi's injuries, that she will not vouch for the assumed facts on which her vocational opinions are based, and that her opinions will be based on assumed facts that comport with evidence presented at trial. *Id.* at 2-3. Whether such facts have been proved will be for the factfinder to decide at trial, absent a contrary ruling after Plaintiffs have presented their case in chief. *See* Fed. R. Civ. P. 50(a); *see also Bustamante v. Graco, Inc.*, No. CV03-182 TUC JMR, 2006 U.S. Dist. LEXIS 97151, 2006 WL 5156868, at *2 (D. Ariz. Mar. 9, 2006) (holding that whether the vocational expert's reliance on wage rates was reasonable was "an issue that goes to the weight of the evidence and should be left to the jury to decide" where the expert's opinions were "not wholly unsupported speculation or based only on subjective beliefs").

The Court will deny [*64] Intel's motion regarding the expert opinions of Bakkenson.

XVII. The Parties' Motion to Seal (Doc. 213).

The parties move to seal exhibits one and three to Plaintiffs' reply in support of their motion for negative inference. Doc. 213. Plaintiffs' have lodged the proposed unredacted sealed versions of the exhibits with the Court. Docs. 214-1, 214-2.

Sealing the exhibits will have no effect on the public's ability to understand the issues in this case because lightly redacted copies will be filed in the public docket. The Court finds compelling reasons to seal and will grant

[13] Given this ruling, the Court need not decide whether Dr. Leff's causation opinion is sufficiently reliable. *See* Doc. 237 at 4.

the parties' motion. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

IT IS ORDERED:

1. Plaintiffs' motion for negative inference (Doc. 207) is **denied**.

2. Plaintiffs' MIL regarding the 11.7 ppm measurement of H_2S (Doc. 241) is **denied**.

3. Plaintiffs' MIL to preclude evidence or argument challenging causation and the permanence of Alsadi's symptoms (Doc. 208) is **denied**.

4. Plaintiffs' MIL to exclude evidence of Alsadi's misdemeanor convictions (Doc. 240) is **granted**.

5. Plaintiffs' MIL to exclude untimely disclosed testimony and documents (Doc. 242) is **granted**.

6. Plaintiffs' MIL regarding the cause of the off-gassing incident (Doc. 243) is **denied**.

7. Intel's MIL regarding [*65] health effects not at issue (Doc. 231) is **denied in part and granted in part**. The motion is denied with respect to the purported inflammatory language and potential health effects caused by H_2S exposure, and granted with respect to Gerganoff's causation opinions.

8. Intel's MIL regarding causation and Alsadi's symptoms (Doc. 232) is **denied**.

9. Intel's MIL regarding new and worsening symptoms (Doc. 233) is **denied**.

10. Intel's MIL regarding trial testimony of Michael Torbert (Doc. 234) is **denied**.

11. Intel's MIL regarding testimony of gases other than H_2S (Doc. 235) is **granted in part and in denied part**. The motion is granted with respect to Dr. Johnson-Arbor's SO_2 exposure opinion and Gerganoff's opinion that there was a release of SO_2, and denied with respect to Denis's opinion that SO_2 may have been present and Dr. Abia's testimony as a fact witness.

12. Intel's MIL regarding certain OSHA regulations (Doc. 236) is **denied**.

13. Intel's MIL regarding expert testimony from certain medical professionals (Doc. 237) is **granted**. Drs. Vu, Spangenberg, Shobe, and Kamarinos are precluded from offering expert opinions at trial, and Plaintiffs may not call Drs. Leff and Schwartzberg as expert witnesses. [*66]

14. Intel's MIL regarding Gerganoff's opinions and the CH-8 building (Doc. 238) is **denied**.

15. Intel's MIL regarding Bakkenson's opinions (Doc. 239) is **denied**.

16. The parties' motion to file exhibits one and three to Plaintiffs' reply brief under seal (Doc. 213) is **granted**. The Clerk is directed to file the lodged exhibits (Docs. 214-1, 214-2) under seal. The parties shall file redacted public versions of the exhibits on the docket by **July 24, 2020**.

17. The Court will schedule the bench trial in this case, and set a final pretrial conference, once it is clear that the trial can be held without jeopardizing the health of all participants.

Dated this 17th day of July, 2020.

/s/ David G. Campbell

David G. Campbell

Senior United States District Judge

End of Document

THE SUPREME COURT *of* OHIO

PROFESSIONALISM DOs & DON'Ts:

PROFESSIONALISM IN THE COURTROOM

Issued by the Commission on Professionalism:

To be truly professional when appearing in court, a lawyer must act in a proper manner. Such conduct goes beyond complying with the specific rules of procedure and of evidence promulgated by the Supreme Court of Ohio and with local rules issued by trial courts and individual judges. Proper conduct in the courtroom also includes adhering to common principles of civility and respect when dealing with the judge, court staff, and opposing counsel. The Supreme Court of Ohio Commission on Professionalism has prepared this list of "dos and don'ts," to illustrate a number of principles so that lawyers appearing in Ohio courts will fully understand what is expected of them. In creating this list, the Commission does not intend to regulate or to provide additional bases for discipline, but rather to help promote professionalism among Ohio's lawyers.

By following the principles of civility and respect, lawyers will enhance their professionalism, as well as the dignity of courtroom proceedings.

DO

- Be prepared for your participation in any court conference or proceeding.
- Wear appropriate courtroom attire when appearing in court. If you are a male attorney, always wear a tie.
- Advise your clients on how to dress appropriately for any scheduled court appearance.
- Be on time for all court conferences and proceedings. (The best practice is to arrive at least five minutes in advance of the scheduled time.)
- If you are going to be late, call the courtroom so those who are waiting are properly informed.
- Turn your cell phone and all other electronic devices off or to silent mode before entering a courtroom.
- Be courteous when addressing the judge and opposing counsel, both in the courtroom and in chambers.
- Begin any argument on the record before the judge or jury, by saying, "May it please the court."
- Stand whenever you address the judge in the courtroom.
- Show all exhibits to opposing counsel before showing the exhibit to a witness. (OVER)

- Ask the judge's permission before approaching a witness during trial or before publishing an exhibit to the jury during an examination.
- Speak clearly and enunciate when addressing the judge or a witness.
- Agree to stipulate to facts that are not in dispute if they will not adversely affect your client.
- Respect the private nature of a sidebar conference; avoid making statements or arguments at a level that may be overheard by the jury.
- Inform the judge in advance of any delays in the scheduling of witnesses.
- Treat court personnel with the same respect you would show the judge.
- Be accurate when setting forth pertinent facts and pertinent rules of law.
- Answer questions from the judge directly and forthrightly.
- Bring to the judge's attention any possible ethics issues as soon as you become aware of them.
- Verify immediately the availability of necessary participants and witnesses after a date for a hearing or trial has been set, so you can promptly notify the judge of any problems.
- During final argument, be circumspect when summarizing testimony that contains profane words.

DON'T

- Make ad hominen attacks on opposing counsel or be sarcastic in either your oral arguments or written briefs.
- Shout when making an objection in a court proceeding.
- Make any speaking objections in a jury case except for an explanatory single word or two (e.g., "hearsay," "leading," "no foundation"). DO request a side bar conference if you must expound on your objections.
- Interrupt opposing counsel or the judge, no matter how strongly you disagree with what is being said.
- Argue with the judge or react negatively after the judge has ruled on an objection or other matter.
- Tell the judge that he or she has committed a reversible error.
- Tell the judge that another judge has ruled a different way without providing a copy of the other judge's written opinion.
- Display anger in the courtroom.
- Make facial objections during testimony or during arguments by opposing counsel.
- Bring a beverage to the trial table unless it is in a non-descript glass or cup and only if you determined that the judge does not object to a beverage on the trial table.
- Lean or sit on the trial table, jury box, or any other furniture in the courtroom.
- Move freely around the courtroom once a proceeding is underway without obtaining permission from the judge.
- Celebrate or denounce a verdict as it is delivered, and also advise clients and interested spectators not to do so. DO behave civilly with opposing counsel when leaving the courtroom.

The Supreme Court of Ohio

OPERATING GUIDELINES FOR THE TASK FORCE ON IMPROVING COURT OPERATIONS USING REMOTE TECHNOLOGY

These guidelines are issued by the Chief Justice of the Supreme Court and apply to the creation, organization, and operation of the Task Force on Improving Court Operations Using Remote Technology to assist the Court in exercising the authority granted pursuant to Article IV of the Ohio Constitution.

These guidelines are intended to establish consistent standards and expectations in implementing this authority. While these guidelines may impose specific duties upon other persons, the Chief Justice may waive compliance with any guidelines to assist the exercise of that authority.

These guidelines have not been adopted as rules pursuant to Article IV, Section 5 of the Ohio Constitution and should not be construed as requiring adoption.

SECTION 1. GENERAL GUIDELINES.

1.01. Creation.

There is hereby created by the Chief Justice the Task Force on Improving Court Operations Using Remote Technology.

1.02. Duties and Authority.

(A) Duties

The task force shall review Ohio courts' use of technology to ensure the continued and effective operation of the judicial system during the COVID-19 pandemic and make recommendations regarding the use of such technology in the future. In fulfilling these duties, the task force shall do each of the following regarding courts' use of technology during the pandemic:

(1) Examine precisely how courts have used technology;

(2) Identify courts' various experiences with remote appearances and trials;

(3) Survey judges and attorneys regarding their experiences and opinions with remote appearances and trials;

(4) Identify best practices and technologies for local courts;

(5) Identify barriers and challenges to the effective use of technology, such as limited internet access, wireless difficulties, costs, and equipment;

(6) Identify next steps;

(7) Identify practices to safeguard procedural due process and access to justice when technology is used;

(8) Identify rules that may need to be updated and modernized;

(9) Address how to conduct remote criminal jury trials

(10) Identify uses of technology that can be implemented to improve court efficiency and access to justice.

(B) Authority

The task force has no independent policy-setting authority.

SECTION 2. MEMBERSHIP.

2.01. Appointments.

(A) Members

The task force consists of the following members appointed by the Chief Justice:

(1) One Justice of the Supreme Court;

(2) No more than twenty-six voting members.

(B) Recommendations

The task force and other interested parties may recommend to the Chief Justice persons for appointment who they believe will serve the purpose for which the task force was created.

2.02. Qualifications.

Each at-large task force member shall be a judge, magistrate, court administrator, information technology professional for a court, or attorney or be an individual who has experience in the use of technology.

2.03. Composition.

Task force membership should be broad-based and multi-disciplinary to represent a cross section of interests related to the legal profession and reflect the gender, racial, ethnic, and geographic diversity of the state.

SECTION 3. TERMS AND VACANCIES.

3.01. Terms.

The term of a task force member extends through the issuance of the final report and recommendations by the task force.

3.02. Change of Position, Employment, Affiliation, or Status.

Each task force member appointed because of the member's elected position, official position, employment, organizational affiliation, or other status ceases to be a member at such time the member no longer holds that position, employment, affiliation, or status.

3.03. Filling of Vacancies.

Vacancies on the task force shall be filled in the same manner as original appointments. A task force member appointed to fill a vacancy occurring prior to the expiration of the term for which the member's predecessor was appointed holds office for the remainder of that term.

SECTION 4. OFFICERS AND STAFF.

4.01. Chairperson and Vice-Chairperson.

The Chief Justice shall appoint one task force member to serve as the chairperson and one member to serve as the vice-chairperson.

4.02. Staff Liaison.

The Administrative Director of the Court shall assign one or more Court employees as may be necessary to serve as staff liaison to the task force. The staff liaison assists the task force as necessary in the implementation of its work, but at all times is considered an employee of the Court.

SECTION 5. MEETINGS.

5.01. Manner.

The task force may meet in person or by telephone or other electronic means available to the Court.

5.02. Frequency.

The task force shall meet as often as required to complete its work. The task force may meet at the call of the chairperson or at the request of a majority of the task force members.

5.03. Scheduling.

All task force meetings shall be scheduled for a time and place so as to minimize costs to the Court and to be accessible to task force members, Court staff, and the public.

5.04. Public Notice and Attendance.

(A) Notice

Public notice of all task force meetings shall be provided on the Court's website.

(B) Attendance

All task force meetings shall be open to the public.

5.05. Member Attendance.

(A) Requirement

For a fully effective task force, a task force member shall make a good faith effort to attend each task force meeting.

(B) Participation by telephone or other electronic means

A task force member may participate by telephone or other electronic means available to the Court. A member who participates in this manner is considered present for meeting attendance, quorum, and voting purposes.

(C) Replacement designee

A task force member may not designate a replacement for participation in or voting at meetings.

(D) Nonattendance

If a task force member misses three consecutive meetings, the chairperson or staff liaison may recommend to the Chief Justice that the member relinquish the member's position on the task force.

5.06. Minutes.

Minutes shall be kept at every task force meeting and distributed to the task force members for review prior to and approval at the next meeting.

5.07. Quorum.

A quorum exists when a majority of task force members is present for the meeting, including those members participating by telephone or other electronic means.

5.08. Actions.

At any task force meeting at which a quorum is present, the task force members may take action by affirmative vote of a majority of the members in attendance, provided the Justice of the Supreme Court shall not vote unless the vote of the task force is equally divided.

SECTION 6. SUBCOMMITTEES.

6.01. Creation.

The task force may form such subcommittees it believes necessary to complete the work of the task force. A subcommittee should consist of select task force members and other persons who the chairperson believes will assist in a full exploration of the issue under the review of the subcommittee.

6.02. Size.

A subcommittee should remain relatively small in size and have a ratio of task force members to non-task force members not exceeding one to three.

6.03. Application of Guidelines.

Guidelines 4.02, 5.01, 5.03, 5.04(B), 5.07, 5.08, 7.01, and 7.03 through 7.06 apply to the work and non-task force members of a subcommittee.

SECTION 7. MISCELLANEOUS GUIDELINES.

7.01. Code of Ethics.

A task force member shall comply with the requirements of the Court's *Code of Ethics for Court Appointees*. The staff liaison shall provide each task force member with a copy of the code following the member's appointment to the task force.

7.02. Reports.

(A) Progress or draft report

The task force may issue a progress or draft report as it believes necessary to facilitate the work of the task force and to communicate the nature of its work to the public and various constituencies of the Court.

(B) Final report and recommendations

The task force shall issue a final report of its findings and recommendations to the Chief Justice and the Justices of the Court by June 30, 2021. The staff liaison shall submit the report to the Administrative Director for distribution to the Chief Justice and publication on the Court's website.

7.03. Work Product.

The work product of the task force is the property of the Court.

7.04. Budget.

The budget of the task force is set by the Court through its internal budget process and as implemented by the Court office, section, or program through which the task force operates. The task force has no authority to set its own budget.

7.05. Compensation.

A task force member serves without compensation.

7.06. Reimbursement of Expenses.

A task force member shall be reimbursed for expenses incurred in service to the task force as permitted by the Court's *Guidelines for Travel by Court Appointees*.

7.07. Dissolution.

The task force shall dissolve following issuance of its final report and recommendations. Additionally, the Chief Justice may dissolve the task force at any time solely upon the discretion of the Chief Justice or upon the recommendation of the task force indicating the task force is no longer productive.

Effective Date: September 10, 2020

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LIVE Webinar:
Successfully Navigating Customer and Supplier Bankruptcies During COVID-19

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- Select "Computer audio" to join via VOIP
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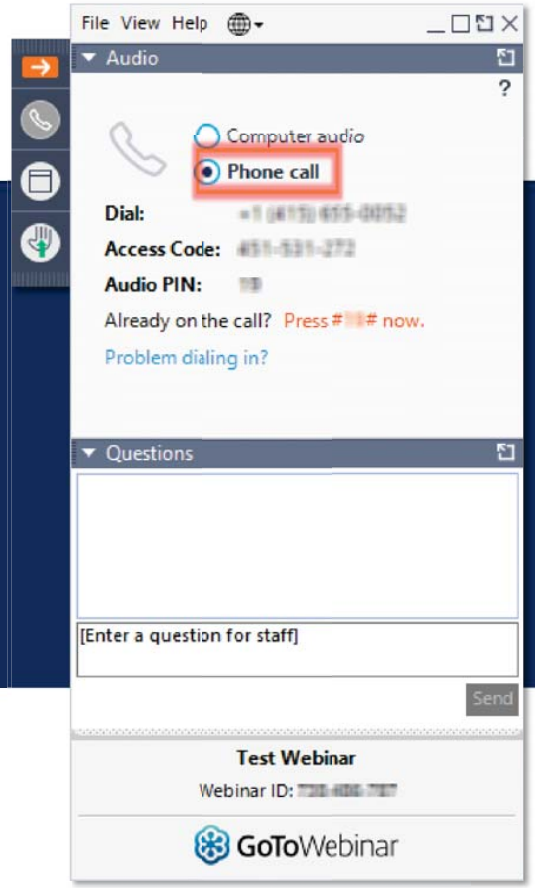

Audio Instructions

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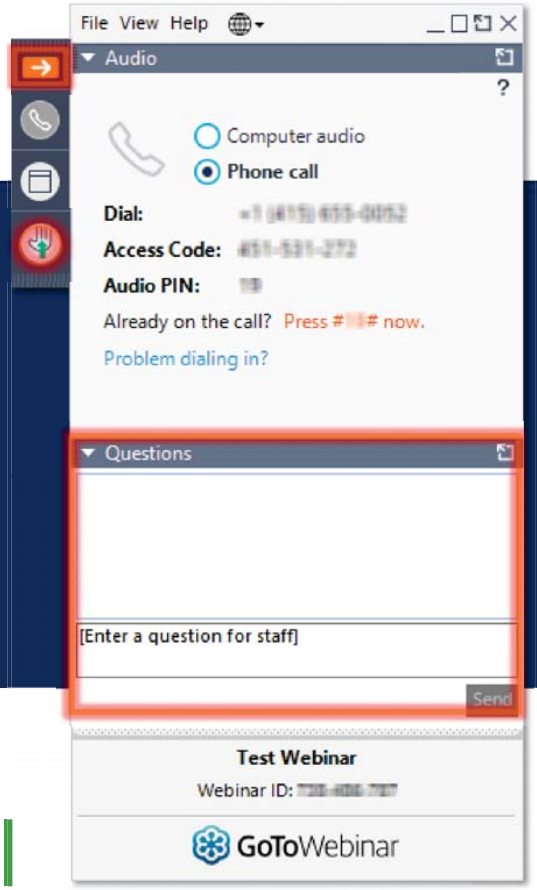
- Handouts
- Questions



Attendee Control Panel

Objectives

On this webinar we will discuss:

- What every business leader should know about solvency issues with customers or suppliers
- Important considerations regarding small business bankruptcies
- How do bankruptcy issues impact your contracts

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Meet the Speakers

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Solvency Issues with Customers or Suppliers

Managing Credit Risk Related to Your Customers

- Avoid Credit Transactions
  - Cash on Delivery
  - Cash in Advance
- Keep Payment Terms "Ordinary"
  - With existing customers payments that are ordinary may provide a defense to future clawback actions in the event of a customer bankruptcy

Managing Credit Risk Related to Your Customers

- Analyze Your Credit Risk – "3 Cs"
  - Character – Will they pay?
  - Capacity – Can they pay?
  - Collection – What if they don't pay?

Managing Credit Risk Related to Your Customers

- Use Your Credit Application Effectively
  - Choice of Law
  - Forum Selection
  - Personal Guaranty
  - Interest on Delinquent Accounts
  - Attorneys' Fees, Collection Costs
  - Security Interest

Managing Credit Risk Related to Your Customers

- Consider Using Secured Credit
  - Mortgage (real estate)
  - Security Interest (tangible and intangible personal property)
    - Security Agreement
    - Purchase Money Security Interest

Managing Credit Risk Related to Your Customers

- Other Credit Enhancements
  - Guaranties
  - Letter of Credit
  - Credit Insurance
  - Deposit

UCC Remedies When You Discover Your Customer is Insolvent

- Demand for Adequate Assurance § 2-609
- Withhold delivery - § 2-702(1)
- Stop delivery of goods in transit - § 2-705
- Reclaim the goods - § 2-702(2)

Managing Credit Risk Related to Your Suppliers

- Analyze Your Credit Risk—The "3 C's" Still Apply
  - Character – Will they perform?
  - Capacity – Can they perform?
  - Collection/Cover – What if they don't perform?

Managing Credit Risk Related to Your Suppliers

- Make Effective Use of Purchase Order and Contract Terms
  - Require Financial Reporting
  - Ownership of Tooling
  - Right to Terminate for Financial Insecurity: Cannot be tied to bankruptcy or insolvency – 11 USC §§ 365(c)(h) and 541(b)(6)
  - Back-loaded Installment Payments

Managing Credit Risk Related to Your Suppliers

- Consider Contract Terms that Contemplate Worst Case Scenarios
- Add Terms to Services Contract to Allow for Control or Transition to Another Supplier
  - Software Escrow
  - Access to Premises and People

Managing Credit Risk Related to Your Suppliers

- Other Credit Enhancements
  - Performance Guarantees
  - Guarantee of Liquidated Damages
  - Performance Bond

UCC Remedies Upon Discovery Supplier Is Insolvent

- Demand Adequate Assurance of Performance § 2-609
  - Suspend payment until goods received
  - Failure to provide adequate assurance within reasonable time not exceeding 30 days is repudiation

- UCC Remedies for Repudiation or Breach
  - Cancel the contract, "cover," or seek damages for the breach
  - Recover goods that have been identified to the contract § 2-502
  - Specific performance in appropriate circumstances

Solvency Issues with Customers or Suppliers

- **Key Learnings:**

  - ✓ It's important to do the work on the front end
  - ✓ Know your vendors and suppliers and continue to do your homework
  - ✓Develop a relationship with your attorney so you are protected when something goes wrong

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Small Business Bankruptcies: Important Considerations

SBRA: Small Business Reorganization Act of 2019

- Signed by the President on August 23, 2019
- Enacts a new Subchapter V of Chapter 11
- Codified as new 11 U.S.C. §§ 1181-1195
- Effective: February 19, 2020 – 180 days after its enactment
- Recently amended as part of Coronavirus Aid Relief and
- Economic Security Act ("CARES Act")

SBRA: Small Business Reorganization Act of 2019

- Passed by Congress to increase efficiency, lower costs, and ease the plan confirmation process for small businesses
- To qualify as a small business debtor, the debtor must be a person or entity engaged in commercial or business activity with aggregate secured and unsecured debts of $2,725,625
- The CARES Act would increase that debt limit to $7,500,000 for a period of one year following the enactment of the Act.
- Single Asset Real Estate Debtors are not eligible to file under Subchapter V

SBRA: Small Business Reorganization Act of 2019

- Key Provisions
  1. Streamlining the reorganization process
  2. A trustee will be appointed in every case
  3. No impaired class of creditors is required to vote in favor of the plan
  4. The absolute priority rule is eliminated
  5. Eliminates the categorical prohibition against individual small business debtors modifying their residential mortgages
  6. Reduced cost and expenses
  7. Payment of costs and expenses may be delayed

SBRA: Small Business Reorganization Act of 2019

- Streamlining the Reorganization Process
  - Only the debtor may file a plan
  - Deadline for the plan is 90 days after the order for relief
  - Court may extend the deadline if the need for extension is attributable to circumstances for which the debtor should not justly be held accountable
  - Debtor is not required to file a Disclosure Statement unless the court requires it
  - Reduces the amount of paperwork and filings required by a Debtor

SBRA: Small Business Reorganization Act of 2019

- Subchapter V provides for a trustee in all cases
  - Court has no role in the appointment of the trustee
  - UST Program has selected a pool of persons (lawyers and financial persons) who may be appointed on a case-by-case basis
  - A trustee appointed while leaving the debtor in possession of assets and control of the business
  - Trustee has oversight and monitoring duties, as well as charged with facilitating a consensual plan
  - Trustee is terminated upon substantial consummation of the plan

SBRA: Small Business Reorganization Act of 2019

- Additional Change from a typical Chapter 11
  - No impaired class of creditors is required to vote in favor of the plan
  - Elimination of the Absolute Priority Rule
  - Eliminates the categorical prohibition against individual small business debtors modifying their residential mortgages

SBRA: Small Business Reorganization Act of 2019

- Reduces expenses related to Chapter 11
  - Eliminates quarterly U.S. Trustee Fees
  - Eliminates an Unsecured Creditors Committee
  - Allows for payment of Trustee and Professionals over time through post-confirmation payments

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Bankruptcy Issues Affecting Contracts

Bankruptcy Issues Affecting Contracts

- Immediate Concerns
  - Automatic Stay
    - Any act to collect a debt or to exercise control over property of the estate is stayed
    - Litigation: Trials and appeals
    - Creation, perfection of liens, security interests

Bankruptcy Issues Affecting Contracts

- Doing Business With the Debtor in Possession
  - Debtor-in-possession is authorized to continue to operate its business
  - No obligation to do business with a debtor-in-possession unless party to an executory contract
  - Free to negotiate new credit terms
  - Credit extended for post-petition transactions is entitled to administrative expense status
  - Cannot demand payment of pre-petition debt as a condition to further shipments – violation of the automatic stay
  - Ensure that debtor has ability and authority to pay

Bankruptcy Issues Affecting Contracts

- Executory Contracts
  - Definition: A contract under which there remains material obligations to perform on both sides
  - Must perform if debtor performs post-petition
  - Ipso Facto clauses are not enforceable
  - Debtor has the right to assume, assume and assign, or reject the contract

Bankruptcy Issues Affecting Contracts

- Examples of executory contracts (and some common reasons why they might be executory) include:
  - Real estate leases
  - Equipment leases
  - Service Agreements
  - Development contracts, and
  - Licenses to intellectual property

Bankruptcy Issues Affecting Contracts

- Treatment of Executory Contracts is a powerful sword for Debtors
  - Assume
  - Assume and Assign
  - Reject
- In each case, the matter is within the reasonable business judgment of the Debtor, requiring the Debtor only to demonstrate that its decision was in the best interest of the company.

Bankruptcy Issues Affecting Contracts

- Assumption of Contracts
  - Accomplished by motion of the debtor-in-possession or trustee, subject to objection by other creditors and court approval
  - Debtor must "cure" prepetition defaults, compensate the non-debtor for actual monetary losses caused by defaults, and assure future performance
  - Debtor typically has until confirmation to determine whether to assume or reject contract. Non-residential real property leases in Chapter 11, Debtor must assume or reject within 120 days, which can be extended by 90 days. Further extensions require consent of lessor

Bankruptcy Issues Affecting Contracts

- Effect of Assumption
  - The contract remains in effect and both parties are able to enforce all terms of the contract going forward
  - Debtor must assume contract in its entirety
    - Debtors will often seek to negotiate reduced cure amounts or amendments to contracts in exchange for assuming the contract

Bankruptcy Issues Affecting Contracts

- Assumption and Assignment
  - Many bankruptcies include a sale of Debtor's assets, which can include contract rights
  - Purchaser of assets may desire to keep certain contract
  - Contractual anti-assignment provisions are invalidated
  - Debtor is still required to "cure" the contract
  - The Purchaser must provide adequate assurance of future performance under the contract
  - The Debtor is no longer responsible for liabilities and obligations arising under a lease or contract once it is assigned. Must look to assignee for performance.

Bankruptcy Issues Affecting Contracts

- Rejection
  - Rejection by the Debtor does not terminate the contract but is a breach that can excuse performance of the Debtor and be a basis for non-debtor to terminate
  - Rejection gives rise to a claim for damages that is generally an unsecured claim
  - Debtor is still required to pay for goods and services received after the petition date and prior to rejecting the contract

Bankruptcy Issues Affecting Contracts

- Non-Debtor Rights After Rejection
  - Real Property Leases
    - Non-debtor tenants (lessees) under real property leases have the right to remain in possession of the property and other ancillary rights, even though the debtor landlord has rejected the lease. Tenant must continue to pay rent by may reduce rent by the amount of services the Debtor has failed to provide
    - Non-debtor landlords (lessors) under leases of non-residential real property are entitled to immediate surrender of the premises

Bankruptcy Issues Affecting Contracts

- Licensees of intellectual property
  - Licensees of rights to intellectual property granted under contracts that have been rejected have the option to retain these rights (including any right to exclusive use, but excluding any other right to specific performance of the contract) for the duration of the contract and to exercise any rights to extend the contract

Bankruptcy Issues Affecting Contracts

- **Key Learnings:**

✓The Debtor has the most leverage in determining which contracts that it wants to keep

✓Be sure to respond to any deadlines set by the bankruptcy court, which can come up quickly in a bankruptcy

✓Ask for help to best protect your rights

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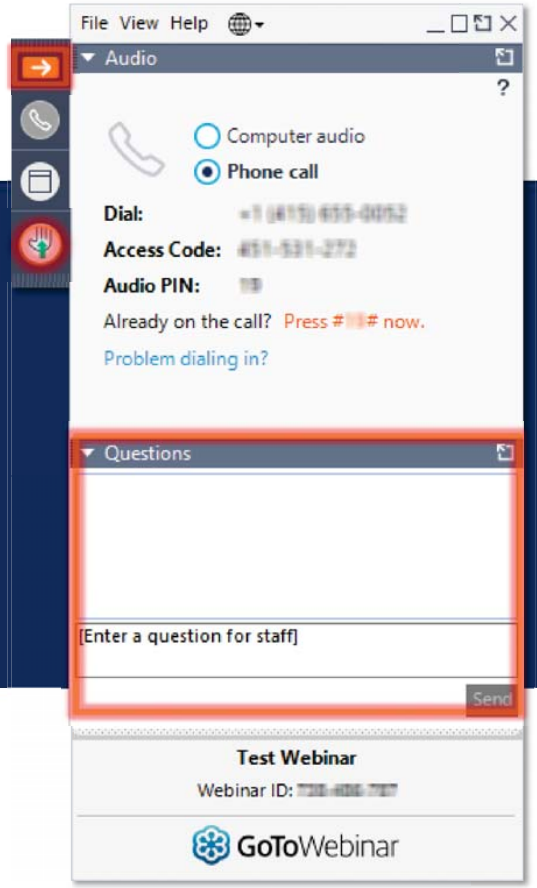
Please type your message/question in the window pane of the attendee control panel.



Questions?

Successfully Navigating Customer and Supplier Bankruptcies During COVID-19

- **Key Learnings:**

✓It is important to strategize on the front end to provide yourself the best protections in a downturn

✓We expect there will be an increase in small businesses filing bankruptcy

✓Your contract rights may be affected when a customer or supplier files bankruptcy

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Additional Resources

Bad loans add to retail struggles; Borrowers have defaulted on $35 billion

USA TODAY

November 16, 2020 Monday, FIRST EDITION

Section: MONEY; Pg. 1B

Length: 1108 words

Byline: Michael Braga, USA TODAY

Body

New York's historic Roosevelt Hotel shut down last month, the latest casualty of the coronavirus pandemic that has upended the city's tourism and retail markets.

Many more hotels and retail properties in the nation's biggest cities are struggling.

In the New York area, the owners of 43 hotel loans were delinquent on loans backed by $1.5 billion in bonds as of Oct. 31, according to Trepp LLC, a research firm that tracks commercial real estate markets.

Another 30 owners of shopping malls and storefronts in the Greater Chicago area were facing similar financial problems, with loans backed by more than $630 million in bonds.

And that's two sets of borrowers in two of the hardest-hit areas of the economy in two of the biggest cities in the United States.

Coast to coast, more than a thousand hotel and retail borrowers have defaulted on more than $35 billion in loans since the coronavirus pandemic stalled travel and tourism and made visits to shopping malls unappealing, especially with easy online alternatives for consumers.

As it stands now, nearly 20% of all hotel loans and slightly more than 14% of all retail loans originated by commercial real estate lenders and packaged into securities that are sold to investors are now delinquent.

That's fewer delinquencies than at the peak of the crisis in June. But problem loans are still at disturbingly high levels compared with previous downturns.

"The pandemic has had the most immediate and dramatic impact on hotels and motels, as we've taken a vacation from vacations," said Jamie Woodwell, vice president of commercial real estate research at the Mortgage Bankers Association. "It's also put a lot of stress on retail, where the conversion to online purchasing that should have happened over five years has accelerated and is now taking place over a matter of months."

The result is that shopping malls are becoming obsolete far faster than expected. Nearly $20 billion in loans tied to malls anchored by the now-bankrupt JCPenney and Neiman Marcus department stores are now in default, according to Trepp LLC.

Hundreds of America's 1,100 malls are expected to shut down because of COVID-19 and pressures from online retailers, experts say, and as many as 25,000 stores will close this year, according to Coresight Research, a research and advisory firm.

New York alone could lose 20% of its hotel rooms by the time the pandemic is over, according to Cushman & Wakefield. That's 6,800 rooms that will be converted to some other use.

Bad loans add to retail struggles; Borrowers have defaulted on $35 billion

The shakeout across the country is already causing hotels to lose 20% to 30% of their value, according to the Avison Young brokerage firm.

"The hotel industry has been devastated by this pandemic," said Stephen Michels, the managing director for Cushman & Wakefield's hospitality practice. "The combined impact has been greater than 9/11 and the financial crisis combined. It's been very painful for a lot of owners."

Occupancy rates across the country dropped to 33% for the three months that ended June 30, from 70% during the same period in 2019, while average room rates dwindled to $83 per night from $133, according to Cushman & Wakefield.

This, in turn, led to 738 borrowers defaulting on hotel loans backed by about $17 billion in bonds as of Oct 31, according to Trepp LLC.

That's down slightly from July. But according to Michels, hotel delinquencies were never this high during the Great Recession.

Once a vaccine has been identified and delivered, Michels says the hotel and motel industry will begin to recover and should be back to full strength by the beginning of 2023. "Large citywide convention and major group bookings have longer lead times than leisure travel," he said. "

In the meantime, however, Michels expects a lot of owners to default on their loans and a lot of properties to change hands. In some markets, like New York, there will be a large decrease in total hotel rooms before the shakeout is over.

"A significant number of hotels will be converted to workforce housing or senior housing or some higher better use," Michels said.

For shopping malls and storefronts in urban areas, the carnage wrought by the coronavirus is just an acceleration of the retail-apocalypse that was supposed to occur anyway, thanks to Amazon and the trend toward online shopping.

"It was looking pretty bleak pre-Covid because of the transition away from bricks and mortar," said Manus Clancy, senior managing director applied data, research, pricing at Trepp LLC. "We had been seeing a wave of bankruptcies - big, medium and small. Mall occupancies were dropping from 98% then 92% and down to 86%. Big retailers like Macy's and Nordstrom's were closing stores."

With coronavirus, the bankruptcy trend has only accelerated, Clancy said.

"We will see dozens and dozens of loans go into default and lenders will only be able to recover 30 cents on the dollar," Clancy said.

As with hotel loans, many loans to these shopping mall owners and large retailers are made in the CMBS, or commercial mortgage-backed securities, market, Clancy said. That's because these loans are very large - often $100 million to $150 million apiece. So they need to be parceled out among a broad pool of investors.

Trepp LLC counted 652 delinquent retail loans totaling about $18.9 billion in the CMBS as of Oct. 31.

The first investors who will be affected when these loans go bad are big private equity firms like KKR, Clancy said. The next to be impacted will be private money managers and hedge funds, who hold the next riskiest pieces. Then pension funds and the big mutual funds that manage money for retirees and investors.

Unlike in the Great Recession, Clancy does not expect retirees and average investors with 401(k) plans to be as affected by loan defaults this time around.

"Nobody is predicting the problems to reach that high," he said.

Bad loans add to retail struggles; Borrowers have defaulted on $35 billion

Still, owners of retail properties, especially owners of second- and third-tier malls that have lost their anchor tenants, will get crushed. Some of those malls, which were once valued at $150 million, may get repurchased by a company like Namdar Realty Group for $30 million, That will enable them to continue functioning as malls, Clancy said. But other properties will have to be repurposed.

Mall operator Simon Property Group, for example, is reportedly in talks with Amazon to convert department stores into e-commerce fulfillment centers.

In big cities, storefronts are not as likely to be repurposed. Overpriced properties will simply change hands and rents will come down, Clancy said.

"The market may come back, but it will come back at a much lower price per square foot," Clancy said. "Two-mall cities will become one-mall cities."

Load-Date: November 16, 2020

End of Document

FREDDIE MAC MULTIFAMILY LOAN AND SECURITY AGREEMENT
(Revised 10-1-2020)

ARTICLE IX EVENTS OF DEFAULT AND REMEDIES.

9.01 Events of Default. The occurrence of any one or more of the following will constitute an Event of Default under this Loan Agreement:

(a) Borrower fails to pay or deposit when due any amount required by the Note, this Loan Agreement or any other Loan Document.

(b) Borrower fails to maintain the Insurance coverage required by Section 6.10.

(c) Borrower or any SPE Equity Owner fails to comply with the provisions of Section 6.13 or if any of the assumptions contained in any nonconsolidation opinions delivered to Lender at any time is or becomes untrue in any material respect.

(d) Borrower or any SPE Equity Owner, any of its officers, directors, trustees, general partners or managers or any Guarantor commits fraud or a material misrepresentation or material omission in connection with: (i) the application for or creation of the Indebtedness, (ii) any financial statement, Rent Schedule, or other report or information provided to Lender during the term of the Indebtedness, or (iii) any request for Lender's consent to any proposed action, including a request for disbursement of funds under this Loan Agreement.

(e) Borrower fails to comply with the Condemnation provisions of Section 6.11.

(f) Any of the following occurs, whether or not any actual impairment of Lender's security results from such action:

(i) A Transfer occurs that violates the provisions of Article VII.

(ii) A Status Event occurs with respect to Borrower.

(iii) A Status Event occurs with respect to any Guarantor that is an entity, unless the conditions set forth in Section 8.02 are satisfied.

(g) A forfeiture action or proceeding, whether civil or criminal, is commenced which could result in a forfeiture of the Mortgaged Property or otherwise materially impair the Lien created by the Security Instrument or Lender's interest in the Mortgaged Property.

(h) Borrower fails to perform any of its obligations under this Loan Agreement (other than those specified in Section 9.01), as and when required, which failure continues for a period of 30 days after Notice of such failure by Lender to

Borrower. However, if Borrower's failure to perform its obligations as described in this Section 9.01(h) is of the nature that it cannot be cured within the 30 day cure period after such Notice from Lender but reasonably could be cured within 90 days, then Borrower will have additional time as determined by Lender in Lender's Discretion, not to exceed an additional 60 days, in which to cure such default, provided that Borrower has diligently commenced to cure such default during the initial 30 day cure period and diligently pursues the cure of such default. However, no such Notice or cure periods will apply in the case of any such failure which could, in Lender's judgment, absent immediate exercise by Lender of a right or remedy under this Loan Agreement, result in harm to Lender, danger to tenants or third parties, or impairment of the Note, the Security Instrument or this Loan Agreement or any other security given under any other Loan Document.

(i) Borrower fails to perform any of its obligations as and when required under any Loan Document other than this Loan Agreement which failure continues beyond the applicable cure period, if any, specified in that Loan Document.

(j) The holder of any other debt instrument secured by a mortgage, deed of trust or deed to secure debt on the Mortgaged Property exercises any right to declare all amounts due under that debt instrument immediately due and payable.

(k) Any of the following occurs:

(i) Borrower or any SPE Equity Owner commences a Bankruptcy.

(ii) Any party other than Lender commences a Bankruptcy against Borrower or any SPE Equity Owner which (A) results in the entry of an order for relief or any such adjudication or appointment, or (B) has not been dismissed, discharged or bonded for a period of 90 days.

(iii) Any action or legal proceeding is commenced against Borrower or any SPE Equity Owner seeking issuance of a warrant of attachment, execution, distraint or similar process against all or any substantial part of its assets which results in the entry of any order by a court of competent jurisdiction for any such relief which is not vacated, dismissed, stayed, or bonded pending appeal within 90 days from the entry thereof.

(iv) Borrower or any SPE Equity Owner takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the acts set forth in Section 9.01(k)(i), (ii) or (iii).

(l) Borrower or any SPE Equity Owner has made any representation or warranty in Article V or any other Section of this Loan Agreement that is false or misleading in any material respect.

(m) If the Loan is secured by an interest under a Ground Lease, Borrower fails to comply with the provisions of Section 6.19.

(n) If the Loan is a Supplemental Loan, any Event of Default occurs under (i) the Senior Note, the Senior Instrument or any other Senior Loan Document, or (ii) any loan document related to another loan in connection with the Mortgaged Property, regardless of whether Borrower has obtained Supplemental Lender's approval of the placement of such Lien on the Mortgaged Property. In addition, if the Loan is a Supplemental Loan, as Borrower under both the Supplemental Instrument and the Senior Instrument, Borrower acknowledges and agrees that if there is an Event of Default under the Supplemental Note, the Supplemental Instrument or any other Supplemental Loan Document, such Event of Default will be an Event of Default under the terms of the Senior Instrument and will entitle Senior Lender to invoke any and all remedies permitted to Senior Lender by applicable law, the Senior Note, the Senior Instrument or any of the other Senior Loan Documents.

(o) If the Mortgaged Property is subject to any covenants, conditions and/or restrictions, land use restriction agreements or similar agreements, Borrower fails to perform any of its obligations under any such agreement as and when required, and such failure continues beyond any applicable cure period.

(p) Any of the following occurs with respect to a Guarantor:

(i) A Bankruptcy or other similar action is commenced by or against any Guarantor, unless the conditions set forth in Section 8.01 are satisfied.

(ii) A natural person who is a Guarantor dies, unless the conditions set forth in Section 7.03(b) or Section 8.03, as applicable, are satisfied.

(iii) A Guarantor that is an entity whose term of existence expires prior to the Maturity Date fails to comply with each of the requirements set forth in Section 22 of the Guaranty.

(iv) Guarantor fails to comply with the provisions of the Section of the Guaranty entitled "Material Adverse Change" or "Minimum Net Worth/Liquidity Requirements" as applicable.

(q) If the Loan Documents require a Cap Agreement, Borrower fails to provide Lender with a Replacement Cap Agreement prior to the expiration of the then-existing Cap Agreement.

(r) through (zzzz) are Reserved.

FREDDIE MAC GUARANTY
(Revised 10-1-2020)

2. Scope of Guaranty.

(a) Guarantor hereby absolutely, unconditionally and irrevocably guarantees to Lender each of the following:

(i) Guarantor guarantees the full and prompt payment when due, whether at the Maturity Date or earlier, by reason of acceleration or otherwise, and at all times thereafter, of each of the following:

(A) Guarantor guarantees a portion of the Indebtedness (including interest at the Note rate) equal to [ ]% of the original principal balance of the Note ("**Base Guaranty**").

(B) In addition to the Base Guaranty, Guarantor guarantees all other amounts for which Borrower is personally liable under Sections 9(c), 9(d) and 9(f) of the Note (provided, however, that Guarantor will have no liability for failure of Borrower or SPE Equity Owner to comply with (I) Section 6.13(a)(xviii) of the Loan Agreement, and (II) the requirement in Section 6.13(a)(x)(B) of the Loan Agreement as to payment of trade payables within 60 days of the date incurred).

(C) Guarantor guarantees all costs and expenses, including reasonable Attorneys' Fees and Costs incurred by Lender in enforcing its rights under this Guaranty.

(ii) Guarantor guarantees the full and prompt payment and performance of, and compliance with, all of Borrower's obligations under Sections 6.12, 10.02(b) and 10.02(d) of the Loan Agreement when due and the accuracy of Borrower's representations and warranties under Section 5.05 of the Loan Agreement. [***environmental obligations and indemnities***]

(iii) Guarantor guarantees the full and prompt payment and performance of, and compliance with, Borrower's obligations under Section 6.09(e)(v) of the Loan Agreement to the extent Property Improvement Alterations have commenced and remain uncompleted. [***alteration of mortgaged property***]

(iv) through (vi) Reserved.

FREDDIE MAC MULTIFAMILY NOTE
FIXED RATE YIELD MAINTENANCE ONLY
(Revised 10-1-2020)

9. Limits on Personal Liability.

(c) In addition to the Base Recourse, Borrower will be personally liable to Lender for the repayment of a further portion of the Indebtedness equal to any loss or damage suffered by Lender as a result of the occurrence of any of the following events:

(i) Borrower fails to pay to Lender upon demand after an Event of Default all Rents to which Lender is entitled under Section 3 of the Security Instrument and the amount of all security deposits collected by Borrower from tenants then in residence. However, Borrower will not be personally liable for any failure described in this Section 9(c)(i) if Borrower is unable to pay to Lender all Rents and security deposits as required by the Security Instrument because of a valid order issued in, or an automatic stay applicable because of, a bankruptcy, receivership, or similar judicial proceeding.

(ii) Borrower fails to apply all Insurance proceeds and Condemnation proceeds as required by the Loan Agreement. However, Borrower will not be personally liable for any failure described in this Section 9(c)(ii) if Borrower is unable to apply Insurance or Condemnation proceeds as required by the Loan Agreement because of a valid order issued in, or an automatic stay applicable because of, a bankruptcy, receivership, or similar judicial proceeding.

(iii) Either of the following occurs:

(A) Borrower fails to deliver the statements, schedules and reports required by Section 6.07 of the Loan Agreement and Lender exercises its right to audit those statements, schedules and reports.

(B) If an Event of Default has occurred and is continuing, Borrower fails to deliver all books and records relating to the Mortgaged Property or its operation in accordance with the provisions of Section 6.07 of the Loan Agreement.

(iv) Borrower fails to pay when due in accordance with the terms of the Loan Agreement the amount of any item below marked "Deferred"; provided however, that if no item is marked "Deferred", this Section 9(c)(iv) will be of no force or effect.

[MARK "COLLECT" BESIDE THOSE ITEMS FOR WHICH ESCROWS WILL BE COLLECTED AND "DEFERRED" BESIDE THOSE ITEMS FOR WHICH ESCROWS WILL NOT BE

COLLECTED. FOR GROUND RENTS, IF NOT APPLICABLE, MARK "N/A"]

[ ] Property Insurance premiums or other Insurance premiums
[ ] Taxes or payments in lieu of taxes (PILOT)
[ ] water and sewer charges (that could become a lien on the Mortgaged Property)
[ ] Ground Rents
[ ] assessments or other charges (that could become a lien on the Mortgaged Property), including home owner association dues

(v) Borrower engages in any willful act of material waste of the Mortgaged Property.

(vi) Borrower fails to comply with any provision of Section 6.13(a)(iii) through (xxvi) of the Loan Agreement or any SPE Equity Owner fails to comply with any provision of Section 6.13(b)(iii) through (v) of the Loan Agreement (subject to possible full recourse liability as set forth in Section 9(f)(ii)).

(vii) Any of the following Transfers occurs:

(A) Any Person that is not an Affiliate creates a mechanic's lien or other involuntary lien or encumbrance against the Mortgaged Property and Borrower has not complied with the provisions of the Loan Agreement.

(B) A Transfer of property by devise, descent or operation of law occurs upon the death of a natural person and such Transfer does not meet the requirements set forth in the Loan Agreement.

(C) Borrower grants an easement that does not meet the requirements set forth in the Loan Agreement.

(D) Borrower executes a Lease that does not meet the requirements set forth in the Loan Agreement.

[INSERT ONLY IF THE PROPERTY IS IN OHIO; IF THE PROPERTY IS NOT IN OHIO, DELETE THE BODY OF SUBSECTION (viii) AND REPLACE WITH "Reserved."]

(viii) The Mortgaged Property is subject to any oil or gas lease, pipeline agreement or other instrument related to the production or sale of oil or natural gas that under applicable state law has been given priority over the Security Instrument.

(ix) through (xviii) are Reserved.

(xix) Borrower fails to complete any Property Improvement Alterations that have been commenced in accordance with Section 6.09(e)(v) of the Loan Agreement.

(xx) Reserved.

(xxi) Borrower or any officer, director, partner, member or employee of Borrower makes an unintentional written material misrepresentation in connection with (1) the application for or creation of the Indebtedness, or (2) any action or consent of Lender; provided that the assumption will be that any written material misrepresentation was intentional and the burden of proof will be on Borrower to prove that there was no intent.

(xxii) through (xxxiv) are Reserved.

(d) In addition to the Base Recourse, Borrower will be personally liable to Lender for all of the following:

(i) Borrower will be personally liable for the performance of all of Borrower's obligations under Sections 6.12, 10.02(b) and 10.02(e) of the Loan Agreement.

(ii) Borrower will be personally liable for the costs of any audit under Section 6.07 of the Loan Agreement.

(iii) Borrower will be personally liable for any costs and expenses incurred by Lender in connection with the collection of any amount for which Borrower is personally liable under this Section 9, including Attorneys' Fees and Costs and the costs of conducting any independent audit of Borrower's books and records to determine the amount for which Borrower has personal liability.

(iv) Reserved.

(v) through (viii) are Reserved.

(ix) Borrower will be personally liable for any fees, costs, or expenses incurred by Lender in connection with Borrower's termination of any agreement for the provision of services to or in connection with the Mortgaged Property, including cable, internet, garbage collection, landscaping, security, and cleaning.

(x) Reserved.

(xi) through (xv) are Reserved.

(f) Notwithstanding the Base Recourse, Borrower will become personally liable to Lender for the repayment of all of the Indebtedness upon the occurrence of any of the following Events of Default:

(i) Borrower fails to comply with Section 6.13(a)(i) or (ii) of the Loan Agreement or any SPE Equity Owner fails to comply with Section 6.13(b)(i) or (ii) of the Loan Agreement.

(ii) Borrower fails to comply with any provision of Section 6.13(a)(iii) through (xxvi) of the Loan Agreement or any SPE Equity Owner fails to comply with any provision of Section 6.13(b)(iii) through (v) of the Loan Agreement and a court of competent jurisdiction holds or determines that such failure or combination of failures is the basis, in whole or in part, for the substantive consolidation of the assets and liabilities of Borrower or any SPE Equity Owner with the assets and liabilities of a debtor pursuant to Title 11 of the Bankruptcy Code.

(iii) A Transfer that is an Event of Default under Section 7.01 of the Loan Agreement occurs other than a Transfer set forth in Section 9(c)(vii) above (for which Borrower will have personal liability for Lender's loss or damage); provided, however, that Borrower will not have any personal liability for a Transfer consisting solely of the involuntary removal or involuntary withdrawal of a general partner in a limited partnership or a manager in a limited liability company.

(iv) There was fraud or intentional written material misrepresentation by Borrower or any officer, director, partner, member, or employee of Borrower in connection with (1) the application for or creation of the Indebtedness, (2) on-going financial or other reporting requirements or information required by the Loan Documents, or (3) any action or consent of Lender.

(v) Borrower or any SPE Equity Owner voluntarily files for bankruptcy protection under the Bankruptcy Code.

(vi) Borrower or any SPE Equity Owner voluntarily becomes subject to any reorganization, receivership, insolvency proceeding, or other similar proceeding pursuant to any other federal or state law affecting debtor and creditor rights.

(vii) The Mortgaged Property or any part of the Mortgaged Property becomes an asset in a voluntary bankruptcy or becomes subject to any voluntary reorganization, receivership, insolvency proceeding, or other similar

voluntary proceeding pursuant to any other federal or state law affecting debtor and creditor rights.

(viii) An order of relief is entered against Borrower or any SPE Equity Owner pursuant to the Bankruptcy Code or other federal or state law affecting debtor and creditor rights in any involuntary bankruptcy proceeding initiated or joined in by a Related Party.

(ix) An involuntary bankruptcy or other involuntary insolvency proceeding is commenced against Borrower or any SPE Equity Owner (by a party other than Lender) but only if Borrower or such SPE Equity Owner has failed to use commercially reasonable efforts to dismiss such proceeding or has consented to such proceeding. "Commercially reasonable efforts" will not require any direct or indirect interest holders in Borrower or any SPE Equity Owner to contribute or cause the contribution of additional capital to Borrower or any SPE Equity Owner.

(x) through (xiii) are Reserved.

ACREL News & Notes
June 2020

When You Want Your Non-Recourse Loan to be Recourse (Sort of)

Michael D. Goodwin[1], Arnold & Porter, Washington, D.C.

We all spend a lot of time drafting, negotiating and wringing our hands over the non-recourse and "special purpose entity" provisions of loan documents. But there's one nuance to these provisions, and their interplay, that gets little attention - that is, until the market turns and the deal goes into foreclosure.

I'm not referring to the non-recourse carveouts and the potential risk of inadvertent contractual liability that carveout guarantors may have to lenders. That topic has been exhaustively discussed within ACREL and elsewhere. Instead, I'm referring to potential tax risks related to foreclosures, and how these risks are affected by the non-recourse and SPE provisions in loan documents.

Non-recourse financing of course predominates in the real estate industry and has for decades. Back in the dark ages, when limited partnerships were the entity of choice for real estate ownership, it was necessary for mortgage loans to be non-recourse. Since general partners had personal liability for partnership debts, they would be allocated all of the tax basis resulting from any recourse mortgage loan obtained by the partnership - not a good result when you're trying to sell tax losses to limited partners. The non-recourse loan was the solution, and enabled the loan tax basis to spread among all of the partners, general and limited. Funny thing: borrowers somehow got used to the concept of not having personal liability to repay loans, and the concept took firm hold.

Typically, the non-recourse nature of a loan is implemented by a provision in the loan documents that expressly limits the lender's recourse to its collateral, and waives the lender's right to pursue a personal judgment against the borrower (except as necessary to access the collateral). This non-recourse provision includes the usual litany of carveouts that is the focus of so much discussion and debate.

But occasionally the non-recourse nature of the loan results solely from the manner in which the borrower entity is structured. This typically occurs where a commercial lender resists including express non-recourse provisions in its loan documents. These loans may nonetheless effectively be non-recourse. In these cases, the borrower is a special purpose entity that owns no material assets other than the collateral securing the loan. This is usually reinforced by express provisions in the loan documents that effectively prohibit the borrower from owning other assets.

In general, these two different approaches to creating a non-recourse loan are functional equivalents. But when distress and then foreclosure hit, they can lead to very different tax consequences.

Consider first the loan that is non-recourse by virtue of an express non-recourse provision in the loan documents. If this loan is foreclosed (or a deed in lieu is granted), the excess of the

[1] With special thanks to my partner, Carey Smith, for any real tax advice imparted by this article.

principal amount over the tax basis of the property is treated as *taxable gain*. This will generally be treated as capital gain to the borrower, with some portion of that gain taxed at the special 25% federal rate. If the borrower is a pass-thru entity - as is generally the case in commercial real estate transactions - then unless the partners (members, etc.) of the borrower who are allocated this gain and income have offsetting losses or deductions, they will likely face a big tax bill.

On the other hand, consider the tax result where the loan is non-recourse solely by virtue of the SPE status of the borrower. In this case, there is no taxable gain. Instead, there is *cancellation of debt income* ("CODI"), which is measured by the excess of the principal amount over the tax basis. CODI is ordinary income, generally taxed at a higher rate than capital gains. However, the partners (members, etc.) of the borrower who are allocated CODI may, in certain circumstances, be able to take advantage of special rules which allow them to defer CODI.

This is usually accomplished by reducing their tax basis in other depreciable assets. Because of this reduction in basis, there will be less shelter (i.e., depreciation) for the future income generated by these assets. As a result, they will generate greater taxable income, effectively spreading out the CODI over time.

At the outset of a loan transaction, it is the rare borrower that has a crystal ball so clear as to be able to discern which tax outcome will be more advantageous. So it's difficult to negotiate the non-recourse structure of the loan based on this particular consideration. But as distress approaches, and we dust off the loan documents to determine our client's strengths and vulnerabilities, this is one area that requires your attention.

I'll leave you with two sets of questions for consideration:

- Let's say your client sees a foreclosure on the horizon. The loan is non-recourse, but the client's situation is such that CODI - which requires a recourse loan - would yield a better tax result. Should you approach the lender and offer to eliminate the non-recourse provision so that the loan is recourse to the borrower entity? Would this offer disclose a potential vulnerability to the lender that the lender could try to exploit in workout discussions? Even if the lender is prepared to modify the loan to make it recourse, will the modification achieve the desired tax result if accomplished on the eve of foreclosure?

- Consider whether this same result be achieved without opening the kimono to the lender. As noted above, the two different non-recourse structures effectively achieve the same result under state law: all of the assets of the borrower may be reached by the lender to satisfy the loan, and the borrower has no assets that are beyond the lender's reach.[2] Given that the two structures have the same result for state law purposes, is it possible to argue that they should have the same result for federal income tax purposes? In other words, might a loan that is nominally non-recourse to an SPE borrower be treated as a recourse loan for tax purposes, thereby enabling the borrower to take advantage of the special CODI tax deferral rules?

[2] Kind of like the refrain in the popular Zac Brown song: "I got everything I need, and nothin' that I don't".

Just a few questions to keep you up at night…

OHIO RULES OF PROFESSIONAL CONDUCT

(Effective February 1, 2007; as amended effective June 17, 2020)

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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

(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.

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. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct

is or is not authorized. With the exception of divisions (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] 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 three 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)(3), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] [RESERVED]

[17] If a lawyer employed 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 3.

[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.

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.

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)
CANON 2	
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
DR 2-104(B)	Rule 7.2
DR 2-105 Limitation of Practice	Rule 7.4
DR 2-106 Fees for Legal Services	
DR 2-106(A) & (B)	Rule 1.5(a)
DR 2-106(C)	Rule 1.5(d)
DR 2-107 Division of Fees Among Lawyers	Rules 1.5(e) & (f)
DR 2-108 Agreements Restricting the Practice of a Lawyer	Rule 5.6
DR 2-109 Acceptance of Employment	None
DR 2-110 Withdrawal from Employment	Rule 1.16
DR 2-111 Sale of Law Practice	Rule 1.17
CANON 3	
DR 3-101 Aiding Unauthorized Practice of Law	Rule 5.5(a)
DR 3-102 Dividing Legal Fees with a Nonlawyer	Rule 5.4(a)
DR 3-103 Forming a Partnership with a Nonlawyer	Rule 5.4(b)
CANON 4	
DR 4-101 Preservation of Confidences and Secrets of a Client	
DR 4-101(A), (B), & (C)(1)	Rule 1.6(a)
DR 4-101(B)	Rule 1.9
DR 4-101(B)(2)	Rule 1.8(b)
DR 4-101(C)(2)	Rule 1.6(b)(6)
DR 4-101(C)(3)	Rule 1.6(b)(2)
DR 4-101(C)(4)	Rule 1.6(b)(5)
DR 4-101(D)	Rule 5.3

CANON 5

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair the Lawyer's Independent Professional Judgment	
DR 5-101(A)(1)	Rule 1.7
DR 5-101(A)(2) & (3)	Rule 1.8(c)
DR 5-101(B)	Rule 3.7
DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness	Rule 3.7
DR 5-103 Avoiding Acquisition of Interest in Litigation	
DR 5-103(A)	Rule 1.8(i)
DR 5-103(B)	Rule 1.8(e)
DR 5-104 Limiting Business Relations with a Client	
DR 5-104(A)	Rule 1.8(a)
DR 5-104(B)	Rule 1.8(d)
DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer	
DR 5-105(A), (B), & (C)	Rule 1.7
DR 5-105(D)	Rules 1.8(k) & 1.10
DR 5-106 Settling Similar Claims of Clients	Rule 1.8(g)
DR 5-107 Avoiding Influence by Others Than the Client	
DR 5-107(A) & (B)	Rule 1.8(f)(1), (2), & (3)
DR 5-107(B) & (C)	Rule 5.4(c) & (d)

CANON 6

DR 6-101 Failing to Act Competently	
DR 6-101(A)(1) & (2)	Rule 1.1
DR 6-101(A)(3)	Rule 1.3
DR 6-102 Limiting Liability to Client	Rule 1.8(h)

CANON 7

DR 7-101 Representing a Client Zealously	
DR 7-101(A)(1)	Rules 1.2(a) & 1.3
DR 7-102 Representing a Client Within the Bounds of the Law	
DR 7-102(A)(1)	Rules 3.3(a)(3) & 4.4(a)
DR 7-102(A)(2)	Rule 3.1
DR 7-102(A)(3), (4), & (5)	Rules 3.3 & 4.1
DR 7-102(A)(4) & (6)	Rule 3.3(a)
DR 7-102(A)(6)	Rule 3.4(b)
DR 7-102(A)(7)	Rule 1.2(d)
DR 7-102(A)(8)	Rule 3.4(a)
DR 7-102(B)	Rules 1.6(b)(3), 3.3(b), & 4.1
DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer	Rule 3.8
DR 7-104 Communicating With One of Adverse Interest	
DR 7-104(A)(1)	Rule 4.2
DR 7-104(A)(2)	Rule 4.3
DR 7-105 Threatening Criminal Prosecution	Rule 1.2(e)
DR 7-106 Trial Conduct	
DR 7-106(A)	Rule 3.4(c)
DR 7-106(B)(1)	Rule 3.3(a) & (c)
DR 7-106(C)(1) & (4)	Rule 3.4(e)
DR 7-106(C)(2)	Rule 4.4(a)
DR 7-106(C)(6)	Rule 3.5(a)(6)
DR 7-106(C)(7)	Rule 3.4(d)
DR 7-107 Trial Publicity	Rule 3.6
DR 7-108 Communication With or Investigation of Jurors	
DR 7-108(A) & (B)	Rule 3.5(a)
DR 7-108(D) & (E)	Rule 4.4(a)
DR 7-108(G)	Rule 3.5(b)

DR 7-109 Contact With Witnesses	
DR 7-109(A)	Rule 3.4(a)
DR 7-109(B)	Rule 3.4(g)
DR 7-109(C)	Rule 3.4(b)
DR 7-110 Contact With Officials	Rule 3.5
DR 7-111 Confidential Information	None
CANON 8	
DR 8-101 Action as a Public Official	None
DR 8-102 Statements Concerning Judges and Other Adjudicatory Officers	Rule 8.2(a)
CANON 9	
DR 9-101 Avoiding Even the Appearance of Impropriety	
DR 9-101(A)	Rule 1.12
DR 9-101(B)	Rules 1.11 & 1.12
DR 9-101(C)	Rule 8.4(e)
DR 9-102 Preserving Identity of Funds and Property of a Client	Rule 1.15
Definitions	Rule 1.0

OHIO ETHICAL CONSIDERATIONS ADDRESSED IN OHIO RULES OF PROFESSIONAL CONDUCT

EC 2-18 Agreement with Client with Respect to Fees	Rules 1.5(b) & (c)
EC 2-19 Contingent Fee Arrangements	Rule 1.5(d)(1)
EC 2-25 – 2-32 Acceptance and Retention of Employment	Rule 6.2
EC 4-1 Confidences and Secrets	Rule 1.18
EC 4-2 Confidences and Secrets	Rule 5.3
EC 5-19 Organizational Clients	Rule 1.13
EC 5-21 Arbitrator or Mediator	Rules 1.12 & 2.4
EC 7-4 Construction of Law; Frivolous Conduct	Rule 1.2(d)
EC 7-7 Decision-Making Authority	Rule 1.2(a)
EC 7-8 Informing Client of Relevant Considerations; Withdrawal from Employment	Rules 1.2(a), 1.4(a) & (b), and 2.1
EC 7-10 Zealous Advocacy	Rule 1.2(a)
EC 7-11 Varying Responsibilities Dependent Upon Client	Rule 1.14
EC 7-12 Incompetent Client	Rule 1.14
EC 7-13 Responsibility of Prosecutor	Rule 3.8
EC 7-24 Expression by Attorney of Personal Opinion in Court	Rule 3.4
EC 7-25 Adherence to Procedural Rules	Rules 3.1 & 3.4
EC 7-26 False Testimony	Rule 3.4
EC 7-27 Suppression of Evidence	Rule 3.4
EC 7-28 Fees to Witnesses	Rule 3.4
EC 9-2 Promoting Public Confidence in Legal Profession	Rules 1.4(a) & (b)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

OSCAR FERNANDEZ INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ISIDRO FERNANDEZ, PLAINTIFF, V. TYSON FOODS, INC., TYSON FRESH MEATS, INC., JOHN H. TYSON, NOEL W. WHITE, DEAN BANKS, STEPHEN R. STOUFFER, TOM BROWER, TOM HART, CODY BRUSTKERN, JOHN CASEY, AND BRET TAPKEN. DEFENDANTS.	Case No. 6:20-cv-02079-LRR-KEM

FIRST AMENDED COMPLAINT

INTRODUCTION

1. This case arises from Tyson Foods' fraudulent misrepresentations, gross negligence, and incorrigible, willful and wanton disregard for worker safety at its pork processing facility in Waterloo, Iowa (the "Waterloo Facility"). Despite an uncontrolled Covid-19 outbreak, Tyson required its employees to work long hours in cramped conditions. Moreover, despite the danger of COVID-19, Tyson failed to provide appropriate personal protective equipment and failed to implement sufficient social distancing or safety measures to protect workers from the outbreak. As a result, Isidro Fernandez and more than 1,000 other Tyson employees were infected with COVID-19 at the Waterloo Facility.

PARTIES

2. Plaintiff Oscar Fernandez is the duly appointed Administrator of the Estate of his deceased father, Isidro Fernandez.

3. At all relevant times, Isidro Fernandez was a Tyson Foods employee working at the Waterloo Facility. He died on April 26, 2020 from complications of COVID-19.

4. Plaintiff's injuries arose out of and in the course of Isidro Fernandez's employment with Tyson Foods.

Defendant Tyson Foods

5. Defendant Tyson Foods, Inc. is the largest meat processor in the United States.

6. Tyson Foods, Inc. is a Delaware Corporation, with its principal place of business in Springdale, Arkansas.

7. As a corporation, Tyson Foods, Inc. can act only through its agents, including its employees, officers, and directors.

8. Tyson Foods, Inc. is vicariously liable for its agents' acts and omissions within the course and scope of their agency.

9. Defendant Tyson Fresh Meats, Inc. is a Delaware Corporation, with its principal place of business in Springdale, Arkansas.

10. As a corporation, Tyson Fresh Meats can act only through its agents, including its employees, officers, and directors.

11. Tyson Fresh Meats is vicariously liable for its agents' acts and omissions within the course and scope of their agency.

12. Tyson Fresh Meats is a wholly owned subsidiary of Tyson Foods, Inc. (collectively "Tyson Foods" or "Tyson").

Executive Defendants

13. Defendant John H. Tyson is the Chairman of Tyson Foods, Inc.

14. Defendant Noel W. White is the Chief Executive Officer of Tyson Foods, Inc.

15. Defendant Dean Banks is the President of Tyson Foods, Inc.

16. Defendant Stephen R. Stouffer is the President of Tyson Fresh Meats, Inc.

17. Defendant Tom Brower is Senior Vice President of Health and Safety for Tyson Foods, Inc.

18. Hereinafter John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, and Tom Brower, will be collectively referred to as the "Executive Defendants."

Supervisory Defendants

19. Defendant Tom Hart is the plant manager of the Tyson Waterloo Facility. He is required to be familiar with all aspects of the Waterloo Facility and to identify potential safety hazards.

20. Defendant Bret Tapken is the Safety Lead of the Tyson Waterloo Facility. He is required to be familiar with all aspects of the Waterloo Facility and to identify potential safety hazards.

21. Defendants Cody Brustkern and John Casey hold upper-level management positions at the Tyson Waterloo Facility.

22. Hereinafter Tom Hart, Bret Tapken, Cody Brustkern, and John Casey will be collectively referred to as the "Supervisory Defendants."

23. The Supervisory Defendants are required to be familiar with all aspects of the Waterloo Facility and to identify potential safety hazards.

JURISDICTION AND VENUE

24. The District Court for Black Hawk County, Iowa has jurisdiction over the Defendants because the acts and omissions giving rise to the Plaintiff's claims occurred in Black Hawk County, Iowa.[1]

[1] Plaintiff filed this action in the District Court for Black Hawk County, Iowa and Defendants improperly removed

25. Plaintiff certifies, pursuant to IA Code § 619.18, that this action meets applicable jurisdictional requirements for amount in controversy.

26. Venue is proper under IA Code § 616.18 because Plaintiff sustained injuries and damages in Black Hawk County.

FACTS COMMON TO ALL CAUSES OF ACTION

The Pandemic

27. COVID-19 is an infectious respiratory disease caused by a novel coronavirus (hereinafter "COVID-19" or "the virus").

28. COVID-19 is highly contagious.

29. COVID-19 can result in serious, long-term health complications and has resulted in more than 123,000 reported deaths in the United States to date.

30. Among these serious health complications, COVID-19 can cause inflammation in the lungs, clogging the air sacs in the lungs, limiting the body's oxygen supply and blood clots, organ failure, liver damage, intestinal damage, heart inflammation, neurological malfunction, and acute kidney disease.

31. The virus primarily spreads from person to person through respiratory droplets produced when an infected person coughs or sneezes.

32. Spread is more likely when people are in close contact with one another (i.e., within 6 feet).

33. The virus can be spread by people who are asymptomatic, pre-symptomatic, or mildly symptomatic.

34. Distinctive factors that affect workers' risk for exposure to COVID-19 in meat processing facilities include distance between workers, duration of contact and type of contact between workers.

35. The best way to prevent infection and illness is to avoid being exposed to the virus.

36. The first known COVID-19 outbreak occurred in Wuhan, Hubei province, People's Republic of China ("China").

37. Tyson Foods has extensive operations and business interests in China, and one of its subsidiaries operates a facility in Hubei province.

38. Tyson Foods has been focused on COVID-19 since January 2020 when it formed a "company coronavirus task force." Tyson formed this task force after observing the impact of COVID-19 on its China operations.

39. In January, nearly all of Tyson's operations in China were affected by the COVID-19 outbreak. By February, Tyson halted operations at some facilities in China and reduced operations at others.

40. On January 11, 2020, Chinese state media reported its first known death from COVID-19; Japan, South Korea, and Thailand reported confirmed cases by January 20, 2020; and the United States reported its first case on January 21, 2020.

41. On January 31, the United States Department of Health and Human Services declared a national public health emergency.

42. On March 8, three COVID-19 cases were reported in Iowa.

43. On March 9, Iowa Governor Kim Reynolds issued a Proclamation of Disaster Emergency in response to the COVID-19 outbreak.

44. On March 11, the World Health Organization declared the COVID-19 outbreak a global pandemic.

45. On March 13, President Donald Trump declared a National Emergency in response to the COVID-19 outbreak.

46. On or about March 13, Tyson Foods suspended all U.S. commercial business travel, forbid all non-essential visitors from entering Tyson offices and facilities, and mandated that all non-critical employees at its U.S. corporate office locations work remotely.

47. On March 17, Governor Reynolds proclaimed a State of Public Health Disaster Emergency for the State of Iowa.

48. On March 17, COVID-19 cases were confirmed in Black Hawk County.

49. On March 24, President Trump approved a major disaster declaration for the State of Iowa in response to the COVID-19 outbreak.

COVID-19 Outbreak at the Waterloo Facility

50. The Waterloo Facility is Tyson's largest pork plant in the United States. The facility employs approximately 2,800 workers who process approximately 19,500 hogs per day.

51. By late-March, the Executive Defendants and Supervisory Defendants were aware that COVID-19 was spreading through the Waterloo Facility.

52. Tyson Foods has been focused on COVID-19 since January when it formed a "company coronavirus task force." On information and belief, Tyson formed this task force after observing the impact of COVID-19 on its China operations.

53. On information and belief, by late-March or early-April, Tyson Foods executives and supervisors or managers at the Waterloo Facility were aware that COVID-19 was spreading through the plant.

54. On April 3, 2020, the CDC recommended that all Americans wear face coverings in public to prevent asymptomatic spread of COVID-19.

55. Tyson Foods did not provide its workers at the Waterloo Facility with sufficient face coverings, respirators, or other personal protective equipment.

56. Tyson Foods did not implement or enforce sufficient social distancing measures at the Waterloo Facility.

57. The Executive Defendants and Supervisory Defendants had advance notice of the danger COVID-19 posed to workers.

58. In March, COVID-19 outbreaks occurred at Tyson's Columbus Junction plant and Camilla plant (in Georgia). Four Tyson employees at the Camilla plant died from the virus and two employees at the Columbus Junction facility died.

59. Waterloo employees were ordered to deliver parts to the Columbus Junction plant during the Columbus Junction outbreak. These employees did not quarantine and were not tested for COVID-19 when they returned to the Waterloo Facility.

60. On or about April 6, 2020, Tyson temporarily suspended operations at its Columbus Junction plant after more than two dozen employees tested positive for COVID-19. Consequently, a portion of the hogs that would have been processed at Columbus Junction were redirected to the Waterloo Facility.

61. In March and April, Packers Sanitation Services Incorporated (PSSI) employees moved back-and-forth between Columbus Junction and the Waterloo Facility. PSSI employees arriving from Columbus Junction did not quarantine and were not tested for COVID-19 prior to entering the Waterloo Facility.

62. By the time COVID-19 was detected at the Waterloo Facility, the Executive Defendants were fully informed of prior and ongoing outbreaks at Tyson facilities in China,

Columbus Junction, and Camilla. At a minimum, the Supervisory Defendants were well informed of the Columbus Junction outbreak.

63. On or about April 6, 2020, Tyson Foods installed temperature check stations to scan persons entering the Waterloo Facility for fever. Tyson knew or should have known these temperature checks did not function as designed and workers taking certain medications could lower their temperatures prior to coming to work and pass through even if they were ill.

64. The Supervisory Defendants did not require truck drivers and subcontractors (such as PSSI employees) to have their temperatures checked before entering the Facility.

65. In late-March or early-April, the Supervisory Defendants and most managers at the Waterloo Facility started avoiding the plant floor because they were afraid of contracting the virus. Consequently, as the virus spread through the plant, the Supervisory Defendants and other managers increasingly delegated managerial authority and responsibilities to low-level supervisors with no management training or experience.

66. In March and April the Supervisory Defendants cancelled regularly scheduled safety meetings.

67. Even after learning of positive COVID-19 tests within the Waterloo Facility, the Supervisory Defendants directed supervisors to deny knowledge of COVID-19 cases at the plant.

68. Consequently, in March and April supervisors—at the direction of the Supervisory Defendants—falsely denied the existence of "confirmed cases" or "positive tests" within the Waterloo Facility.

69. In April, the Supervisory Defendants falsely told workers they had a responsibility to keep working in order to ensure Americans don't go hungry.

70. In April, the Supervisory Defendants falsely told workers that they would be notified if they had been in close contact with a co-employee with a confirmed diagnosis of COVID-19.On April 10, 2020, Black Hawk County Sherriff Tony Thompson and Black Hawk County health officials visited the Waterloo Facility.

71. According to Sherriff Thompson, working conditions at the Waterloo Facility "shook [him] to the core." Workers were crowded elbow to elbow; most without face coverings.

72. Sheriff Thompson and other local officials lobbied Tyson to close the plant, but the company refused.

73. Around this time, Defendant Tom Hart, the Plant Manager of the Waterloo Facility, organized a cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19.

74. On the night of April 12, 2020, nearly two-dozen Tyson employees were admitted to the emergency room at MercyOne Waterloo Medical Center.

75. On April 14, Black Hawk County officials asked Tyson to temporarily shut down the Waterloo plant due to the outbreak of positive cases and the risks to Tyson employees and the community. Again, the company refused. On April 16, 2020, Tyson company officials publicly denied a COVID-19 outbreak at the Waterloo Facility.[2]

76. On or about April 17, 2020, twenty local elected officials sent a letter to Tyson Foods imploring the company to take steps "to ensure the safety and well-being of Tyson's valuable employees and our community" and to "voluntarily cease operations on a temporary basis at [the] Waterloo Facility so that appropriate cleaning and mitigation strategies can take place."

[2] *See* https://wcfcourier.com/business/local/tyson-workers-say-they-work-sick-clinic-seeing-tons-of-covid-19/article_965e046b-f4e8-5c57-99dd-2b9938734909.html

77. On or about April 19, Iowa state lawmakers filed an OSHA complaint against Tyson Foods after Waterloo employees complained of unsafe working conditions amid the coronavirus pandemic. The complaint alleged: at least one Tyson employee had informed Waterloo health care providers that he or she had been transferred to the Waterloo Facility from Tyson's Columbus Junction plant, which had closed due to a COVID-19 outbreak; workers did not have sufficient personal protective equipment; social distancing measures were not being implemented or enforced on the plant floor or in employee locker rooms; nurses at the Waterloo Facility lacked sufficient medical supplies and were unable to accurately conduct temperature checks; and because of language barriers, non-English speaking employees mistakenly believed they could return to work while sick.

78. Tyson transferred workers to the Waterloo Facility from its Columbus Junction plant after it shut down due to a COVID-19 outbreak.

79. Tyson failed to test or adequately quarantine workers from the Columbus Junction plant before allowing them to enter the Waterloo Facility.

80. The Supervisory Defendants permitted or encouraged sick and symptomatic employees and asymptomatic employees known or suspected to have been exposed to COVID-19 to continue working at the Waterloo Facility. At least one worker at the facility vomited on the production line and management allowed him to continue working and return to work the next day.

81. The Supervisory Defendants ordered sick employees who were tested at the Waterloo Facility to return to work and continue working until they were notified that they had tested positive for COVID-19.

82. Defendant John Casey *explicitly directed* supervisors to ignore symptoms of COVID-19. Mr. Casey told supervisors they had to show up to work, even if they were exhibiting symptoms of COVID-19, and he directed supervisors to make their direct reports come to work, even if those direct reports were showing symptoms of COVID-19.

83. On one occasion, Mr. Casey intercepted a sick supervisor en-route to get tested and ordered the supervisor to get back to work, adding, "we all have symptoms—you have a job to do."

84. Tyson offered $500 "thank you bonuses" to employees who turned up for every scheduled shift for three months. This policy further incentivized sick workers to continue coming to work.

85. In March and April, supervisors and managers at the Waterloo Facility told employees that their co-workers were sick with the flu (not COVID-19) and warned them not to discuss COVID-19 at work.

86. The Supervisory Defendants regularly downplayed the dangers of COVID-19. For instance, John Casey regularly referred to COVID-19 as the "glorified flu" and told workers not to worry about it because "it's not a big deal; everyone is going to get it."

87. High-level Tyson executives began lobbying the White House for COVID-19 related liability protections as early as March and continued their lobbying efforts throughout April. Tyson officials dined at the White House and participated in several calls with President Trump and Vice President Pence during March and April.

88. Tyson executives lobbied, or directed others to lobby, members of the U.S. House of Representatives or the U.S. Senate for COVID-19 related liability protections.

89. Tyson executives lobbied, or directed others to lobby, Iowa Governor Reynolds for COVID-19 related liability protections.

90. Tyson executives successfully lobbied, or directed others to lobby, Governor Reynolds to issue an executive order stating that only the state government, not local governments, had the authority to close businesses in northeast Iowa, including the Tyson Waterloo facility.

91. On or about April 20, 2020, Governor Reynolds held a conference call with the CEO of Tyson Foods, other high-ranking Tyson officials, and Tyson lobbyist Matt Eide. On information and belief, Tyson officials downplayed the seriousness of the COVID-19 outbreak at the Waterloo Facility and exaggerated the efficacy of safety measures implemented at the facility.

92. According to Tyson Foods, the company began winding down operations at the Waterloo Facility on April 20 because a lack of available healthy labor, but the plant did not shut down until April 22, after the company had processed the remaining hog carcasses in its cooler.

93. On April 22, 2020, Tyson Foods announced plans to indefinitely suspended operations at the Waterloo Facility.

94. On or about April 26, 2020, Tyson Foods placed a full-page advertisement in The New York Times, Washington Post and Arkansas Democrat-Gazette entitled "A Delicate Balance: Feeding the Nation and Keeping Our Employees Healthy," which asserted that "the food supply chain is breaking." The advertisement, signed by Defendant John H. Tyson, warned that "millions of pounds of meat will disappear from the [U.S.] supply chain" due to plant closures and, "[a]s a result, there will be limited supply of our products available in grocery

stores" until closed facilities reopen. The advertisement stressed that Tyson had a "responsibility to feed our nation."

95. On numerous occasions in April, Tyson executives (including Defendants John H. Tyson, Noel W. White, Dean Banks, and Stephen R. Stouffer) and company spokespersons (including Liz Croston and Gary Mickelson) publicly argued that it was necessary to continue operating meat processing facilities during the pandemic (despite uncontrolled COVID-19 outbreaks at many of those facilities) in order to feed Americans.

96. Tyson exports to China increased by 600% in the first quarter of 2020. In fact, Tyson exported 1,289 tons of pork to China in April 2020, its largest single month total in more than three years.

97. On April 28, President Trump signed an executive order classifying meat processing plants as essential infrastructure that must remain open. The stated purpose for the order was to avoid risk to the nation's food supply.

98. On May 1, 2020, the human resources director of the Tyson Waterloo Facility told local officials that the plant was weeks away from reopening; however, the plant reopened six days later.

99. The Black Hawk County Health Department has recorded more than 1,000 infections among Tyson employees—more than one third of the Tyson Waterloo workforce—and at least 5 workers have died.

100. Dr. Nafissa Cisse Egbuonye, director of the Black Hawk County Health Department, attributed 90% of the county's COVID-19 cases to the Tyson Waterloo Facility.

101. A grossly disproportionate number of Tyson Waterloo workers have been infected with COVID-19 compared to the general populations of Black Hawk County and Iowa.

102. At the time of filing this lawsuit, more than 8,500 Tyson employees have contracted COVID-19, more than double the number for any other company, and at least 20 have died nationwide. A grossly disproportionate number of Tyson workers have been infected with COVID-19 compared to the general population of the United States.

103. At all relevant times, the Supervisory Defendants and Executive Defendants individually and collectively had responsibility for Ms. Buljic, Mr. Garcia and Mr. Ayala's safety and work conditions.

104. Plaintiff Oscar Fernandez, as Administrator of the Estate of Isadro Fernandez, seeks recovery from Defendants for all damages cognizable under Iowa law including but not limited to:

a. Isidro Fernandez's pre-death physical and mental pain and suffering;

b. Isidro Fernandez's pre-death loss of function of the mind and body;

c. Isidro Fernandez's pre-death fright and emotional distress;

d. Isidro Fernandez's pre-death medical expenses;

e. Pecuniary loss of accumulation to the Estate of Isidro Fernandez;

f. Interest on premature burial expenses; and

g. Past and future loss of the love, services, society, companionship, support, affection, and consortium suffered by Celia Fernandez as a result of the death of her husband.

h. Past and future loss of the love, services, society, companionship, support, affection, and consortium suffered by Oscar Fernandez, Alejandro Fernandez, Angelina Fernandez, Sergio Fernandez and Maria Fernande as a result of the death of their father.

FIRST CAUSE OF ACTION
CLAIMS AGAINST TYSON FOODS
(FRAUDULENT MISREPRESENTATION, VICARIOUS LIABILITY AND PUNITIVE DAMAGES)

105. Plaintiff incorporates by reference all allegations contained in this Complaint.

106. In March and April of 2020, Defendant Tyson Foods, through the Supervisory Defendants, made numerous false representations to Isidro Fernandez, and other workers at the Waterloo Facility concerning: (1) the presence and spread of COVID-19 at the facility; (2) the importance of protecting and keeping workers safe; (3) the efficacy of safety measures implemented at the facility; and (4) the need to keep the facility open to avoid U.S. meat shortages.

107. In March and April, Tyson Foods, through the Supervisory Defendants, falsely represented to Mr. Fernandez and others workers at the Waterloo Facility that:

a. COVID-19 had not been detected at the facility;

b. COVID-19 was not spreading through the facility;

c. Worker absenteeism was unrelated to COVID-19;

d. Sick workers were not permitted to enter the facility;

e. Sick or symptomatic workers would be sent home immediately and would not be permitted to return until cleared by health officials;

f. Workers would be notified if they had been in close contact with an infected co-worker;

g. Tyson's "top priority" is the health and safety of its "team members;"

h. Safety measures implemented at the facility would prevent or mitigate the spread of COVID-19 and protect workers from infection;

i. The Waterloo Facility needed to stay open in order to avoid U.S. meat shortages; and

j. The Waterloo Facility was a safe work environment.

108. Tyson Foods knew these representations were false, and knew or should have known that it was wrong to make such false representations.

109. These representations were material in that Mr. Fernandez would not have continued coming to work had he been informed of the extent of the COVID-19 outbreak at the Waterloo Facility.

110. Tyson intended by these false representations to deceive workers at the Waterloo Facility, including Mr. Ferndandez, and to induce them to continue working despite the uncontrolled COVID-19 outbreak at the plant and the health risks associated with working at the Waterloo Facility.

111. Mr. Fernandez and others accepted and relied on Tyson's representations as true, and were justified in doing so.

112. Tyson Foods thereby induced Mr. Fernandez and others to continue working at the Waterloo Facility.

113. Tyson's false representations directly and proximately caused Plaintiff's injuries and were a substantial factor in causing Plaintiff's injuries.

114. Tyson Foods is vicariously liable for the culpable acts and omissions committed by all of its agents acting within the course and scope of their agency, including but not limited to the executives and supervisors named in this Complaint.

115. Tyson Foods' acts and omissions were grossly negligent, reckless, intentional, and constitute willful and wanton misconduct.

116. Tyson Foods' fraudulent misrepresentations and prolonged refusal to temporarily close down the Waterloo Facility despite knowing that many workers at the plant had tested

positive for COVID-19 and despite knowing that COVID-19 was rapidly spreading through the workforce at the Waterloo Facility are evidence of Tyson's incorrigible, willful and wanton disregard for workplace safety and culpable state of mind.

117. Tyson knowingly and intentionally prioritized profits over the health, safety and well-being of its Waterloo employees.

118. Tyson's lobbying efforts for liability protections while simultaneously failing to sufficiently protect its workers from COVID-19 is further evidence of the company's incorrigible, willful and wanton disregard for workplace safety and culpable state of mind.

119. An award of punitive damages is necessary to punish Tyson Foods for its willful and wanton disregard for workplace safety and to deter it and other similarly situated companies from jeopardizing workers' lives in the future.

SECOND CAUSE OF ACTION
CLAIMS AGAINST TYSON EXECUTIVES
(GROSS NEGLIGENCE AND PUNITIVE DAMAGES)

120. Plaintiff incorporates by reference all allegations contained in this Complaint.

121. At all relevant times, Tyson Foods employed the Executive Defendants in managerial capacities.

122. At all relevant times, the Executive Defendants were acting within the course and scope of their employment.

123. The Executive Defendants had a duty to exercise reasonable care to prevent injuries to employees such as Isidro Fernandez.

124. The Executive Defendants were regularly briefed on positive COVID-19 cases at Tyson facilities, and they learned that the virus had been detected at the Waterloo Facility within days of the first confirmed case.

125. The Executive Defendants breached their duty through acts and omissions

including but not limited to:

a. Failing to develop or implement worksite assessments to identify COVID -19 risks and prevention strategies at the Waterloo plant;

b. Failing to develop or implement testing and workplace contact tracing of COVID-19 positive workers at the Waterloo plant;

c. Failing to develop and implement a comprehensive screening and monitoring strategy aimed at preventing the introduction of COVID-19 into the worksite, including a program to effectively screen workers before entry into the workplace; return to work criteria for workers infected with or exposed to COVID-19; and criteria for exclusion of sick or symptomatic workers;

d. Allowing or encouraging sick or symptomatic workers to enter or remain in the workplace;

e. Failing to promptly isolate and send home sick or symptomatic workers;

f. Failing to configure communal work environments so that workers are spaced at least six feet apart;

g. Failing to modify the alignment of workstations, including those along processing lines, so that workers do not face one another;

h. Failing to install physical barriers, such as strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions, to separate or shield workers from each other;

i. Failing to develop, implement or enforce appropriate cleaning, sanitation, and disinfection practices to reduce exposure or shield workers from

COVID-19 at the Waterloo plant;

j. Failing to provide all employees with appropriate personal protective equipment, including face coverings or respirators;

k. Failing to require employees to wear face coverings;

l. Failing to provide sufficient hand washing or hand sanitizing stations throughout the Waterloo Facility;

m. Failing to slow production in order to operate with a reduced work force;

n. Failing to develop, implement or enforce engineering or administrative controls to promote social distancing;

o. Failing to modify, develop, implement, promote, and educate workers, including those with limited or non-existent English language abilities, on revised sick leave, attendance or incentive policies to ensure that sick or symptomatic workers stay home;

p. Failing to ensure that workers, including those with limited or non-existent English language abilities, were aware of and understood modified sick leave, attendance or incentive policies;

q. Failing to ensure adequate ventilation in work areas to help minimize workers' potential exposures and failing to minimize air from fans blowing from one worker directly at another worker;

r. Failing to establish, implement, promote, and enforce a system for workers, including those with limited or non-existent English language abilities, to alert supervisors if they are experiencing signs or symptoms of COVID-19 or if they have had recent close contact with a suspected or

confirmed COVID-19 case;

s. Failing to inform workers, including those with limited or non-existent English language abilities, who have had close contact with a suspected or confirmed COVID-19 case;

t. Failing to educate and train workers and supervisors, including those with limited or non-existent English language abilities, about how they can reduce the spread of, and prevent exposure to COVID-19;

u. Failing to encourage or require workers, including those with limited or non-existent English language abilities, to stay home when sick;

v. Failing to inform or warn workers that persons suspected or known to have been exposed to COVID-19 at other Tyson plants, including the Columbus Junction Facility, were permitted to enter the Waterloo Facility without adequately quarantining or testing negative for COVID-19 prior to entry;

w. Operating the Waterloo Facility in a manner that resulted in more than 1,000 infected employees and five deaths;

x. Making false and fraudulent misrepresentations on behalf of Tyson Foods as set forth in the First Cause of Action above;

y. Failing to provide and maintain a safe work environment free from recognized hazards that cause or are likely to cause serious physical harm or death;

z. Failing to take reasonable precautions to protect workers from foreseeable dangers;

aa. Failing to abide by State and Federal rules, regulations, and guidance;

bb. Failing to abide by appropriate OSHA standards, directives, and guidance; and

cc. Failing to exercise reasonable care under all of the circumstances.

126. The Executive Defendants' acts and omissions were grossly negligent, reckless, intentional, and constituted willful and wanton disregard for the safety of workers.

127. The Executive Defendants engaged in gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of Tyson workers, including Plaintiff.

128. The Executive Defendants knew of the danger to be apprehended (i.e., an uncontrolled COVID-19 outbreak at the Waterloo Facility probable to result in serious illness or death).

129. The Executive Defendants were fully informed of prior COVID-19 outbreaks at Tyson facilities in China, Columbus Junction and Camilla, and they knew that three employees at the Camilla plant had died from COVID-19 during the first week of April.

130. The Executive Defendants authorized or directed the Columbus Junction plant to temporarily close after learning that approximately two-dozen employees testified positive for COVID-19. But they refused to slow or pause production at the Waterloo Facility even after learning that many more employees had tested positive.

131. The Executive Defendants knew, from the moment they learned that COVID-19 had been detected at the Waterloo Facility, that failure to take prompt and appropriate action (see ¶ 125(a)-(cc)) would almost certainly lead to a COVID-19 outbreak at the Facility resulting in injury or death.

132. The Executive Defendants determined that slowing or pausing production at the

Waterloo Facility would cause the company to lose millions of dollars per day.

133. The Executive Defendants forbid Defendant Tom Heart from slowing or pausing production at the Waterloo Facility and directed Mr. Heart to keep the Waterloo Facility running at full production for as long as possible.

134. As the Waterloo outbreak progressed and worsened, the Executive Defendants were regularly briefed on the horrific conditions within the plant.

135. The Executive Defendants knew or should have known that their conduct was probable to cause injury to employees.

136. The Executive Defendants consciously failed to avoid the danger. They recognized the danger of a COVID-19 outbreak at the Facility and failed to take sufficient precautions to avoid an outbreak.

137. The Executive Defendants' acts and omissions directly and proximately caused Plaintiff's injuries and were a substantial factor in causing those injuries.

138. The Executive Defendants' prolonged refusal to slow production or temporarily close down the Waterloo Facility despite knowing that many workers at the plant had tested positive for COVID-19 and despite knowledge that COVID-19 was rapidly spreading through the workforce at the Waterloo Facility is evidence of their incorrigible, willful and wanton disregard for workplace safety and culpable state of mind.

139. The Executive Defendants knowingly and intentionally prioritized company profits over the health, safety and well-being of Tyson's Waterloo employees.

140. The Executive Defendants' lobbying efforts for liability protections while simultaneously failing to sufficiently protect workers from COVID-19 is further evidence of their incorrigible, willful and wanton disregard for workplace safety and culpable state of mind.

141. An award of punitive damages is necessary to punish the Executive Defendants for their willful and wanton disregard for workplace safety and to deter them and other similarly situated executives and companies from jeopardizing workers' lives in the future.

THIRD CAUSE OF ACTION
CLAIMS AGAINST SUPERVISORY DEFENDANTS
(GROSS NEGLIGENCE, FRAUDULENT MISREPRESENTATION AND PUNITIVE DAMAGES)

142. Plaintiff incorporates by reference all allegations contained in this Complaint.

143. At all relevant times, Tyson Foods employed the Supervisory Defendants in managerial capacities.

144. At all relevant times, the Supervisory Defendants were within the course and scope of their employment.

145. The Supervisory Defendants had a duty to exercise reasonable care to prevent injuries to employees such Plaintiff.

146. The Supervisory Defendants breached their duty through acts and omissions including but not limited to:

a. Failing to develop or implement worksite assessments to identify COVID-19 risks and prevention strategies at the Waterloo plant;

b. Failing to develop or implement testing and workplace contact tracing of COVID-19 positive workers at the Waterloo plant;

c. Failing to develop and implement a comprehensive screening and monitoring strategy aimed at preventing the introduction of COVID-19 into the worksite, including a program of screening workers before entry into the workplace; return to work criteria for workers infected with or exposed to COVID-19; and criteria for exclusion of sick or symptomatic workers;

d. Allowing or encouraging sick or symptomatic workers to enter or remain in the workplace;

e. Failing to promptly isolate and send home sick or symptomatic workers;

f. Failing to configure communal work environments so that workers are spaced at least six feet apart;

g. Failing to modify the alignment of workstations, including along processing lines, so that workers do not face one another;

h. Failing to install physical barriers, such as strip curtains, plexiglass or similar materials, or other impermeable dividers or partitions, to separate or shield workers from each other;

i. Failing to develop, implement or enforce appropriate cleaning, sanitation, and disinfection practices to reduce exposure or shield workers from COVID-19 at the Waterloo plant;

j. Failing to provide all employees with appropriate personal protective equipment, including face coverings or respirators;

k. Failing to require employees to wear face coverings;

l. Failing to provide sufficient hand washing or hand sanitizing stations throughout the Waterloo Facility;

m. Failing to slow production in order to operate with a reduced work force;

n. Failing to develop, implement or enforce engineering or administrative controls to promote social distancing;

o. Failing to modify, develop, implement, promote, and educate workers, including those with limited or non-existent English language abilities, on

revised sick leave or incentive policies to ensure that sick or symptomatic workers are not in the workplace;

p. Failing to ensure that workers, including those with limited or non-existent English language abilities, were aware of and understood modified sick leave or incentive policies;

q. Failing to ensure adequate ventilation in work areas to help minimize workers' potential exposures and failing to minimize air from fans blowing from one worker directly at another worker;

r. Failing to establish, implement, promote, and enforce a system for workers, including those who with limited or non-existent English language abilities, to alert their supervisors if they are experiencing sings or symptoms of COVID-19 or if they have had recent close contact with a suspected or confirmed COVID-19 case;

s. Failing to inform workers, including those with limited or non-existent English language abilities, who have had close contact with a suspected or confirmed COVID-19 case;

t. Failing to educate and train workers and supervisors, including those with limited or non-existent English language abilities, about how they can reduce the spread of, and prevent exposure to COVID-19;

u. Failing to encourage or require workers, including those with limited or non-existent English language abilities, to stay home when sick;

v. Failing to inform or warn workers that persons suspected or known to have been exposed to COVID-19 at other Tyson plants, including the

Columbus Junction Facility, were permitted to enter the Waterloo Facility without adequately quarantining or testing negative for COVID-19 prior to entry;

w. Operating the Waterloo Facility in a manner that resulted in more than 1,000 infected employees and five deaths;

x. Making false and fraudulent misrepresentations on behalf of Tyson Foods as set forth in the First Cause of Action above;

y. Failing to provide and maintain a safe work environment free from recognized hazards that are causing or are likely to cause serious physical harm or death;

z. Failing to take reasonable precautions to protect workers from foreseeable dangers;

aa. Failing to abide by State and Federal rules, regulations, and guidance;

bb. Failing to abide by appropriate OSHA standards, directives, and guidance; and

cc. Failing to exercise reasonable care under all of the circumstances.

147. The Supervisory Defendants' acts and omissions were grossly negligent, reckless, intentional, and constituted willful and wanton disregard for the safety of workers.

148. The Supervisory Defendants engaged in gross negligence amounting to such lack of care as to amount to wanton neglect for the safety of Tyson workers, including Mr. Fernandez.

149. The Supervisory Defendants knew of the danger to be apprehended (i.e., an uncontrolled COVID-19 outbreak at the Waterloo Facility probable to result in serious illness or death).

150. The Supervisory Defendants knew or should have known that their conduct was probable to cause employees to become infected with COVID-19.

151. The Supervisory Defendants consciously failed to avoid the danger. They recognized the danger of a COVID-19 outbreak at the facility and failed to take sufficient precautions to avoid an outbreak.

152. The Supervisory Defendants' acts and omissions directly and proximately caused Plaintiff's injuries and were a substantial factor in causing those injuries.

153. The Supervisory Defendants made fraudulent misrepresentations to the Waterloo workforce. They made false statements concerning the presence and spread of COVID-19 at the Waterloo Facility, the importance of protecting and keeping employees safe, the breadth and efficacy of safety measures implemented at the facility, and the importance of keeping the facility open. The Supervisory Defendants knew these representations were false; they knew or should have known it was wrong to make such false representations; and they intended to deceive and induce Waterloo employees, including Isidro Fernandez, to continue working despite the danger of COVID-19.

154. The Supervisory Defendants falsely represented to Mr. Fernandez and others workers at the Waterloo Facility that:

a. COVID-19 had not been detected at the facility;

b. COVID-19 was not spreading through the facility;

c. Worker absenteeism was unrelated to COVID-19;

d. Sick workers were not permitted to enter the facility;

e. Workers from other Tyson plants that had shut down due to COVID-19 outbreaks were not permitted to enter the Waterloo facility;

f. Sick or symptomatic workers would be sent home immediately and would not be permitted to return until cleared by health officials;

g. Workers would be notified if they had been in close contact with an infected co-worker;

h. Tyson's "top priority" is the health and safety of its "team members;"

i. Safety measures implemented at the facility would prevent the spread of COVID-19 and protect workers from infection;

j. The Waterloo Facility needed to stay open in order to avoid U.S. meat shortages; and

k. The Waterloo Facility was a safe work environment.

155. The Supervisory Defendants knew these representations were false, and knew or should have known that it was wrong to make such false representations.

156. These representations were material in that Mr. Fernandez would not have continued coming to work had he been informed of the extent of the COVID-19 outbreak at the Waterloo Facility.

157. The Supervisory Defendants intended by these false representations to deceive workers at the Waterloo facility, including Mr. Fernandez, and to induce them to continue working at the facility despite the uncontrolled COVID-19 outbreak at the plant and the health risks associated with working at the Waterloo Facility.

158. Mr. Fernandez and others accepted and relied on the Supervisory Defendants' representations as true, and were justified in doing so.

159. The Supervisory Defendants thereby induced Mr. Fernandez and others to continue working at the Waterloo Facility.

160. The Supervisory Defendants' false representations directly and proximately caused Plaintiff's injuries and were a substantial factor in causing Plaintiff's injuries.

161. The Supervisory Defendants' fraudulent misrepresentations and prolonged refusal to temporarily close down the Waterloo Facility despite knowing that many workers at the plant had tested positive for COVID-19 and despite knowing that COVID-19 was rapidly spreading through the Waterloo workforce are evidence of the Supervisory Defendants' incorrigible, willful and wanton disregard for workplace safety and culpable state of mind.

162. An award of punitive damages is necessary to punish the Supervisory Defendants for their willful and wanton disregard for workplace safety and to deter them and other similarly situated supervisors and companies from jeopardizing workers' lives in the future.

PRAYER FOR RELIEF

Plaintiff respectfully request that the Court enter Judgment against Defendants for:

I. Economic damages in an amount consistent with the allegations in the Complaint and the proof at trial;

II. Non-economic damages in an amount consistent with the allegations in this Complaint and the proof at trial;

III. Punitive damages in an amount sufficient to punish the Defendants for their egregious, life-threatening misconduct and to deter similar misconduct in the future; and

IV. Costs, interest and all other relief to which Plaintiff is entitled by law or equity.

DATED this 11th day of November 2020.

/s/ Thomas P. Frerichs

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DEMAND FOR JURY TRIAL

Plaintiff respectfully requests a Jury of six.

DATED this 11th day of November 2020.

*/s/ Thomas P. Frerichs*_____
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Frerichs Law Office, P.C.

KMK | Law

COVID-19 GUIDANCE FOR EMPLOYERS: ADJUSTING TO THE "NEW NORMAL"

Links to Labor & Employment Law Websites and Legislation

U.S. Dept. of Labor

Coronavirus Resources
https://www.dol.gov/coronavirus

OSHA COVID-19
https://www.osha.gov/SLTC/covid-19/

EBSA Disaster Relief Notice 2020-01
https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01

Final Rules on Financial Factors in Selecting Plan Investments
https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/final-rule-on-financial-factors-in-selecting-plan-investments

Acts

Families First Coronavirus Response Act (FFCRA)
https://www.congress.gov/bill/116th-congress/house-bill/6201?q=%7B%22search%22%3A%5B%22Families+First+Coronavirus+Response+Act%22%5D%7D&r=13&s=8

SECURE Act
https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865enr.pdf

CARES Act
https://www.congress.gov/bill/116th-congress/house-bill/748?q=%7B%22search%22%3A%5B%22Coronavirus+Aid+Relief+and+Economic+Security+Act%22%5D%7D&r=5&s=7

Proposed Legislation

Safe to Work Act
https://www.congress.gov/bill/116th-congress/senate-bill/4317?q=%7B%22search%22%3A%5B%22Safe+to+Work+Act%22%5D%7D&r=1&s=9

HEROES Act
https://www.congress.gov/bill/116th-congress/house-bill/6800

Securing A Strong Retirement Act of 2020
https://www.congress.gov/bill/116th-congress/house-bill/8696